



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-028

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida M. Alvy, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from a decision of an impartial hearing officer which annulled a manifestation team's December 18, 2009 determination that the misconduct of respondent's (the parent's) son was not a manifestation of his disability. The appeal must be sustained in part.

At the time of the impartial hearing on February 23, 2010, the student had been suspended from attending the district's high school due to an altercation with another student that occurred on November 30, 2009 (Tr. p. 15; Dist. Ex. 4 at p. 1). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). Furthermore, the parties do not dispute that the student engaged in misconduct during the November 2009 incident.

The hearing record is sparse with regard to the student's educational history. On April 6, 2009, the Committee on Special Education (CSE) met to conduct an annual review of the student's special education services and to develop an individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 1). With respect to his academic performance, the April 2009 IEP noted that the student had been struggling and that he received failing grades in computer, history, geometry, health and science, and it was likely that the student would fail English due to missed work and poor class work (id. at p. 3). According to the April 2009 IEP, the student was a "distractive influence" in most of his classes (id.). The IEP also indicated that the student was able to perform academic assignments and passed several State exams (id. at p. 4). With regard to social/emotional performance, the April 2009 IEP noted that the student may become aggressive if he is not permitted to reach out to teachers and counselors that he trusts (id.). Among other things, the April 2009 CSE recommended that the student be placed in a 15:1 class in a community

school and receive group counseling once per week for 40 minutes (id. at pp. 1, 10). The April 2009 CSE also developed a transition plan and a behavioral intervention plan (BIP) for the student (id. at pp. 11-13). Among other things, the BIP noted that the student had difficulty controlling unacceptable impulses, difficulty in rational decision making, and difficulty interacting positively (id. at p. 13).

According to the district, the student was suspended on December 2, 2009 (Tr. p. 48; Dist. Ex. 3 at p. 3).<sup>1</sup> A superintendent's hearing was conducted on December 8, 2009, at which the student was charged with: 1) engaging together with three other students in a fight with a different group of students; and 2) striking another student (Dist. Ex. 6 at p. 1). At the conclusion of the superintendent's hearing, the charges against the student were sustained (id.). Upon leaving the superintendent's hearing, a hearing officer from the district's suspension office explained to the parent that a manifestation determination review (MDR) was required to be completed within a certain timeframe and that the district would contact the parent within a week to schedule it (Tr. pp. 62, 66-67).

A notification from the district dated December 11, 2009 was sent to the parent, which indicated that an MDR meeting was scheduled on December 15, 2009 to determine whether the student's misconduct was the result of his disability (Dist. Ex. 2 at p. 1; see 8 NYCRR 201.4).<sup>2</sup> The notification included a procedural safeguards notice and was sent to the parent via certified mail (id. at pp. 1, 4).

On December 15, 2009, the district's social worker telephoned the parent at approximately 8:00 AM to advise the parent of the MDR meeting scheduled at 9:00 AM and that a letter had been sent (Tr. p. 23). The parent indicated that he had not received the district's letter and would not attend the meeting because he did not receive prior notification (id.). The social worker called the parent again and indicated that the MDR meeting had been rescheduled for December 18, 2009 (Tr. pp. 23-24, 60). In response to the social worker, the parent stated that he was not certain whether he would attend the December 18, 2009 MDR meeting because he needed additional time to obtain witnesses and to seek advice from an attorney (Tr. pp. 24, 60).

According to the district, a certified letter regarding the rescheduled December 18, 2009 MDR meeting was sent to the parent on December 15, 2009 (see Dist. Ex. 3 at p. 3).<sup>3</sup> On December 18, 2009, the social worker telephoned the parent to inform him that the MDR meeting was scheduled that morning and then gave the telephone to the school psychologist (Tr. p. 24; see Dist. Ex. 3 at p. 3). According to the social worker, the parent told the school psychologist that he would not attend the December 18, 2009 MDR meeting in person and would not participate by telephone (Tr. p. 24). The district proceeded with the MDR meeting as scheduled with the school psychologist, the social worker, and the dean of the school in attendance, and the manifestation

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<sup>1</sup> The parent indicated that the student was immediately suspended after the incident on November 30, 2009 (Tr. p. 63).

<sup>2</sup> The December 11, 2009 notification indicated that the MDR meeting would be conducted on "11-15-2009," which appears to be a typographical error (Dist. Ex. 2 at p. 1). The notice was sent via certified mail (Dist. Exs. 2 at p. 4; 3 at p. 3); however, there is no indication in the hearing record regarding whether the letter was delivered (see Tr. p. 23).

<sup>3</sup> The district's December 15, 2009 letter to the parent is not contained in the hearing record.

team concluded that the student's misconduct was not a result of the student's disability (Tr. p. 27; Dist. Ex. 4 at p. 4).

The district sent a letter dated December 21, 2009 to the parent, notifying him that the student would be placed on suspension from the district's high school for one calendar year effective December 2, 2009 at a long term suspension site (Dist. Ex. 4 at p. 1). The district indicated that the student would be eligible for early reinstatement on June 2, 2010, which may occur after a review conducted at the long term suspension site (id.). The letter advised the parent that he may contact the district with any questions at the telephone number provided (id.).

In a due process complaint notice dated January 22, 2010, the parent requested an expedited impartial hearing to challenge the December 18, 2009 manifestation determination (IHO Decision at p. 2).<sup>4</sup> An impartial hearing was conducted on February 23, 2010 (Tr. p. 3).

In a decision dated March 4, 2010, the impartial hearing officer found that the district failed to provide the parent with prior written notice of the MDR meetings (IHO Decision at p. 7). Specifically, the impartial hearing officer determined that the letter sent to the parent regarding the MDR meeting scheduled for December 15, 2009 was returned to the district unclaimed, and the postmark for the second written notice for the rescheduled MDR meeting was dated the same day as the meeting, December 18, 2009 (id. at pp. 4, 7). The impartial hearing officer concluded that the telephone calls made by the district to the parent were a "courtesy" and did not constitute adequate notice of the MDR meetings (id. at p. 7). The impartial hearing officer determined that the district's MDR meeting was "null and void" and directed the district to return the student to his 15:1 class at the district's high school, unless the parties otherwise agreed (id.). The impartial hearing officer further directed the district to convene a CSE meeting for the student, review and update his functional behavioral assessment (FBA) and BIP, review the student's IEP, and consider whether the student should continue to be placed in a 15:1 program in a community school (id. at p. 8).

The district appeals, contending that the impartial hearing officer erred in determining that it was required to give the parent prior written notice of the MDR meeting. Alternatively, the district argues that even if prior written notice was necessary, in this case the lack of such notice was a procedural inadequacy that did not result in a deprivation of a free appropriate public education (FAPE)<sup>5</sup> for the student and, therefore, does not require expungement of the manifestation determination. For relief the district requests that the impartial hearing officer's decision be vacated. In the alternative, the district requests that the manifestation team be convened to reconsider whether the student's misconduct was the result of his disability.

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<sup>4</sup> Although cited in the district's petition and mentioned in the impartial hearing officer's decision, the parent's due process complaint notice was not entered into the hearing record and its contents are unknown (IHO Decision at p. 2; see Pet. ¶ 5).

<sup>5</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

In his answer, the parent denies many of the district's allegations and asserts that the district failed to provide him with proper notice for either the December 15 or December 18, 2009 MDR meetings.<sup>6</sup> The parent contends there was no advanced notice for either meeting, and that he could not prepare for and fully participate in the MDR meeting. The parent requests that the impartial hearing officer's determination be upheld.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

One of the IDEA procedures relevant to this case involves the process by which school officials may seek a disciplinary change in placement of a student with a disability who violates a code of student conduct (see 20 USC § 1415[k]; 34 C.F.R. §§ 300.530 – 300.537; Educ. Law § 3214[3][g]; 8 NYCRR Part 201).<sup>7</sup> State regulations provide that a disciplinary change in placement means a

suspension or removal from a student's current educational placement that is either:

(1) for more than 10 consecutive school days; or

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<sup>6</sup> Although the parent was represented by an attorney at the impartial hearing, he is apparently appearing pro se on appeal.

<sup>7</sup> The procedures also apply to a student presumed to have a disability for discipline purposes (20 USC § 1415[k][5]; 8 NYCRR 201.2[n], 201.5; see 34 C.F.R. § 300.534).

(2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year

(8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 C.F.R. § 300.530[b][2], [c]).<sup>8</sup> If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct an MDR meeting "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" (20 U.S.C. § 1415[k][1][E]; 34 C.F.R. § 300.530[e]; 8 NYCRR 201.4[a][3]). An MDR meeting must also be conducted within 10 school days after a superintendent or impartial hearing officer decides to place a student in an interim alternative educational setting (IAES) (see 8 NYCRR 201.4[a][1]-[2], 201.7[e], 201.8[a]; see also 20 U.S.C. § 1415[k][1][G], [3][[B][ii][II]; 34 C.F.R. §§ 300.530[g], 300.532[b][2][ii]; Educ. Law § 3214[3][g][3][iv], [vii]). The participants at the MDR meeting must include a district representative, the parents, and the "relevant members" of the CSE as determined by the parent and the district (20 U.S.C. § 1415[k][1][E][i]; 34 C.F.R. § 300.530[e][1]; Educ. Law § 3214[3][g][2][ii]; 8 NYCRR 201.4[b]). State regulations additionally require that the parent must receive written notification prior to any manifestation team meeting "to ensure that the parent has an opportunity to attend" (8 NYCRR 201.4[b]). Further, State regulations require that such written notice inform the parent of the purpose of the meeting, the names of the people expected to attend, and the parent's right to have relevant members of the CSE participate at the parent's request (id.).

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the manifestation team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if:

- (1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
- (2) the conduct in question was the direct result of the school district's failure to implement the IEP.

(8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 C.F.R. § 300.530[e][1]; Educ. Law § 3214[3][g][3][vii]).<sup>9</sup> If the result of the MDR is a determination that the student's behavior was not a manifestation of the his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 C.F.R. § 300.530[c]; see Educ. Law § 3214[3][g][vi]). However, if the result of the MDR is a determination that the student's behavior was a manifestation of his or her disability, the district's CSE is required to

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<sup>8</sup> If a district proposes to suspend a student with a disability for more than five school days for alleged misconduct, a superintendent's hearing is conducted in which the student's guilt of the alleged misconduct is first determined and, if found guilty, a threshold determination is made regarding whether a disciplinary change in placement will be considered as a possible penalty (Educ. Law § 3214 [3][c]; 8 NYCRR 201.9[c][1]).

<sup>9</sup> In this case, it does not appear that there is any dispute regarding the implementation of the student's IEP (Tr. pp. 15, 38, 47-48).

conduct an FBA and implement a BIP;<sup>10</sup> or if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 C.F.R. § 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances" as defined in the IDEA and regulations, the district must also return the student to the placement from which he or she was removed or suspended (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 C.F.R. § 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>11</sup> If the manifestation team determines that the student's conduct was the direct result of the school district's failure to implement the student's IEP, the district must take immediate steps to correct the deficiencies in the implementation of the student's IEP (20 U.S.C. § 1415[k][3][E][i][II]; 34 C.F.R. § 300.530[e][1][ii], [3]; 8 NYCRR 201.4[e]).

If the parent of a student with a disability disagrees with: (1) a school district's decision regarding the student's placement, including but not limited to the decision by the district to place the student in an IAES; or (2) a determination of the manifestation team, the parent may request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 C.F.R. § 300.532[c]; 8 NYCRR 201.11[3]-[4]; see Coleman v. Newburgh Enlarged City School Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

In this case, the impartial hearing officer concluded that the district did not comply with State regulations that require the district to provide the parent with prior written notice of the MDR meeting and, therefore, she annulled the determination of the manifestation team and directed the district to return the student to the district's high school (IHO Decision at p. 7; see 8 NYCRR 201.4[b]). Here, the impartial hearing officer determined that the written notice for the December 18, 2009 MDR meeting was untimely because it was not postmarked until December 18 (IHO Decision at pp. 4, 7). Although the district claims the notice was sent on December 15, it concedes on appeal that its own copy of the postmark is illegible (Pet. ¶ 27 n 6; see Dist. Ex. 2 at p. 3).

On appeal the district argues first that it is was not required to provide the prior written notice required by State regulations, and second, that even if it were required to do so, any failure to provide prior written notice caused no harm because the district provided actual prior notice to the parent of the proposed manifestation meeting dates by speaking with the parent over the telephone.<sup>12</sup> I need not reach the district's first argument, because, the district's second argument, that the parent had actual notice, is not supported by the hearing record.

Although I need not resolve the district's first argument on appeal, in view of the forgoing and having examined the evidence in the hearing record, I find that there is no reason to disturb

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<sup>10</sup> A school district is not required to conduct a second FBA if the district had conducted an FBA prior to the behavior that resulted in the change of placement (34 C.F.R. § 300.530[f][1][i]; 8 NYCRR 201.3).

<sup>11</sup> A district and parents may agree to a change in the student's placement and, under certain circumstances, a district may continue to maintain the student in an IAES for up to 45 days (20 U.S.C. § 1415[k][1][F][iii], [G]; 34 C.F.R. § 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[d], 201.9[c][3]).

<sup>12</sup> The district contends that it was not required to comply with the written notice requirement in the State regulations (8 NYCRR 201.4[b]) because Education Law § 3214[3][g] provides that the statute shall not be construed to provide greater rights than are conferred under the analogous provisions of IDEA pertaining to student discipline (Educ. Law § 3214[3][g][1]; see 20 U.S.C. § 1415[k]).

the impartial hearing officer's determination that the prior written notice the district provided to the parent for the December 18, 2009 MDR meeting was untimely.

The inquiry, however, does not end there, because a technical violation of the procedures for disciplining a student with a disability does not automatically render the determination of a manifestation team invalid (Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 551 [E.D. Va. 2008]; Farrin v. Maine Sch. Administrative Dist. No. 59, 165 F. Supp. 2d 37, 51 [D. Me. 2001] [holding that the delay in conducting an MDR meeting under the circumstances did not result in harm]; see generally A.C., 553 F.3d at 172 [2d Cir. 2009]; Matrejek, 471 F. Supp. 2d at 419 [S.D.N.Y. 2007]). The student in this case was suspended effective December 2, 2009 (Dist. 6 at p. 1). The parent testified that he received two telephone calls from the district regarding the December 18, 2009 MDR meeting, but he also indicated that he asked the district for additional time to get in touch with additional participants for the MDR meeting, but was unable to do so prior to the meeting (Tr. pp. 24, 59-61; Dist. Ex. 3 at p. 3). An e-mail from the school psychologist dated December 15, 2009 indicated that the parent would have attended the MDR meeting scheduled for December 15, 2009 had he received notice of it, and at that time, the district decided to proceed with the rescheduled MDR meeting on December 18, even though they had not yet been able to reach the parent regarding rescheduling the meeting (Dist. Ex. 3 at p. 3). Although it appears that on December 18, 2009, the parent may have been offered the opportunity to participate in the rescheduled MDR meeting by telephone (Tr. p. 24), the substance of the telephone call and the reasons he declined to participate by telephone were not made part of the hearing record (see id.).<sup>13</sup> Under the circumstances of this case, in which the hearing record does not support the conclusion that the parent received prior written notice of the MDR meeting, and in view of the scant evidence of the circumstances surrounding the actual notice provided to the parent of the rescheduled meeting and the reasons why the parent did not attend in person or by telephone, I find that the actual notice provide to the parent was inadequate to allow him to participate in the December 18, 2009 MDR meeting.

Additionally, I note that the impartial hearing officer, upon annulling the manifestation determination, did not address whether the student's misconduct was a manifestation of his disability before directing the district to return the student to the district's high school (IHO Decision at pp. 7-8). Although there is some evidence that shows that the manifestation team concluded that the student's misconduct was not a manifestation of his disability (Tr. pp. 28, 53; Dist. Ex. 4 at p. 4), the hearing record contains no evidence that describes why the manifestation team reached this conclusion. Instead, much of the evidence focuses on the belief of those in attendance at the MDR meeting that the student should not be returned to the district's high school due to possible retribution sought by other students and concerns for the student's safety (Tr. pp. 17, 39-42, 54).<sup>14</sup> In light of the forgoing determinations that the parent was not given adequate notice of the MDR meeting and the lack of evidence in the hearing record regarding whether the student's misconduct was a manifestation of his disability, I will direct the district to reconvene the manifestation team with appropriate notice to allow the parent to participate, and to reconsider

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<sup>13</sup> The school psychologist, with whom the parent was speaking on December 18, 2009 when the parent explained that he would not be participating in the rescheduled MDR meeting, did not testify at the impartial hearing (see Tr. p. 24).

<sup>14</sup> I remind the parties that in addition to changing a student's placement by agreement, separate procedures address the circumstances in which a student's current placement is substantially likely to result in injury to the student or others (20 U.S.C. § 1415[k][3]; 34 C.F.R. § 300.532[a]-[b]; 8 NYCRR 201.8).

whether the student's misconduct was caused by or had a direct and substantial relationship to the student's disability or the conduct in question was the direct result of the school district's failure to implement his IEP.

Although the district is ordered herein to provide the parent with prior written notice consistent with the requirements of 8 NYCRR 201.4(b), neither party is precluded from contacting each other for the purpose of scheduling a mutually acceptable time to convene the manifestation determination review meeting.

Lastly, the portion of the impartial hearing officer's decision directing the CSE to reconvene to consider the student's behavior and program needs is not annulled by this decision (IHO Decision at p. 8). The CSE shall reconvene, if it has not already done so, per the order of the impartial hearing officer (id.)

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's order dated March 4, 2010 that directed the district to return the student to the district's high school is annulled; and

**IT IS FURTHER ORDERED** that the district shall, unless the parties otherwise agree, upon prior written notice to the parent to be provided by certified mail return receipt requested and by general U.S. mail, reconvene the manifestation team within 30 days of the date of this decision to reconsider whether the student's misconduct on November 30, 2009 was caused by or had a direct and substantial relationship to the student's disability or the conduct in question was the direct result of the district's failure to implement his IEP.

**Dated:** Albany, New York  
May 7, 2010

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**