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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: AP

Date of Birth: XX-XX-XXXX

Date of Hearing: September 16, 2009

CLOSED HEARING

ODR Case # 00013-09-10-KE

Parties to the Hearing:

Mrs.

Ms. Janet McCauslin
Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Phillip Drumheiser, Esquire
P.O. Box 890
Carlisle, PA 17013

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P.O. Box 1146
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September 25, 2009

October 1, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is a 16-year old student residing in the Central Dauphin School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. The District seeks to expel the student based on a behavioral incident. The parent opposes the expulsion.

Parent filed a complaint on July 1, 2009 after the finding of a manifestation determination review that the behavioral incident was not a result of the student’s disability under the IDEIA. Parent disagreed and sought to have the determination overturned.

Because parent’s complaint regards a disciplinary change in placement, this decision is on an expedited timeline. (34 C.F.R. §300.532(c); 22 PA CODE §14.162(q)(4)). The hearing was conducted in one session on September 16, 2009. The decision is due within ten school days of the hearing. (34 C.F.R. §300.532(c)(2)). In an off-the-record discussion with District personnel at the end of the hearing, it was determined that the 10-school day timeline expired on October 1, 2009.

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. 175-176.

For the reasons set forth below, I find in favor of the District regarding the result of the manifestation determination review.

ISSUE

Was the manifestation determination finding that the student's behavior was not a manifestation of his disability correct?

FINDINGS OF FACT

1. The student entered the District in November 2006 and was placed in an emotional support classroom at a District elementary school. (Notes of Testimony ["NT"] at 237, 241).
2. Upon entering middle school, the student was assigned to a similar classroom in the 6th and 7th grades (the 2007-2008 and 2008-2009 school years). (Parent's Exhibit ["P"]-8; NT at 136-139, 215-217).
3. On September 10, 2007, the District issued a re-evaluation report ("RR") which identified the student as a student with an emotional disturbance, an identification that was noted in the student's prior evaluation at another school district. There was no mention of a diagnosis of attention deficit hyperactivity disorder ("ADHD"). (P-8 at pages 1, 3).
4. The student has a history of behavior issues. In its review of the evaluation report from the other school district, the District noted

- in its September 2007 RR that “(a) history of behavior difficulties and inability to focus attention was noted throughout the (initial evaluation report)”. In the first few weeks of 6th grade (the 2007-2008 school year), the student was exhibiting school-appropriate behavior only 60% of the time and had been involved in two consecutive days of behavior that involved room-clearing for the safety of other students. (P-8 at pages 1-2).
5. Over the course of 7th grade, the 2008-2009 school year, the District documented eight behavior incidents prior to May 6, 2009. One of those incidents involved inappropriate school/classroom behavior, six of these incidents involved disrespect behavior toward school personnel, and one of these incidents involved fighting/assaulting a peer on the school bus (and consequent disrespectful behavior towards the bus driver). (P-11; S-12).
 6. The student’s last agreed-to individualized education plan (“IEP”) took effect on January 22, 2009. A functional behavior assessment in the IEP found: “When presented with a non-preferred social situation or a non-preferred academic task, (the student) responds with inappropriate words, disrespect towards staff or verbal aggression towards others in order to avoid social interaction, or completion of work. (The student) struggles during unstructured times. The function of the behavior is to gain peer attention. When (the student) performs these behaviors, (the student) disrupts the

educational process for (the student) and other students in the same environment.” (S-6 at page 4).

7. Antecedents to problematic behaviors are listed as “asked to do non-preferred task, engaged in uncomfortable social situation, redirection, less structure, group assignment”. (S-6 at page 4).
8. Consequences as a result of the behaviors are listed as “attention from peers, attention from staff, escape task, avoid social interaction”. (S-6 at page 5).
9. Functions of the behaviors are listed as “maintain perception of control, save face, maintain perception that there is no social skills deficit”. (S-6 at page 5).
10. The hypothesis of the functional behavior assessment is:
“When (the student) is in a difficult social situation that (the student) finds undesirable or difficult, (the student) will tease, become verbally aggressive and refuse to comply to maintain a sense of control, save face or maintain perception that there is no social skill deficit”. (S-6 at page 5).
11. The student’s behavior plan is geared only to behavior involving staff and peers in classroom interactions. (S-6 at page 14).
12. The functional behavior assessment was undertaken by the student’s special education teacher, not a District behavior

specialist. The teacher also wrote the behavior plan. (NT at 146-147, 150).

13. The student continued in the District's middle school emotional support classroom through 6th and 7th grades, where the District teachers testified that the student made progress on behaviors. (NT at 142-143, 218-223, 229-231).

14. On May 6, 2009, two behavioral incidents took place after school. (School District Exhibit ["S"]-4; NT at 115-119;).

15. As reported by the student to the building principal, in the first incident, as the student walked home from school, the student allegedly heard a slur directed toward the student. When the student confronted the individual who allegedly said it—another student at the school ("Student A")--, Student A allegedly admitted to uttering the slur. Thereafter, the student allegedly enlisted the help of a third student to restrain Student A while the student attempted to take valuable items from Student A. (S-4; NT at 115-118).

16. As reported by the student to the building principal, in the second incident, as the student walked home from school, the student allegedly asked another student at the school ("Student B") to pick up the student's book bag from the ground. When Student B refused, the student alleges that Student B lightly bumped into

the student, whereupon it is alleged that the student punched Student B. (S-4; NT at 118).

17. On May 11, 2009, the District conducted an informal hearing as required under Pennsylvania education regulations for student discipline. On the same date, the District held a manifestation determination review as a result of the District's decision to implement discipline that would amount to a cumulative 15 days or more of suspension in the 2008-2009 school year, a suspension which was being contemplated pending a determination of recommendation for an expulsion hearing. (S-2 at page 1; S-4).

18. The participants in the manifestation determination review were the student, the student's parent, a special education supervisor, the middle school principal, the middle school assistant principal, and the student's special education teacher. (S-2, S-3).

19. The student and the student's parent did not dispute the events as relayed in findings of fact 15 and 16. (NT at 119, 194).

20. The manifestation determination review found, from the District's perspective, that the student's behaviors in the May 6th incidents were not related to the student's identification/diagnoses. Primarily, the District's view was that the student's behavior was pre-meditated, planned, involved at least

one co-conspirator, and was undertaken with purpose. (S-2, S-4; NT at 119-122, 193-201, 226-227, 238-240).

21. Parent objected to the findings of the manifestation determination review, feeling that “the IEP does not contain diagnostic information from outside agency evaluations”. Overall, parent objected to the manifestation determination review because she felt that the District had neglected to include, or was ignoring, reports and other information about the student’s identification/diagnoses. Parent also testified that, on May 6th, the student did not take medication for attention deficit hyperactivity disorder (“ADHD”) and that the District should have made sure that the student was on a school bus rather than walking home from school. (P-14; S-3 at page 6; NT at 52-56, 60-65).

22. Parent’s expert issued a report and testified at the hearing that the student’s behaviors on May 6th were a manifestation of the student’s disability. (P-3 at pages 8, 9; NT at 87-105).

23. The student was known to have involved in verbal altercations with peers but was not known to be physically aggressive with peers. (NT at 135, 153-155).

DISCUSSION AND CONCLUSION OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818;

22 PA CODE §§14.101-14.163). Under these laws, students with disabilities have protections regarding school district discipline. (34 C.F.R. §§300.530-300.536; 22 PA CODE §§14.162(q)). When a student with a disability is suspended from school in excess of 15 cumulative school days in a school year (22 PA CODE §14.143(a)), or in excess of 10 consecutive school days (34 C.F.R. §300.536(a)(1)), that disciplinary action constitutes a change in the student's educational placement. An intricate series of protections must be observed before a school district can impose the discipline. (34 C.F.R. §300.530).

Pursuant to the applicable federal regulations, the school district must conduct a review to determine whether the behavior which led to the proposed discipline "was caused by or had a direct or substantial relationship to the child's disability or was the direct result of the (school district's) failure to implement the IEP." (34 C.F.R. §300.530(e)(1)(i-ii)). This is referred to a manifestation determination review. The team must determine if the behavior was a manifestation of the student's disability.

Such determination must be made within 10 school days of any decision to change an eligible child's placement, and must be made by "the (school district), the parent, and relevant members of the child's IEP team." (34 C.F.R. §530(e)(1)). The participants "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." (34 C.F.R. §530(e)(1)).

If, after conducting an appropriate review in compliance with the applicable regulatory standards, the IEP team concludes that the behavior at issue was not a manifestation of the child's disability, the school district may take the same type of disciplinary action that it would take with respect to a child with no disabilities, provided that if the student is removed from the current placement, the school district must ensure that the child is provided with a free, appropriate public education, continues to participate in the general curriculum in the alternative setting, and continues to make progress toward achieving his/her IEP goals. (34 C.F.R. §300.530(c),(d)). If the manifestation determination review results in upholding the school district's recommendation for an alternative placement, the IEP team determines the alternative setting. (34 C.F.R. §531).

A parent who disagrees with the results of the manifestation determination review, or with the alternative placement decision, is entitled to appeal by means of a due process hearing. (34 C.F.R. §532(a)). If the hearing officer determines that the district violated the manifestation determination procedures, or that the behavior was a manifestation of the child's disability or the school district's failure to implement the IEP, the hearing officer may (1) return the child to the original placement or (2) order a change of placement to an alternative placement for 45 school days upon determining that "maintaining the

current placement of the child is substantially likely to result in injury to the child or to others.” (34 C.F.R. §300.532(b)(1),(2)).

In this case, the District has complied with the procedural requirements of the manifestation determination process. Appropriate members of the IEP team convened a timely meeting and reviewed relevant information concerning the student in terms of the behavioral incident. (FF 17, 18, 19, 20, 21). Therefore, a procedural grounds for setting aside the manifestation determination does not exist.

The substantive evidence for setting aside the manifestation determination is more complex. While the District attempts to characterize the incidents of May 6th as wholly premeditated, the instigating events are, to the mind of this hearing officer, rooted in the student’s ADHD. It was impulsivity that engendered it, and impulsivity/inappropriate peer interaction which fueled it. The District’s own functional behavior assessment reveals that the student struggles during unstructured time, that the student seeks peer attention, that triggers include uncomfortable social situations, and that the consequences include maintaining the perception of control/saving face/maintaining the perception that there is no social skills deficit (FF 6, 7, 8, 9, 10).

The parent fails, however, in two regards: one, in showing that the behavior was wholly “caused by, or had a direct and substantial relationship to” the student’s ADHD. (34 C.F.R. §300.530(e)(i)), and, two,

in the lack of any indication that the student's prior behaviors resulted in physical aggression towards other students.

As to the first point, the behavior was not wholly caused by the student's ADHD, nor did the ADHD have a direct and substantial relationship to the behavior. (FF 15, 16, 19, 20, 21). As to the second point, although there was at least one incident (on the school bus) which involved fighting with a peer, the student's behavior history, on this record, seems primarily directed toward school personnel and not peers. (FF 4, 5, 11, 23).

In this regard, both parties misjudge the strength of their arguments—the student's ADHD played a role in the incident but not to the point of causation/directness/substantiality. Given that, the manifestation determination review must be upheld as a matter of law.

Likewise, the parent's argument that the District failed to implement the student's IEP fails. Both of the student's special education teachers, who taught the student in the emotional support classroom, testified credibly that the student was making behavioral progress under the terms of the IEP as written. (FF 13). There was no failure to implement the IEP, as written, on the part of the District. (34 C.F.R. 34 C.F.R. §300.530(e)(ii)).²

² Parent's complaint also included general denials of a free appropriate public education regarding alleged violations on the part of the District in evaluating and/or programming for the student. Those issues were bifurcated from the disciplinary change of placement issue considered in this decision to allow for the discipline issue to be heard on the expedited timeline. While, on this record, it appears that the District has implemented the IEP as written, the ultimate appropriateness of the evaluation

CONCLUSION

The District committed no error in its May 11, 2009 manifestation determination review of the behavioral incident involving the student which took place on May 6, 2009. Therefore, the manifestation determination review will not be overturned.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the manifestation determination review of May 11, 2009 will not be overturned.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 1, 2009

and/or IEP processes of the District are still at issue, to be determined on the basis of a separate record.