

FINDINGS OF FACT AND DECISION

Case Number: 113998

Student's Name: T

Date of Birth: May 19, 1993

District: 5

Hearing Requested By: Parent

Dates of Hearing: January 30, 2008
February 6, 2008
February 13, 2008
March 27, 2008

Hearing Officer: Judith T. Kramer, Esq.

NAMES AND TITLES OF PERSON WHO APPEARED

Janet Shepherd	DOE Representative, Region 5
Susan Lacointe	DOE Operational Specialist
Betsy Combier	Parent Advocate
K. [REDACTED]	Parent
T. [REDACTED]	The Student
Sabrina Bouchette	Receptionist, Suspension hearing office
Christine Alvarez	Hearing officer, Suspension hearing office
Jesse Bernstein	School psychologist, P.S. 225
Sheila Gauthier-Francois	Guidance counselor, MS 53
John Gasparino	Student's Teacher at Queens Middle School
Steven Karp	Site Supervisor
Monique Greenfield	Resolution counselor
Jackie Morrison-Brownsfeld	Assistant Principal
Dawn Ackerman	Guidance Counselor, PS 225
Corrine Kitchen	Guidance Counselor, Queens Middle School

INTRODUCTION

On January 30, 2007 an impartial hearing was commenced pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. 1415 regarding a parental challenge to a one year suspension; and MDR determination as well as the issue of whether the DOE provided T. M. ("the student") with a FAPE for the 2007-2008 school year.¹ The hearing was continued for several additional days at the request of the parties. With no objection by either party, extensions were granted on February 6, 2008, February 13, 2008 and March 27, 2008 (T.129, 423, 682, 852) at the Impartial Hearing Office of the Board of Education of the City of New York located at 131 Livingston Street, Brooklyn, New York.

A list of exhibits that were admitted into evidence is attached to this decision.

BACKGROUND

The student is 14 years old and currently classified as having an emotional disturbance ("ED"). (Parent's Exhibit A). His home school is PS 225 Q. (Parent's Ex. D) He has had five different school placements since the Spring of 2007. (Parent's Exhibits D, F, G3, G10)

On October 19, 2007 the student brought a small knife to school which was detected by the metal detector just prior to his entry. The student was told not to return to school. An MDR was held on November 2, 2007 where it was determined that the student's behavior was not a manifestation of his disability. (Parent's Ex. G 9)

A suspension hearing was held in *absentia* on November 19, 2008 and a one -year suspension was imposed. (T.297)

The parent challenges, among other things, the length of the suspension as well as the determination that the student's behavior was not a manifestation of his disability. In addition, the parent believes that the student was denied a FAPE because he was not provided with the services mandated on his IEP at his various alternative placement sites during the 2007-2008 school year.

¹ The parent's advocate requested an adjournment by letter dated January 28, 2008 stating that the DOE needed time to review documents which were disclosed by the Parent fewer than five days prior to the commencement of the hearing. (IHO Ex. ii) The DOE was not copied on the letter and did not join in that request. The request was denied. The IHO gave both parties ample time to review documents.

THE PARENTS' POSITION

While no longer challenging the classification of the student as ED, the parent contends that the student was denied a FAPE because he was not provided with the services mandated on his IEP during the 2007-2008 school year. In addition, she contends that the child's behavior on October 19, 2008 was a manifestation of his disability and thus, the one- year suspension, which was imposed after the suspension hearing, was improper. She further contends that she was not properly notified of the date of the suspension hearing and thus, it was improperly held in *absentia*.

THE DOE'S POSITION

The DOE contends that the student was offered a FAPE for the 2007-2008 school year. The DOE further contends that the parent did receive a notice of the suspension hearing, that the length of his suspension was proper because his behavior on October 19, 2007 was correctly found not to be a manifestation of his disability and he had been suspended before.

THE EVIDENCE PRESENTED

The student is 14 years old and currently classified as having an emotional disturbance ("ED"). (Parent's Exhibit A). His home school is P.S. 225 Q . (Parent's Ex. D) He has had five different school placements since the Spring of 2007. (Parent's Exhibits D, F, G3, G10)

While the student was on an 89-day suspension, the parent requested a CSE review because the child was not being served well at P.S. 225. As a result of that request, a new IEP was created in July, 2007 which recommended that the child's classification be changed from learning disabled to ED. (Parent's Exhibit A, T. 81). The IEP recommended that he be to be placed in a general education class with five periods per week of Special Education Teacher Support Services (SETSS) with a staff ratio of 8:1. (Id., pg. A-1) The IEP also provided that the student should receive counseling once a week for thirty minutes in a group no larger than five. (Id., pg. A-15)

On August, 2007, the parent received a letter stating that the child was to report to MS 53 Q on September 4, 2007. (Parent's Ex.F, T. 91-92) The parent accompanied the student to MS 53 Q on the first day of school, thereafter he went to school on his own. (T. 92) On the first day, she met with the site supervisor, Mr. Karp and the guidance counselor Ms.Francois, and she received paperwork for his admission there including

document which the child has to sign agreeing to abide by the rules of the school. (T.92) At that time, neither Mr. Karp nor Ms. Francois had a copy of the student's July IEP. (T. 95) Ms.Francois still did not have the IEP two weeks later. (T.96) The child did not receive SETSS or counseling during some or all of the time he spent at MS 53 Q. (T. 97)

On October 19, 2008, the child was accused of entering the school with a knife and placing it on the floor after he was stopped by security while coming through the metal detector. He was told not to return to MS 53Q. The student was officially suspended on October 24, 2007. The student was not given an alternative site placement until November 2, 2007.(T. 99-105)

On November 2, 2008 a MDR was held at PS 225. The parent, the child and Mr. Bernstein attended that meeting. The parent's advocate was contacted by telephone after the MDR team made its decision. (T.108-110) The first time the parent met Bernstein was at PS 225 sometime prior to the CSE meeting which was held in July 2007. At that time, Mr. Bernstein stated to her that the student had a "bad boy" image. (T. 88)

At the MDR, Mr. Bernstein told the parent that because the alleged misconduct involved the possession of a knife, the student's misconduct was not related to his IEP and was not a manifestation of his disability. She was told that the IEP was irrelevant because there is "zero tolerance" for the type of conduct engaged in by the student. (T. 112) The parent was not given an opportunity to present any evidence and the anecdotes—Parent's Ex. M-- were not considered. Mr. Bernstein delivered the determination to the parent. She testified that it appeared to her that the determination was prepared in advance of the MDR. (T. 111) The parent was advised on November 2 that the child was to report to a new placement at ALC 231. She accompanied the child to ALC 231 on November 2 where they followed the intake procedures. The staff at ALC 231 did not have the student's IEP until the parent provided a copy to them. (T. 125) The parent testified that ALC was "wild and crazy" and that she was not told what services the student would receive.

The parent stated that she received a notice of hearing advising her that the suspension hearing would be held on October 31, 2007. She testified that she appeared at the suspension hearing office on October 31, 2007 to request an adjournment. The request was granted but the date of the hearing was left open. She stated that she did not

receive any further notice of the suspension hearing until she received a letter in the mail stating that the hearing would be held on November 19, 2008. (T. 145, 194). She received the letter two or three days prior to November 19, 2007. Id. She testified that she didn't do anything when she got the letter and "just waited for the results". (Id., T. 204)

The suspension hearing was held on November 19, 2007 without the parent. The evidence at the hearing showed that the student was observed placing a knife in the floor after the metal detector alerted security that the student had a metal object in his pocket. A picture of the knife was also placed into evidence. (T. 154)

On November 26, 2007, a decision was issued in which the student was suspended for one year. The same document contained the results of the MDR that the student's misconduct was not a Manifestation of his Disability. (Parent's Ex. G 5) She did not understand the determination because it referred to an MDR that took place in March 2007 and a suspension hearing that took place in October 2007. Id.

As a result of the disposition that a one-year suspension was to be imposed, the student's placement was changed once again to the Sutphin Academy-- also referred to herein as Queens Middle School. (Parent's Ex. G8). The student began at the Sutphin Academy/ Queens Middle School on December 3, 2007. The parent met with Ms. Kitchen for intake. The parent testified that Ms Kitchen told her that they did not have the student's IEP. (T. 180) The student has been attending Sutphin Academy/ Queens Middle School ever since. (T. 179)

On January 30, 2008, the parent testified that since December 3, 2007, when the student began at Sutphin Academy/Queens Middle School, she did not know if the student has been receiving any of the services recommended on the July IEP. She stated that during the week of January 31 when the impartial hearing began, the student began to receive some services. (T. 182-183) In addition, the parent testified that the student was not receiving any instruction in social studies or science and was not being given any homework, workbooks or textbooks when he began at the Queens Middle School suspension site. (T. 181)

On February 6, 2008, the parent continued her testimony. On that day she testified that on February 1, 2008, the student received a workbook and was given resource room, and counseling. In addition, the student now has a science teacher and the parent received

a call from a special education teacher for the first time to discuss the student's services. (T. 188)

The parent testified that she initially disagreed with the classification of ED because she did not know who made the decision but now she agrees with it. (T. 193, 200) She requests that the student be returned to PS 225. At the resolution meeting in December 2007, the parent agreed to have the child retested. She was told that the new evaluations would be performed within two weeks but they were not. (T. 176-179) An interim order was issued on January 31, 2007 ordering DOE to pay for private psychiatric and psychoeducational evaluations for the student.

The student testified and acknowledged that he had a knife with him on that day but his testimony trying to explain his reasons for having it were contradictory. First, he testified that he brought it to school because he was afraid that other boys intended to engage him in a fight. However, he later testified that he did not know that the knife was in his pocket when he left his home that morning. He testified that the knife was in his wallet, which he doesn't usually take to school. He then stated that he took his wallet that day because he needed his metrocard. (T. 273-285)

The student testified that he has not receive any special education services in any of his suspension sites since September 2007 until February 1, 2008 when for the first time he met with a counselor for 45 minutes. He also testified that he was not receiving academic instruction in science or social studies at the Sutphin Academy and that during his tutorials he was playing card games. (T.241-246) The student testified that he has not been involved on any further incidents while at Sutphin Academy. (T.263-264) The student also stated that he does not feel safe at PS 225, gets into trouble there and does not want to return. (T.265) He stated that when he feels afraid, he does not know what to do. (T. 288)

Sabrina Bouchette testified that she is the receptionist at the Suspension Hearing Office. (T. 293) She testified that she remembers the parent because she met her on October 31 when the parent requested an adjournment of the suspension hearing. (T. 294-295) She testified that she tried to set a new hearing date and that on November 14, 2008 she called the parent twice and left a message for the parent to call her back. She sent a notice of nearing to the parent on November 14th advising the parent that the hearing would take place on November 19th. (T.302-303) Although she usually retains a copy of

such notices, she was unable to produce the notice she said she sent to the parent. (T. 305) When she did not hear from the parent by sometime after 10:00 am on November 19, she informed the parent that the suspension hearing would be held in *absentia* on November 19, 2007.(T. 306)

Christine Alvarez, the hearing officer at the suspension hearing, testified that the suspension hearing took place on November 19, 2007 in *absentia*. (T. 350) She testified that Steven Karp and Debbie Green were present at the suspension hearing.(T. 351) She acknowledged that it was her responsibility to draft the decision letter dated November 26, 2007 after the hearing.(T. 353) She acknowledged that the decision letter contained several errors which she deemed "clerical" only. She acknowledged that at least four of the dates contained in the decision letter came from a template she uses for all of her decisions and that they had nothing to do with the student. (T. 368-371) She failed to edit the letter using material from the students file. (T. 371) She stated that she did not review the student's IEP except to fill in the class ratio information but even that piece of information was erroneous. (See, Parent's Ex. A1 and Parent's Ex. G 5, T. 374-377) She also stated that the last page of the letter may have been missing from the copy sent to the parent. She also testified that she had nothing to do with the determination that the child should receive a one-year suspension. That decision was made by the resolution counselor. (T. 390-391)

Mr. Jesse Bernstein testified that he was a school psychologist at PS 225 when the student was in attendance there. (T. 438) He conducted the MDR on November 2, 2007. (T.439). He testified that the parent and Ms. Ackerman were also in attendance at the MDR. (T.440) He looked through the IEP at some point but he was not sure when or whether it was the most current IEP. (T.440) He reviewed the charges and he determined that the student's actions were not a result of his disability.(T. 440) After the meeting, the parent asked to call her advocate, and Mr. Bernstein reported his finding to the advocate.(T. 443-446) He testified that the records before him at the MDR contained no discussion of the students poor impulse control, poor decision making ability or aggressive tendencies that would warrant bringing a knife to school. (T.440-441) He then stated that in the most recent IEP, there was a reference in the goals for the student that he will "demonstrate better self-control and less impulsivity in social/.class interactions" and "will gain insight in to maladaptive behaviors and will improve judgment". (T.448 ,

Parent's Ex. A-8) He further testified that impulsivity is in part defined as the ability to look at the consequences of one actions. (T. 451) He also said that the student does have impulsivity issues and that is why the student's classification was changed by the CSE from learning disabled to emotionally disturbed. (T.454) But, Mr. Bernstein implied that the student fully understood how to act and that he knew right from wrong. (T.542,545).

Mr. Bernstein testified that he was not a member of the CSE team, which changed the classification (T.459), and neither was the psychologist who evaluated that student. (T.459) He stated that the other members of the. CSE team did not know the student nor had they ever come in contact with the student.(T.460-461) He stated that the parent was on the telephone for about two minutes. He only attended the CSE meeting because he was pulled in by the team to sit in. (T.459,460) He spoke to the team of the students prior suspensions and fights.(T.463) He did not write any part of the IEP.(T.464-465)

He had no knowledge of whether the IEP had been implemented prior to the MDR.(T.477) He testified that if the student was not receiving the mandated SETSS, it could have raised his level of frustration which in turn could relate to the level of impulsivity.(T.536)

He didn't recall how he prepared for the MDR. He didn't ask many questions at the MDR.(T..495) He had a file but it contained only the IEP and the charges.(T.486,502) It did not contain the anecdotes regarding the student's behavior prior to the incident at issue at the MDR. (T.525, 532-533) He testified that the anecdotes might have been relevant to the MDR. (T.533) He also testified that if the student wasn't getting counseling, it would have changed things at the MDR. (T. 534) The student was attending IS 53 at the time of the incident. He thought that the MDR should have been conducted at the student's school but he was told to do it by the suspension office because the student was still on his roster. (T.525-526) He testified that usually the teacher would attend an MDR but in this case, there was no one from IS 53 in attendance at the MDR and he spoke to no one from that school prior to the MDR. (T.501, 535)

Ms. Dawn Ackerman is the guidance counselor at PS 225. (T.555) She knows the student and has worked with him 20-25 times. (T. 558) She participated in the MDR.(T. 555) She testified that the MDR team found that the incident was not a manifestation of the student's disability because the student brought a knife to school, knew what he was doing and that the nature of the incident was a zero tolerance

offense.(T.556) She also testified the she never saw any anecdotal—Ex. M.-- at the MDR but that if she had seen them, she might have thought that the student would have done something rash next. (T.592,593) She looked at the charges and the IEP and testified that the student did not give any input at the meeting but that if he had, it might have factored into the whole course of the meeting. (T.557,591)

Monique Greenfield testified that she was the resolution counselor who made the disposition to give the student a one-year suspension. (T.597) She made that decision based upon the fact that the student had two prior suspensions and the MDR was negative and thus, he could get a suspension equal to that of a child without a disability. (T. 604-606, 615) She applied a formula and had no discretion. (T.609, 613)She testified that she applied for a second opportunity school (“SOS”) where he could go for the one-year suspension. That application was approved. (T.604) There was no testimony that Ms. Greenfield was made aware of the fact that the previous MDR was resolved in favor of the student on consent of the DOE after an impartial hearing was held. (T. 10, 617)²

Sheila Gauthier-Francois is the guidance counselor at MS 53 and was there when the student was there from September 2007 to October 19, 2007. (T.689-690) She testified that she met with student at least once a week for thirty minutes in a group of three and more often if necessary. (T. 691) She stated that some his behaviors were addressed at the sessions including the difference between right and wrong.(T. 696) She testified that on October 2, 2007 she learned that the child felt threatened at the school and she was aware the he was threatened by another child there.(T. 695)She discussed the situation with the parent who agreed to pick the student up from school.(T.695,704) They put all of the teachers on “heightened alert” but she did not tell the principal.(T.705) She told the child to let her know if he was uncomfortable.Id. She was never made aware of the anecdotal prepared that week by Mr. Gasparino even though she knew that he was encouraged to prepare them for the student.(T. 712-713) She did not ask him for his daily reports on the student. (T. 718) She counseled the student on October 18, 2007 but doesn’t remember anything about it. (T.721)She never saw the report prepared by Mr. Gasparino that day.(T.723) Ms.Gauthier-Francois testified that during the month of

² Although the Findings of Fact and Decision dated June 8, 2007 was offered by the parent as an exhibit and was excluded as an exhibit here, the IHO is taking judicial notice of that decision in which it was held that the DOE conceded that the negative MDR determination should be vacated and it was vacated by the decision of the IHO. (See, Parent’s Ex. E)

October, 2007, the student was upset and the teachers were concerned about him which lead her to speak to the parent.(T.723)

Ms. Francois was not consulted with regard to the suspension. (T.719) She was not aware of the MDR.(T.720)

Mr. John Gasparino was the student's science teacher at MS 53. (T.735) He was the person responsible for teaching the student in resource room. (T.735) He possesses a transitional certificate for teaching special education as a teaching fellow.(T.737) He had no teaching experience prior to his teaching at MS 53 in September 2007.(T. 740) He does not have his masters degree in special education but is completing it this year.(T.738) He testified that the student has weak phonics, weak word recognition, and attention problems.(T.737) He has seen the child be inattentive, calling out, getting out of his seat and demonstrating behaviors that make it difficult for the student to pay attention.(Id.,T.748) He said that the students behavior was consistent with the IEP. (T.750, 752)

During the week of October 15, 2007 through October 19, 2007—the date of the suspension—Mr. Gasparino prepared a report which indicated that he wrote up the student for inappropriate behavior seven times. Four of those related to the student's behavior on October 18th. (Parent's Ex. M) He testified that on October 18, the student's behavior was "particularly egregious." (T.753) Mr. Gasparino spoke to the student several times but the student was not responsive. (T.753-754) On that day the student was reported for failing to sit in his seat, drinking and eating in class, interrupting the teacher, leaving the room five times without permission, snapping the lights on and off in the classroom fifty times, throwing an empty soda bottle at another student, throwing it in the air, slamming the teachers hand away from a locker when the teacher was trying to prevent the student from opening the locker, throwing food in the lunchroom, trying to throw other students to the ground, standing on a chair and screaming loudly, banging into students in the hall, jumping on a counter and opening a window and hanging on the top several times, and repeatedly cursing at his teacher. (Parent's Ex. M)

Mr. Gasparino was not consulted with regard to any aspect of the suspension.(T.756) He never spoke to anyone about the MDR.(T.757)

Mr. Steven Karp was the site supervisor at IS 53 in the early Fall of 2007.(T.773-774) He knew the student as a "wrap around" student because he was already on

suspension from another site. Id. He testified that the student's behavior was erratic including horrible cursing, belligerent behavior towards adults, no respect for authority and inappropriate gestures.(T.775) He stated that he was aware that Mr. Gasparino was having trouble with the student but did not remember any incidents on October 18th. (T.782) He did not think that the student was classified as emotionally disturbed. He thought he student's classification was learning disabled. (T. 788)

Mr. Karp testified that he witnessed the incident upon which the most recent suspension was based. He saw the red lights on the scanning device and asked the student to empty his pockets. He observed the student reach down and put a knife on the floor. It was a knife with a two and one- half inch blade .(T.797-798, 806)

He attended a suspension hearing about a week later. (T.809) He saw the anecdotes and shared them with the Dean of P S 225 on the day of or the day before the suspension hearing. At the time of the suspension on October 19th, he noted that there would have to be an MDR to determine if the action of the student was a manifestation of his disability. He did not attend the MDR and was not consulted about it. (T.822) He attended the suspension hearing .(T.809) He was not aware of the suspension guidelines and was a little surprised to learn that the student was suspended for one year as a result of the incident. (T.819)He thought it would be a ninety day suspension although he knew this to be the student's third suspension.(T.819) He was aware that the child was not permitted back in to IS 53 but was unaware that the student stayed home and did not attend school from October 19 through November 2, 2007. (T.840) He understood that it was either the principal or a person at the ISC who was responsible for finding the student an alternative school site.(T.833,834,839)

Jackie Morrison-Brownsfeld is the Assistant Principal at Queens Middle School . She has held that post since August 2007. (T.624) She testified that she has seen the child almost every day since he began there in December 2007 and that he got counseling and that he had resource room once a day. (T. 625, 630) She testified that he was getting tutorials to prepare for the ELA and math exams.(T. 628-629) She testified that he had social studies for only two weeks and that he was not have a science teacher for several months. (T. 633-634) She has never called the parent for any reason. (T.652)

Corrine Kitchen testified that she is the guidance counselor at the Queens Middle School and has been counseling the student since December 2007 once week in a

group.(T.655-656) She takes attendance and the students sign into her room. (T. 656)The student has attended many sessions with her and has made up sessions that he has missed.(T.665) Together they discuss anger management, positive and negative things that have happened in his past. (T.658) In her opinion, he cannot handle certain issues do to his emotions, but she is meeting his needs at this time and she hasn't seen any behavioral problems with him at Queens Middle School.(T.668)

CONCLUSIONS OF LAW

Both the IDEA; state law and regulations require that each and every disabled child be provided a FAPE in the LRE appropriate to meet their individual needs. (emphasis added) 20 U.S.C. § 1412 (a)(1)(A); 1412 (a)(5)(A); 34 CFR § 300.550(b); 8 NYCRR § 200.4 (c)(4); 8 NYCRR § 200.6 (a)(1). Moreover, in order to provide a FAPE, each such student shall have an IEP which must be implemented in a timely fashion. The DOE has the burden to show that they have provided the student with a FAPE.

In addition, under New York State regulations, when conducting an MDR, the manifestation team must review all relevant information in the student's file including the IEP, any teacher observations, and any relevant information provided by the parent to determine if: 1) the conduct in question was caused by or had a direct and substantial relationship to the 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) In addition, if the manifestation team determines that either condition number 1 or 2 above was met, the conduct must be determined to be a manifestation of the student's disability. 8 NYCRR § 201.4 (d)

In this case, the determination that the student's conduct was not a manifestation of his disability cannot stand for several reasons. First, the review team *must review all relevant information in the student's file including the IEP and any teacher observations*. Here, it did not have all of the relevant information that it should have obtained about the student including but not limited to the IEP and teacher observations that were made and reported during the week of and on the very day of the incident.

Jesse Bernstein, who conducted the MDR testified that he wasn't sure if he saw the IEP on the day of the MDR and he never saw the anecdotes prepared by Mr. Gasporino, the student's teacher, during the week of October 15, 2007 through October 19, 2007—the date of the suspension. Mr. Gasparino prepared a report, which indicates

that he wrote up the student for inappropriate behavior seven times that week—four of which related to the student's behavior on October 18th. (Parent's Ex. M) He testified that on October 18, the student's behavior was "particularly egregious." (T.753) He testified that usually the teacher would attend an MDR but in this case, there was no one from IS 53 in attendance at the MDR and he spoke to no one from that school prior to the MDR. (T.501, 535)

Without having this relevant information about the student, it was not possible for the team to have made an accurate determination as to whether the conduct in question was caused by or had a direct and substantial relationship to the disability. Mr. Bernstein's testimony that even if he had considered the anecdotes, his opinion would be the same, is speculative at best and at worst, disingenuous. Indeed, Ms. Ackerman who was also on the MDR team testified that if she had seen the anecdotes, she may have anticipated that this student could have done something rash. If Ms. Ackerman thought that the student would have done something rash, she may very well have changed her own opinion and determined that the actions were a manifestation of the student's disability.

Second, the evidence shows that the student was not being provided with all of the services required on his IEP in September 2007 when he was switched from PS 225 to MS 53. The parent's testified that she accompanied the student to MS 53 Q on the first day of school. (T. 92) On the first day, she met with the site supervisor, Mr. Karp and the guidance counselor Ms.Francois. (T.92) At that time, neither Mr. Karp nor Ms. Francois had a copy of the student's July IEP. (T. 95) Ms.Francoise still did not have the IEP two weeks later. (T.96) The child did not receive SETSS or counseling during some or all of the time he spent at MS 53 Q. (T. 97) There was no testimony offered to the contrary. Where, as here, there was a failure to implement the student's IEP in full at MS 53,, the MDR team was required to find whether the conduct in question was the direct result of the school district's failure to implement the IEP. Here, there is no evidence that the team inquired into that issue at all much less made such a finding. In the absence of such a finding, the determination of the MDR team must be reversed.

Having found that the MDR team's determination cannot stand, the length of the suspension is also called into question. Where conduct is found to be a manifestation of a student's disability, the length of the student's suspension cannot be more that 45 days

even where, as here, the behavior involves a weapon. . 8 NYCRR § 201.7(e) Accordingly, in this case the student's suspension should not have been in excess of 45 days.

Even assuming the MDR team's determination was correct, the one-year suspension should never have been approved. Ms. Greenfield testified that the only time a student can be suspended for one-year is with the approval of the SOS. She further testified that the SOS approved this one-year suspension because the student had been suspended before and he met the criteria under the "formula". However, she was unaware that with regard to at least one of those prior suspensions, the MDR team's determination was reversed. If she had had that information, and factored it into the formula, the one-year suspension would not have been approved. Thus, the student's suspension should not have been more than ninety days under any circumstances—a time frame which has already been exceeded. In light of this conclusion, the fact that the suspension hearing was held in absentia is of no particular importance particularly since the parent admitted that she received notice of the suspension hearing and chose not to go.

As stated above, the unrefuted evidence shows that the student did not receive SETSS at the beginning of the 2007-2008 school year at MS 53. In addition, it is also apparent that the student was not provided with a FAPE during the 2007-2008 school year between the time of his suspension on October 19 and November 2 when he was not placed at all. Moreover, from November 2 through December 3 when the student was placed at ALC 231, according to the parent's unrefuted testimony, the student did not receive services either.

Once he was placed at Queens Middle School the evidence shows that he was also denied a FAPE. There he does not and never has had a permanently certified special education teacher to teach him in resource room. Mr. Gasparino was a very credible witness who testified that he was not a fully licensed or certified special education teacher but rather has a transitional B certificate, which is a letter from New York City. He is not certified by New York State, he does not have a master's degree and he had no prior teaching experience prior to his assignment in September 2007 at MS 53. He and he alone is the one who has had the full responsibility to address the student's special education academic needs at Queens Middle School. The evidence presented by the DOE

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does not establish whether this individual has the "appropriate certification" required by 200.6(b)(1) and thus, does not establish that the student is currently receiving a FAPE.

In any event, even he possesses the appropriate certification, he never taught before this year and he lacks the necessary experience to fully implement this student's IEP without assistance. This is a student with many academic problems as well as emotional problems. His IEP indicates that he is performing well below grade level with reading skills within the second to fourth grade range and math skills within a range of fourth to seventh grade. (Parent's Ex. A.3) There was no evidence presented as to whether Mr. Gasparino had any assistance or supervision to ensure that the methods he was utilizing in the resource room were appropriate for this student. Thus, the DOE did not meet its burden that it is providing the student with a FAPE in his current alternate placement site.

Accordingly, the parent's various requests for relief are granted as set forth in the order below.

It is ordered that:

- 1) the suspension is immediately vacated and the student shall be permitted to return to PS 225;
- 2) the student shall receive 240 hours of compensatory tutoring to be provided at the expense of the DOE by a provider selected by the parent to be used at anytime but before the commencement of the 2008-2009 school year in September,
- 3) the matter shall be referred to the CSE immediately for a determination as to whether the student's placement at PS 225 is appropriate and in accordance with the evaluation completed during the pendency of this hearing. If the CSE determines that the student's needs cannot be met at PS 225, the CES shall find him an appropriate placement and/or defer the case to the CBST for placement in a NPS for the remainder of the 2007-2008 school year.

Dated: May 5, 2008


JUDITH T. KRAMER, ESQ.
Impartial Hearing Officer

JTK:ds

Case No. 113998

PLEASE TAKE NOTICE

Within 35 days of the date of this decision, the parent and/or the New York City Department of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.

“The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period.” (8NYCRR279.2[b]) Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and sample forms for filing an appeal are included with this decision. Directions and forms can also be found in the Office of State Review website: www.sro.nysed.gov/appeals.htm.