

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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STUDENT HEARING OFFICE
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PETITIONER, on behalf of
[STUDENT],¹

Date Issued: February 3, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

PUBLIC CHARTER SCHOOL

Hearing Date: January 24, 2011

and

Student Hearing Office, Room 2006
Washington, D.C.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondents.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Petitioner alleges that PUBLIC CHARTER SCHOOL ("PCS") violated the IDEA by expelling

¹ Personal identification information is provided in Appendix A.

Student when it knew Student was a child with a disability. Petitioner seeks an order to require PCS to readmit Student or to fund his placement at SECOND PRIVATE SCHOOL ("SPS"). In her complaint, Petitioner also alleged that DCPS had failed to enroll Student after he was expelled by PCS. At the beginning of the due process hearing, Petitioner dismissed DCPS as a respondent and proceeded only against PCS.

The Student, an AGE adolescent, is a resident of the District of Columbia and has never been found eligible for special education services under the IDEA. The Petitioner's Complaint for Expedited Due Process, filed on December 20, 2010, named PCS and DCPS as respondents. The undersigned Hearing Officer was appointed on December 20, 2010. The parties waived resolution on December 22, 2010. A prehearing telephone conference was held with the Hearing Officer and counsel on January 6, 2011 to set the hearing date, and to discuss issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 24, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by counsel. Respondent PCS was represented by DEAN and by counsel. The Petitioner testified and called as her witnesses EDUCATIONAL ADVOCATE and SPS ASSISTANT DIRECTOR. PCS called no witnesses. Petitioner Exhibits P-1 through P-7, DCPS Exhibit R-1 and PCS Exhibit PCS-1 were admitted into evidence without objection. At the conclusion of the presentation of Petitioner's evidence, PCS made a motion for a directed finding against Petitioner. The Hearing Officer took the motion under advisement.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

1. Whether PCS violated the IDEA by expelling Student when it was deemed to have knowledge that Student was a child with a disability;
2. Whether PCS violated the IDEA by failing to give prior written notice when it refused Petitioner's request for an evaluation of Student and expelled Student for disciplinary reasons.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia. (Exhibit R-1)
2. Petitioner is Student's mother. (Testimony of Petitioner)
3. After February 2, 2010, DCPS convened an MDT/Eligibility Meeting to determine if Student met criteria for identification as a child with a disability. (Exhibits P-1, PCS-1) Student was found not eligible for special education services. Petitioner, who was represented by counsel, did not appeal this determination. (Stipulation of Counsel)
4. In the summer of 2010, Petitioner enrolled Student in PCS for the 2010-2011 school year. In a PCS questionnaire, Petitioner certified that Student had been evaluated for special education eligibility and did not have an IEP. (Exhibit PCS-1)
5. On September 24, 2010, PCS suspended Student for five days for disruptive hallway behavior and insubordination. This incident followed Student's earlier suspension, from

September 9 - 13, 2010, for fighting and class disruption and other disciplinary incidents at PCS.
(Exhibit P-4)

6. On October 4, 2010, after the suspension, Student, Petitioner and Educational Advocate attended a "Reentry Meeting" with Dean at PCS. Dean gave Petitioner the option of either withdrawing Student from PCS or Student's being expelled. (Exhibit P-4)

7. At the October 4, 2010 meeting, Educational Advocate requested that PCS make a determination of Student's eligibility for special education before expelling him. Dean consulted with PCS's IN-HOUSE COUNSEL, who advised Petitioner that it was too late to request an eligibility determination. (Exhibit P-4, Testimony of Educational Advocate)

8. Petitioner never requested PCS to conduct an eligibility evaluation of Student until the October 4, 2010 meeting. (Testimony of Educational Advocate)

9. Petitioner informed Dean that she would not feel comfortable withdrawing Student from PCS and would rather that PCS expel him. (Exhibit P-4) PCS expelled Student.

10. Petitioner was not given prior written notice when PCS expelled Student or refused Petitioner's request for a special education evaluation. (Testimony of Petitioner)

11. SPS is a private school for students with various disabilities. There are no non-disabled students at SPS. Student has been accepted at SPS. (Testimony of SPS Assistant Director)

12. Student is currently enrolled at DCPS HIGH SCHOOL. (Exhibit R-1)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as

well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. DID PCS VIOLATE THE IDEA BY EXPELLING STUDENT WHEN PCS WAS DEEMED TO HAVE KNOWLEDGE THAT HE WAS A CHILD WITH A DISABILITY?

The Petitioner contends that PCS should be deemed to have had knowledge that Student was a child with a disability when it expelled him, even though DCPS had evaluated Student in the spring of 2010 and found him ineligible for special education services. If PCS were deemed to have knowledge that Student was a child with a disability, then Student would be entitled to the special discipline rights, including the right to a Manifestation Determination Review ("MDR"), which accrue to a child with a disability under the IDEA. *See* 34 CFR § 300.530. In order for PCS to be deemed to have knowledge that Student was a child with a disability, it must be shown that, before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to 34 CFR §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

34 CFR § 300.534(b). In this case, the evidence does not establish that before the September 24, 2010 incident which precipitated the October 4, 2010 expulsion of Student, any of these "basis of knowledge" conditions existed. The Petitioner had not expressed a concern in writing. She had not requested an evaluation (until after the precipitating behavior). No teacher or other PCS personnel had expressed concerns about a pattern of behavior.

Furthermore, the IDEA provides a "safe harbor" for local education agencies ("LEA") if a child has been evaluated and determined not to be a child with a disability within the preceding year. Under the U.S. Department of Education regulations, an LEA is not deemed to have knowledge of a disability if the child has been evaluated in accordance with 34 CFR §§ 300.300 through 300.311 and determined to not be a child with a disability. *See* 34 CFR § 534(c)(2). In this case, Student had been evaluated by DCPS in the spring of 2010 and determined to not be a child with a disability. PCS therefore would not be deemed to have knowledge of Student's having any disability.

Neither was Petitioner entitled to obtain a reevaluation as she requested at the October 4, 2010 meeting. A reevaluation may not occur more than once a year, unless the parent and the school system agree otherwise. 34 CFR § 300.303(b)(1). Since an evaluation of Student was conducted in the spring of 2010, Petitioner would not have been entitled to a reevaluation until the spring of 2011.²

In summary, I find that PCS is not deemed to have had knowledge that Student was a child with a disability before the September 24, 2010 disciplinary incident occurred, and that PCS did not violate the IDEA by expelling Student on October 4, 2010, without conducting a reevaluation for special education eligibility. *See* 34 CFR § 300.534(d)(1) (If school system does not have knowledge, child may be subjected to disciplinary measures applied to children without disabilities.) PCS prevails on this issue.

2. DID PCS VIOLATE THE IDEA BY FAILING TO GIVE PRIOR WRITTEN NOTICE WHEN IT REFUSED PETITIONER'S REQUEST FOR A REEVALUATION?

² The U.S. Department of Education regulations also contain a provision for conducting an expedited evaluation, if a request is made during the time period in which the child is subjected to disciplinary measures. *See* 34 CFR § 300.534(d)(2)(i). Until the evaluation is completed, the child may remain on expulsion. *Id.* Because Student had been evaluated within the preceding year, this regulation is not applicable.

Petitioner contends that DCPS violated the IDEA's prior written notice requirement when it refused her request for an evaluation on October 4, 2010. I agree. The IDEA requires that the LEA must give prior written notice before the LEA refuses to conduct an eligibility evaluation of a child. *See* 34 CFR § 300.503(a)(2). In this case, PCS refused Petitioner's request for an eligibility evaluation on October 4, 2010 and, neither before nor after, gave her written notice of its refusal. I find that PCS's failure to provide the required prior written notice was a procedural violation of the IDEA. For that reason, PCS's motion for a directed finding must be denied. However, only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006) In this case, PCS's failure to provide prior written notice did not affect Student's substantive rights. As stated in the preceding section, Student was not entitled to a reevaluation in October 2010. Moreover, despite not receiving prior written notice, Parent was not deterred from exercising her participation rights. She was accompanied by her educational advocate to the October 4, 2010 meeting and she ultimately filed the present due process complaint to challenge PCS's decisions. PCS prevails on this issue.

SUMMARY

In summary, I find that PCS did not violate the IDEA by expelling Student on October 4, 2010 or by refusing Petitioner's request for an eligibility reevaluation. PCS's failure to provide prior written notice, when it refused to conduct the requested reevaluation, was a procedural violation of the IDEA, which did not affect Student's substantive rights.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:
All relief requested by the Petitioner in her Complaint for Due Process is denied. PCS's Motion for a Directed Finding is denied.

Date: February 3, 2011



Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).