

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20003

RECEIVED

STUDENT,¹

Petitioner,

v

District of Columbia Public Schools,

Respondent.

Date Issued: December 30, 2010

Wanda I. Resto Torres, Hearing Officer

Case No:

Hearing Date: December 14, 2010 Room 2006

HEARING OFFICER DECISION

On November 15, 2010, Petitioner filed a due process complaint ("Complaint") alleging that the District of Columbia Public Schools ("DCPS") violated the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA") by failing to re-evaluate the Student and to evaluate him for all suspected disabilities. The Petitioner claims that DCPS failed to follow proper procedures in suspending the Student, and failing to provide the Student an appropriate placement upon suspending him from school. The Petitioner asked as relief for a determination that the Student has been denied a free appropriate public education ("FAPE"). She requests the Respondent be ordered to fund independent comprehensive psychological, psychiatric, clinical evaluations, and a functional behavior assessment. The Petitioner also requests that a meeting be convened to discuss evaluations, develop a behavior intervention plan and revise the individualized education plan ("IEP"). The Petitioner asked that the multidisciplinary team ("MDT") develop a compensatory education award, and in the alternative, for the Respondent to fund an independent evaluation to determine the Student's academic achievement.

I was appointed as the Hearing Officer on November 16, 2010. Because the matter before the consideration of the Hearing Officer included disciplinary matters the hearing date was expedited.²

On November 18, 2010, the Petitioner filed a Motion requesting the Student be maintained at the then current school during the pendency of these proceedings. On November 19, 2010, this Hearing Officer entered a Stay Put Order on behalf of the Student and ordered that he be returned to his current school.³

On November 22, 2010, the Respondent filed DCPS' Motion to Remove requesting authorization to change the placement of the student to an interim alternative educational setting for 45 school days.

¹ Personal identification information is provided in Appendix A.

² 34 C.F.R. 300.532(c)(2)-the hearing must occur within 20 school days of the date of the Complaint is filed and the Hearing Officer must make a determination within 10 school days after the hearing.

³ 20 U.S.C. 1415(e)(3)(A) directs that a disabled child "shall remain in [the then current educational placement]" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree.

On November 23, 2010, a prehearing conference was held in the above matter. After discussing the circumstances that led to the suspensions and the parties' motions, the parties agreed, and the Hearing Officer assented that the Student's interim alternative educational setting would change to Choice Academy with all his IEP services and transportation provided until the conclusion of the proceeding. The Pre-Hearing Conference Summary and Oder was issued on November 25, 2010.

DCPS' Response to the Complaint was filed on November 29, 2010. On November 29, 2010, the parties agreed that there was no resolution to the matter and the case should proceed to a due process hearing.

On December 14, 2010⁴, a closed hearing was held. Nicholas Ostrem, Esq. represented the Petitioners and Daniel McCall, Esq. represented the Respondent. The Petitioners presented eleven documents; they were admitted into evidence and labeled P-1 through 11.⁵ Two witnesses testified on behalf of the Petitioners: the Mother, and the Expert Witness.⁶ The Respondent presented eight documents, labeled DCPS 1, 1A through F, and 2. One witness testified for the Respondent: the Special Education Coordinator. No written closing arguments or briefs were submitted.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA," 20 U.S.C. §§1400 et seq.), its implementing regulations, 34 C.F.R § 300 et seq., Title 5-E, the District of Columbia Municipal Regulations, Chapter 30, Education of the Handicapped, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.

BACKGROUND

The Student is a year-old boy in the grade in a DCPS school, and he is eligible for special education as a Student with a Specific Learning Disability. The Student's March 3, 2010 individualized education program ("IEP") provides that he is to receive 5 hours per week of reading support, 5 hours per week of written expression support and 30 minutes per week of behavior support services, all of which were to be provided in the general education setting. It also provides for an additional 30 minutes a week of behavioral support services outside the general education.⁷

On October 7, 2010, DCPS suspended the Student from school for 15 days and on November 4, 2010, the Student was suspended for 45 more days. The Petitioner claims that DCPS failed to invite her to the manifestation determination review meeting during the November suspension. She further claims that DCPS did not provide the Student specialized instruction or behavior support services for approximately 25 days during the suspensions, and as a consequence the Student had an inappropriate educational placement. The Petitioner also claims that DCPS has failed to evaluate for all suspected disabilities. This Complaint was filed as result.

⁴ November 25^h and 26^h, 2010, the DCPS were closed. A second hearing date as scheduled was not necessary because the parties agreed all issues were addressed in the hearing held December 14, 2010..

⁵ DCPS' objection to P 8 was overruled after Petitioner presented a witness to testify on the content and the Respondent was allowed to ask questions about the plan.

⁶ This witness was qualified as an Expert in programming and planning for students with learning disabilities and/or emotional disturbance. The witness is also employed as an Education Advocate by the Law Firm representing the Petitioner.

⁷ P 1 March 3, 2010- IEP.

ISSUES

The issues to be determined are as follows:

- A. Whether DCPS invited the parent to the November 10, 2010 manifestation determination review ("MDR") meeting, and whether the parent was denied an opportunity to participate in a meaningful manner in the decision making process in violation of 20 U.S.C. §1415 f(3)(E), and 34 C.F.R. 300.513(a)(2)?
- B. Did DCPS have an obligation to conduct a functional behavior assessment and a behavior intervention plan for the Student after the October 6, 2010 and November 4, 2010 suspensions,; is DCPS in violation of 20 U.S.C. §1415(k)(2) and 300.530d(ii)?
- C. Is the Student due a clinical evaluation since his most current was done February 28, 2007; is there a violation of 20 U.S.C. 1414(b)(1)(3), 1412 (a)(6)(B) and 34 C.F.R. §300.303(b)(2)?
- D. Has DCPS failed to evaluate the Student for an emotional disturbance and to provide a comprehensive psychiatric evaluation as recommended in a January 8, 2008 DCPS psychological evaluation; is there a failure to comply with 20 U.S.C. § 1414 (b) (1)-(3), § 1412 (a) (6) (B), § 1414 (b) (3) (C), and 34 C.F.R. §300.303(c)(4)?
- E. Did DCPS fail to provide specialized instruction or behavior support services to the Student after the October 7, 2010 and the November 4, 2010 suspensions, and if so, did this amount to a denial of a free appropriate public education?
- F. Did DCPS change the Student's educational placement during the suspension? Is there is a violation of 20 U.S.C. §1415(k)(1)(D) and 34 C.F.R. §§ 300.530(c) and (d) and 300.320(a)(4).

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The parties stipulated:
 - a. On October 7, 2010, a MDR meeting was held the parent was present. The MDR notes indicate the conduct that led to the suspension of the Student was not a manifestation of the Student's disability and he was suspended for more than 10 days.
 - b. On November 4, 2010, another MDR was held the parent was not in attendance. The DCPS' MDR team determined the conduct that led to this suspension also was not a manifestation of the Student's disability and he was suspended for more than 10 days.

- c. the interim alternative educational placement, is implementing the Student's IEP.
 - d. The Respondent authorized the Petitioner to obtain an independent comprehensive psychological evaluation, psychiatric evaluation, and a functional behavior assessment of the Student.
2. A January 8, 2009 Psychological Evaluation recommended a psychiatric evaluation for the Student and as of December 14, 2010, the evaluation has not been provided to the Petitioner.⁸
 3. In November, 2010, the Student was not following instructions and was engaging in disruptive behavior in and out of the classroom. School personnel spoke to the Student about his behavior and a behavior contract was developed for the Student. Both in the October and November school suspensions, it was determined that the Student was acting by choice and that the conduct that led to the suspensions were not a manifestation of his disability.⁹
 4. The Petitioner's communication with the school personnel was sporadic and difficult, and at times there was no response from the Petitioner to inquiries made by the school. The Petitioner informed the Special Education Coordinator ("SEC") that she would not receive any call from the school and that all communication must go through her attorney. On November 9, 2010, three school days after the suspension, DCPS hand delivered a letter of invitation for the MDR meeting to the Education Advocate ("EA"). The EA agreed on the date for the MDR meeting, and did not mention the Petitioner could not attend. At the Hearing, Counsel for the Petitioner argued the EA was a volunteer at the law firm and that his sole engagement was to pick up the educational record of the Student, and that he was not authorized to consent to meeting dates for the Petitioner.¹⁰ No evidence was offered to show that DCPS was advised of this limited engagement.
 5. The Student was suspended for 45 days on October 6, 2010, yet, he was out of school for 15 days only. He was provided a work packet with 10 days of school work. The Student was not provided specialized instruction or counseling during 5 days of suspension from school, and he was home with no instruction. When he was suspended on November 4, 2010 for 45 days, he was out of school for 10 days and he was not provided with a work packet. The Student during the suspensions was to attend _____ as an interim educational placement for 45 days where all his IEP services would be provided. The Petitioner called to register the Student at _____ and was told it did not have the Student's paperwork. The Petitioner did not call the SEC or anyone at the then current school to ask for assistance, because, she testified, it was not her responsibility.¹¹
 6. The Petitioner claimed the invitation letter which heading is "Dear Parent/ Guardian" was invalid because it did not have marked the box that indicates that the parent is one of the individuals they

⁸ P 3 Psychological Evaluation –January 8, 2009.

⁹ Testimony of the SEC.

¹⁰ P 7E-mail correspondence from Counsel for the Petitioner acknowledging receipt of a letter of invitation and testimony of the Special Education Coordinator.

¹¹ P 4 Student Discipline Report and Testimony of the Mother.

anticipated to be in attendance at the meeting. Therefore the Petitioner wrote to the SEC claiming that the meeting would not be a legally valid meeting, and that the SEC should contact the Petitioner's attorney. There was no explanation in the letter as to what the claim of illegality convening the meeting was in reference to.¹²

7. The Petitioner believes the Student suffered harm during the 25 days he was suspended because he was not given the proper school work, and did not receiving his counseling during that period. The Petitioner felt stressed and harmed because she was not able to tell the MDR team that the Student should have only received an in-school suspension. The Petitioner, however, had no knowledge of what the Student's reading, and written expression levels were prior to his removal from his then-current school, did not know how many hours of specialized instruction he was to receive, and did not know what or when evaluations were performed on the Student, or which he needed.¹³
8. The Expert Witness did not evaluate or observe the Student in class, and only talked with him for approximately 5-10 minutes. She reviewed the Student's school record including his most recent IEP/assessments, and concluded he should have made almost a year progress. The expert witness' knowledge was based on information from the mother about dates, and services. She was not aware where the Student was functioning academically prior to the first suspension or if during the suspensions any of his skills were impacted. She did not know what amount of services the Student lost, and did not know how many weeks the Student was suspended.¹⁴
9. The Petitioner proposed a compensatory education plan of 20 hours of tutoring based on her claims that the Student was not provided services during 25 days of suspension from school. DCPS offered the 20 hours at the hearing, but did not provide any written document to confirm the verbal offer.¹⁵

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

A free appropriate public education must be available to all children between the ages of 3 and 21 who are residing in the District of Columbia, including children with disabilities who have been suspended or expelled from school.¹⁶ The applicable regulations define a FAPE as "special education and related services that are provided at public expense; meet the standards of the [State Education Agency]-; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."¹⁷

¹² P 7E-mail correspondence from Counsel for the Petitioner

¹³ Testimony of the Mother.

¹⁴ Testimony of the Expert Witness.

¹⁵ P-8 Compensatory education plan proposed.

¹⁶ 34 C.F.R. § 300.101(a) and D.C.M.R. 5§3002.1

¹⁷ 20 U.S.C. 1401(9), and 34 C.F.R. § 300.17

In assessing whether a FAPE has been provided, a court must determine whether, (1) the school complied with the IDEIA's procedures; and (2) whether the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits.¹⁸

The burden of proof is the responsibility of the party seeking relief, in this case the parent. Based solely upon the evidence presented at the hearing, the hearing officer must determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.¹⁹

The Respondent met its legal obligations under the IDEIA. Here is why.

The Petitioner alleged the Respondent did not invite the parent to the November 10, 2010 MDR meeting and that she was denied an opportunity to participate in a meaningful manner in the decision making process at that meeting in violation of the IDEIA.

The IDEIA requires that the Respondent make efforts to ensure that a parent of a child with a disability is present at each IEP Team meeting or is afforded the opportunity to participate, including-

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

The information provided to parents must indicate the purpose, time, and location of the meeting and who will be in attendance.²⁰

The IDEIA also demands that the public agency use other methods to ensure parent participation, including individual or conference telephone calls, consistent with regulations at 34 C.F.R § 300.328.

The evidence was that the SEC was given instruction by the Petitioner for all communications to go through the attorney and that is what the SEC did: he gave the invitation for the parent to the MDR to the Education Advocate. The EA agreed to the date of MDR meeting. Although Counsel for the Petitioner argued that the notice of the MDR meeting was not valid, the Hearing Officer finds the EA was an agent of the Law Firm representing the Petitioner, and that the invitation to the MDR was adequate given the EA's agreement to the date of the MDR meeting.

Petitioner claims the Student did not receive specialized instruction or behavior support services for more than 10 days after the October 7, 2010 and the November 4, 2010 suspensions. It's the Petitioner's position that as a result there was a chance in the Student's educational placement.

A child with a disability who is removed from his or her current placement based on a disciplinary violation for more than 10 consecutive days (regardless of whether the conduct is found to be a manifestation of the child's disability), must "continue to receive educational services ... so as to enable

¹⁸ Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982); and Jalloh v. District of Columbia, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

¹⁹ 5 D.C.M.R. § 3030.3,

²⁰ 34 C.F.R § 300.501(b)(i)

the child to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."²¹

In the present case, the evidence was the Student did not receive any educational services during 5 days in October while he was suspended. Then in November when the Student was suspended again, he was to receive educational services at an interim alternative setting with his IEP services included. The Petitioner however did not take the Student to the school and stated it was not her obligation to provide the school with paperwork for his enrollment. The evidence of harm from the brief period the Student was suspended without services is insufficient. It included only the Petitioner's statement that the Student did not have work and the testimony of the Expert that he should have progressed one year however she had no clue of the past or current levels of the Student academic performance.

The IDEIA and its implementing regulations contemplate cases when a student must be excluded from an educational placement for disciplinary reasons. Comments to the IDEIA implementing regulations state:

We believe it is important to ensure that children with disabilities who are suspended or expelled from school receive appropriate services, while preserving the flexibility of school personnel to remove a child from school, when necessary, and to determine how best to address the child's needs during periods of removal and where services are to be provided to the child during such periods of removals, including, if appropriate, home instruction. Sections 300.530 through 300.536 address the options available to school authorities in disciplining children with disabilities and set forth procedures that must be followed when taking disciplinary actions and in making decisions regarding the educational services that a child will receive and the location in which services will be provided.²²

* * *

In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.²³

* * *

²¹ 20 U.S.C. §1415(k)(1)(7), 34 C.F.R. §§ 300.530(2)(c), (d) and (g).

²² Comments to 34 C.F.R 300.530 (d) Page 46586 -Federal Register / Vol. 71, No. 156 / Monday, August 14, 2006 / Rules and Regulations.

²³ Id. Page 46716

The extent to which educational services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals.²⁴

The IDEIA consider it necessary that school officials need some reasonable amount of flexibility in providing services to children with disabilities who have violated school conduct rules, and should not necessarily have to provide exactly the same services, in the same settings, to these children.

* * *

School personnel may remove a child with a disability from his or her current placement to an interim alternative educational setting, another setting, or suspension for up to 10 school days in the same school year without providing educational services. Beginning, however, on the eleventh cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided to the extent required in § 300.530(d), while the removal continues.²⁵

The Respondent argued that because it does not provide services to non special education students when they are suspended for 10 school days or less, and therefore, it can act in the "same manner" with respect to students who do have an IEP and require specialized instruction, provided the suspended student's conduct is not a manifestation of his disability.²⁶

A child with a disability who is removed from the child's current placement for more than 10 consecutive school days or who is removed for up to 45 school days for special circumstances— (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting. *Whenever* a removal is for more than 10 days, the child's IEP Team determines the services the child will be provided.²⁷

These provisions, taken together, require that all students with IEPs who are suspended cumulatively for 11 days or more be provided services comparable to those on their IEP although in a different location. In this case the Student was provided on both suspensions access to services on his IEP. On occasion of each suspension, DCPS offered _____ as interim alternative placement -- a setting that could implement the Student's IEP and that allows him access to general education curriculum. However, in the present case it is not clear that during the 5 days in October 2010 (over the allowed 10 days) that the Student was without services, it was because of a failure of the Respondent. The Respondent in this case acted in a manner consistent with the IDEIA when it offered the Student an interim alternative educational placement during suspensions. Furthermore, the Petitioner did not prove that the interruption in services caused the Student an educational harm.

²⁴ Id. at Page 46717

²⁵ Id. at Page 46717

²⁶ 34 C.F.R §300.530(d)(3)

²⁷ 34 C.F.R. §§300.530(c), and (d)(5)

Petitioner claims that DCPS had an obligation to conduct a functional behavior assessment and develop a behavior intervention plan for the Student after the October 6, 2010 and November 4, 2010 suspensions, and that it failed to evaluate the Student for an emotional disturbance and to provide a comprehensive psychiatric evaluation as recommended in a January 8, 2008.

The Hearing Officer does not need to address the matter because the evaluations have been authorized and are pending. Until the evaluations are completed, the Student will remain in the educational placement determined by school authorities. Once completed the evaluations will allow the MDT/IEP to determine what if anything was missing and if any changes in the Student's educational programming needs to be modified. The evaluations will also provide insight has to whether behavior modification strategies are necessary to allow the Student to gain educational benefit.

The Student's most current clinical evaluation was done February 27, 2007. According to the IDEIA, 20 USC 1414(2)(a)(b), DCPS, as the local education agency, is responsible for ensuring that every evaluation, of each child with a disability, shall occur "at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary." Furthermore, under 20 U.S.C. 1414(b)(1)(3), 1412 (a)(6)(B) the local educational agency shall ensure that a re-evaluation is done upon the request of the parent and/or the recommendations of teachers or service providers and/or not less than once every three years. Accordingly, D.C. Municipal Regulations place the obligation to conduct re-evaluations of the student upon the LEA.²⁸

In the instant matter, it is clear the DCPS failed to comply with a procedural requirement of the IDEIA. The Student's clinical evaluation dated February 27, 2007 expired February 27, 2010. A re-evaluation is required to be conducted within three years and it was not.

According to the IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a), "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child's right to a free appropriate public education;
- ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- iii. caused a deprivation of educational benefits."

The Petitioner failed to demonstrate that the Student's right to a FAPE was denied because he was not re-evaluated or that DCPS impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE: the parent participated in the October MDR and was informed of the November 2010 MDR and did not attend. The Petitioner did not show that an educational harm was caused by any procedural violation DCPS committed. There is no FAPE denial because there is no evidence whatsoever to establish a nexus between the lack of services for 5 days and a resulting educational harm or that there was an impediment to the parent's role in decision making process regarding a FAPE to the Student.

²⁸ 30 D.C.M.R. § 3005.7§

Assuming DCPS' failure to perform required assessments, that failure, alone, does not result in a FAPE denial under the IDEIA. This is particularly so in a case like this, where the Petitioner is receiving substantially what she requested: all the evaluations sought and a meeting to be convened after the receipt of the reports of the evaluation to discuss the evaluations, develop a behavior intervention plan if necessary, revise the IEP and decide placement if it is determined that a change in placement is required.

Furthermore, the District of Columbia District Court recently addressed a similar situation as in this case where the Petitioner has already obtained a significant portion of the remedies she sought in her complaint as relief in Hawkins v. District of Columbia, 110 LRP 15428 (D.C. Cir. 2010). In that case, the court found that DCPS was funding the student's placement at a private school, had convened a new MDT meeting and had developed a new IEP to which the petitioner consented.³ As a result, the court said, her many allegations of procedural error could no longer support relief. It found that IDEA claims based on procedural error are "viable only if those procedural violations affected the student's substantive rights." Hawkins, (citing Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006) holding that only those procedural violations of the IDEIA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable.

Accordingly, the Petitioner has failed to meet the burden of proof and her claims fail on the merits.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. The Complaint is DISMISSED with prejudice.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 USC §1415(i)(2)(B).

Dated: December 30, 2010



Hearing Officer