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Office of the State Superintendent of Education
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OSSE
Office of Dispute Resolution
February 4, 2015

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“LEA”)</p> <p>Respondent.</p> <p>Date Issued: February 3, 2015</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: January 20, 2015</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The expedited due process hearing was convened on January 20, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a child with disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including other health impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”) and specific learning disability (“SLD”).

On November 19, 2014, Petitioner filed a due process complaint. On November 26, 2014, Respondent filed a notice of insufficiency challenging the sufficiency of the complaint. On December 4, 2014, Petitioner filed a response to the notice of insufficiency. On December 4, 2014, this Hearing Officer issued an order concluding the complaint was insufficient and directing Petitioner to file an amended complaint to correct the deficiency.

On December 9, 2014, Petitioner filed an amended complaint that alleged, inter alia, that DCPS inappropriately concluded at a December 1, 2014, manifestation determination review (“MDR”) that student’s November 21, 2014, behavior that led to his removal from school was not a manifestation of his disability and thus denied the student a free appropriate public education (“FAPE”). This issue was bifurcated from other issues alleged in the complaint and an expedited hearing was conducted as to this issue alone.²

A resolution meeting was held on December 3, 2014, for the first complaint filed and nothing was resolved.³ The Hearing Officer’s Determination (“HOD”) for this expedited hearing is due ten (10) school days following the January 20, 2015, hearing: February 3, 2015.

Petitioner seeks as relief for all issues alleged in the complaint the following: a functional behavioral assessment (“FBA”), an updated clinical psychological evaluation, speech and language evaluation, an occupational therapy evaluation, a revised IEP that includes a behavior intervention plan (“BIP”), transitional support, behavioral support, an appropriate placement,

² The Hearing Officer issued an order on December 9, 2014, directing that the timeline for this case was changed and is to be measured from the the date the amended complaint was filed. On January 29, 2015, the Hearing Officer issued an order consistent with the pre-hearing order that bifurcated the case. The non-expedited issues alleged in the complaint now have the following case # 2014-0487-B and a second hearing for all other issues alleged in the complaint is scheduled to be held February 5, 2015, and an HOD is to be issued in that case on or before February 22, 2015.

³ There was no resolution meeting convened on the amended complaint.

academic support in reading, writing, and math during and after school, and an award of 150 hours of compensatory education.

On December 19, 2014, DCPS filed a timely response to the complaint and denied any violation or denial of a FAPE to the student. DCPS asserted, inter alia, that it complied with the requirements of the disciplinary provisions of IDEA and the MDR determination was appropriate.

The Hearing Officer convened a pre-hearing conference (“PHC”) on December 22, 2014, on the amended complaint and issued a pre-hearing order on January 2, 2015, outlining, inter alia, the issue(s) to be adjudicated.

ISSUE: 4

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to conclude at the December 1, 2014, MDR that the student’s November 21, 2014, behavior that resulted in his out of school suspension was a manifestation of his disability.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1 through 10 and Respondent’s Exhibits 1 through 8) that were all admitted into the record and are listed in Appendix A.⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT: 6

1. The student is a child with disability pursuant to IDEA with a disability classification of MD including OHI for ADHD and SLD. (Witness 1’s testimony, Petitioner’s Exhibit 2-1)

⁴ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

⁵ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁶ The evidence that is the source of the Finding of Fact (“FOF”) is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party’s exhibit.

2. In March 2011 DCPS conducted the student's initial psychological evaluation. In this evaluation the student's overall cognitive abilities were determined to be below average and in the low range of other children his age. The student's academic testing indicated in reading and math he was functioning approximately two years below his age and grade level. (Petitioner's Exhibit 9-6, 9-7, 9-13, 9-16, 9-18)
3. In December 2011 an independent a psychological/psycho-educational evaluation was conducted of the student principally to determine if the student presented with ADHD. The evaluation assessed the student's cognitive abilities which were determined to be comparable to that obtained in his DCPS evaluation. The independent evaluator diagnosed the student with ADHD, Dysthymic Disorder, Reading Disorder, Written Expression Disorder and Borderline Intellectual Functioning and recommended that the student's IEP reflect both his learning disabilities and emotional disturbance ("ED") or OHI for ADHD. (Petitioner's Exhibit 1-10, 1-11)
4. In February 2012 a DCPS psychologist conducted a review the student's December 2011 independent psychological evaluation. The DCPS psychologist cited in the review that the student presented with significant behaviors associated with ADHD including externalizing behaviors such as conduct problems and bullying and indicated that many of the student's impulsive behaviors are associated with his ADHD. (Petitioner's Exhibit 3-1, 3-6)
5. The student's most recent IEP was developed at School A in March 2014 and prescribes that the student be provided ten (10) hours of specialized instruction outside general education and 120 minutes monthly of behavioral support services outside general education. (Petitioner's Exhibit 2-7)
6. On September 3, 2014, the student engaged in a fight at school for which he was given an off-site suspension for five (5) school days from September 4, 2014, to September 10, 2014. (Petitioner's Exhibit 5-4)
7. On November 7, 2014, the student engaged in behavior for which he was given an off-site suspension for three (3) school days from November 12, 2014, to November 14, 2014. On November 18, 2014, there was a reentry conference held at School A that the student's parent attended for the incident that occurred on November 7, 2014. (Petitioner's Exhibit 5-3, 5-4)
8. On November 21, 2014, the student disrupted his classroom by throwing a test paper on the floor and walking out of the classroom. The student's school disciplinary record has the following entry:

"On November 21, 2014, the student was removed from 1st period class for non-compliance with classroom instructions for SCA. Dean of student requested to remove student from classroom as he refused to use 5-10 min cool down and school social worker. Upon transition to 2nd period he refused to do any work and threw test on the floor when asked to stop clicking the pen cap disrupting students around him. W[hen]

escorted out of the classroom he pushed the door in the face of the Dean of students. Attempted to reach parent at [phone numbers] All non-working numbers.” (Petitioner’s Exhibit 5-2)

9. The student was given an off-site short-term suspension for the November 21, 2014, incident for three (3) school days from November 24, 2014, until November 26, 2014. (Petitioner’s Exhibit 5-1)
10. On December 1, 2014, School A convened a MDR meeting with the student’s parent and the student in attendance to review the student’s behavior of disrupting class during testing on November 21, 2014. The School A staff at the meeting included the School A principal and social worker. The student acknowledged that he caused the disruption and that he refused to be redirected by school staff. The team determined that the student’s behavior was not a manifestation of his disability. (Respondent’s Exhibit 4-1, 4-2, 4-3, 4-4, 4-5)
11. On December 3, 2014, School A completed a FBA interview and an a BIP for the student. (DCPS Exhibits 2, 3)
12. At the hearing Petitioner presented a psychologist who offered his opinion as to the whether the student’s conduct on November 21, 2014, was a manifestation of his disability. The psychologist opined that ADHD can cause the student to sometimes explode, lose focus, lose control of his emotions and display maladaptive behaviors and his November 21, 2014, behavior as described in the disciplinary record is consistent with ADHD behaviors. (Witness 1’s testimony)⁷

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (“FAPE”).

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

⁷ Petitioner sought to have this witness qualified an expert witness. Because Petitioner did not follow the requirements set forth in the pre-hearing as to expert witnesses the designation was not granted. However, this Hearing Officer allowed the witness to express his professional opinion and that opinion was given the weight the Hearing Officer concluded it was due. The witness acknowledged he had never met or evaluated the student and his opinion was based on reviewing the student’s evaluations and records and speaking with the student’s parent.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. § 1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to conclude at the December 1, 2014, MDR that the student's November 21, 2014, behavior that resulted in his out of school suspension was a manifestation of his disability.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student's November 21, 2014, behavior that resulted in his off-site suspension was a manifestation of his disability.

Pursuant to the requirements 34 C.F.R. § 300.530 et seq.⁹ once a student is removed from school

⁸ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

⁹ 34 C.F.R. § 300.530: School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under Sec. 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section

for a violation of a code of conduct for more than ten (10) school days in a school year a MDR

must--

(i) Continue to receive educational services, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Sec. 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) Manifestation determination.

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

must be convened with the parent, and relevant members of the student's IEP team to review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the student's conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. A student should not be removed from school if his or her behavior is determined to be a manifestation of his or her disability.

Petitioner asserts that School A inappropriately determined that the student's conduct on November 21, 2014, that led to his off-site suspension was not a manifestation of this disability. The student's parent requested during her testimony that the student be allowed the complete the work he missed during the time of this suspension.

The evidence in this case demonstrates that on November 21, 2014, the student disrupted the classroom by throwing a test paper on the floor, walking out of the classroom and refusing attempted interventions by School A to staff to address his behaviors.¹⁰

The Hearing Officer considered and credited Petitioner's witness' opinion that the student's behavior of November 21, 2014, of disrupting class was a manifestation of his disability.¹¹ There was no evidence to contrary presented that would indicate that the student's behavior on that day was not a manifestation of his disability.

The student's psychological evaluations that were conducted in 2011 and the 2012 DCPS review of the student's independent evaluation indicate that the student presents with significant behaviors associated with ADHD including externalizing behaviors such as conduct problems and bullying and many of his impulsive behaviors are associated with ADHD.¹²

Based on this information in the student's evaluations and the opinion of Petitioner's witness who was a former DCPS psychologist, the Hearing Office concludes that Petitioner met her burden of proof by a preponderance of the evidence that the student's November 21, 2014, behavior was a manifestation of ADHD and his OHI disability.

The evidence demonstrates that the student was removed from school for a total of eleven (11) school days during SY 2014-2015 at the time the amended complaint was filed and a total of three (3) school days for the November 21, 2014, incident.¹³

Petitioner asserted the student was removed from school up to twenty school days. However, the documentary evidence only reflects that the student received off-site suspensions for a total of eleven (11) school days prior the amended complaint being filed. The parent testified the student was sent home often without documentation and the student was out of school for five school days due the November 21, 2014, incident. However, the Hearing Officer found the documentation of the of the student's absences was more credible than the parent's testimony regarding the number of days the student missed due to his suspensions and for the November 21, 2014, incident.

¹⁰ FOF # 8

¹¹ Although DCPS counsel attempted to discredit this witnesses' testimony the Hearing Officer concluded based on the witnesses professional experience and his demeanor and forthrightness that his testimony was credible and his opinions were logical and reasonable.

¹² FOF #s 3, 4

¹³ FOF #s 6, 7, 9

Consequently, the Hearing Officer concludes that the student was inappropriately suspended for these three (3) school days and as a result was denied a FAPE.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner requested compensatory education in the form of tutoring but presented no specific evidence that would meet the factors outlined in *Reid*. There was insufficient evidence from which the Hearing Officer can base a specific award of compensatory education; but to award no compensatory education when a denial of a FAPE has been established would be inequitable. Consequently, the Hearing Officer grants Petitioner a nominal amount of independent tutoring as compensatory education to assist the student in making up any deficit in classwork and or learning that he missed during his three day absence due the inappropriate off-site suspension.¹⁴

ORDER:

1. DCPS shall within ten (10) school days of this issuance of this order provide the student as compensatory education ten (10) hours of independent tutoring at the DCPS/OSSE prescribed rates to be used by Petitioner by June 30, 2015.
2. All other requested relief is denied as to the claim and issue adjudicated in this expedited hearing.

¹⁴ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: February 3, 2015