

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA
Special Education Hearing Officer

Child's Name: M. M.

Date of Birth: xx/xx/xx

File Number: 6553/05-06 LS

Dates of Hearing: May 24, 2006

CLOSED HEARING

Parties to the Hearing:

Parent

West Shore School District
P.O. Box 803
New Cumberland, PA 17070-0803

Representative:

Grace Deon, Esq.
Eastburn and Gray
60 East Court Street
Doylestown, PA 18901

Date Transcript Received:

May 31, 2006

Date of Decision:

June 2, 2006

Hearing Officer Name:

Gregory J. Smith

Background

STUDENT is a [teenaged] child with a disability who resides with his father within the area served by the West Shore School District. On March 10, 2006 and several days preceding March 10, 2006 STUDENT improperly and in an unauthorized manner used district computer equipment. Student's actions were a violation of School Board policy and subject to disciplinary action. Because STUDENT is a child with a disability, an IEP team meeting was held to determine whether or not Student's behavior subject to disciplinary action was a manifestation of his disability. The conclusion of the IEP team was that Student's behavior was not a manifestation of his disability. Student's father and the District's at-risk counselor disagreed with that conclusion. On or about May 3, 2006 Student's father requested the present hearing to challenge the conclusion of the IEP team.

Findings of Fact

1. STUDENT is a [teenaged] tenth grade student who resides with his father within the area served by the West Shore School District (District). (N.T. at 63; S-5)
2. STUDENT is a child with a disability eligible for special education services as a student with an emotional disturbance. (N.T. at 25-27; S-1, S-5)
3. STUDENT was identified as emotionally disturbed early in his education. (N.T. at 25-27; S-1)
4. STUDENT was noted as having strong academic skills. Early difficulties were noted as including poor self-control, problems with peers and adult authority figures, parent-child relational problems, oppositional defiant disorder, and possibly attention deficit hyperactivity disorder. (N.T. at 25-28; S-1, S-2, S-4)
5. Various placements occurred during Student's elementary and middle school career. (N.T. at 25-27, 31; S-1, S-2, S-5)
6. In ninth grade, the 2004-2005 school year, STUDENT was placed in a full-time emotional support classroom located in a school separate from either high school in the District. Because his behaviors had improved, during the spring semester of the 2004-2005 school year STUDENT was included at the high school for math. Because of continuing success with the partial inclusion, at the start of tenth grade, the 2005-2006 school year, STUDENT was included for biology, computer class, and lunch at the high school. (N.T. at 31-33, 37, 107-108; S-6)
7. Prior to starting the computer class STUDENT received instruction on School Board policy regarding appropriate use of the computer. STUDENT was also required to pass a test on that policy before continuing in that course. (N.T. at 78-81, 93; S-9)

8. While in the partial inclusion placements during the spring 2004-2005 and fall 2005-2006 semesters, STUDENT succeeded in three areas: behavior, academics, and attendance. (N.T. at 34-35, 108)
9. On January 18, 2006 a reevaluation was completed and a reevaluation report was issued. At that time reports from Student's teachers indicated that STUDENT had failed to complete several homework assignments, that his study habits needed to improve, and that he had some deficits in organizational skills. The evaluation team, which included STUDENT and his father, concluded that STUDENT continued to be eligible as a student with an emotional disturbance. (N.T. at 36; S-5, S-7)
10. Because of his successful performance with partial inclusion during the spring 2004-2005 and fall 2005-2006 semesters, on January 18, 2006 an Individualized Education Program (IEP) team met and developed an IEP that would provide for full-time inclusion with itinerant emotional support. (N.T. at 36-37, 114-115; S-6)
11. The January 18, 2006 IEP included a single goal that included several parts focused on the completion of assignments (both in-class and homework), being organized and bringing materials to class, and maintaining grades. (S-6)
12. On January 18, 2006 a Notice of Recommended Educational Placement (NOREP) was issued formalizing Student's change in placement. Student's father approved the NOREP on January 18, 2006. (N.T. at 36; S-6)
13. STUDENT began full-time inclusion following the acceptance of the NOREP. Except for the behavior that was the subject of the present hearing, Student's behavior and performance in school following his change in placement were appropriate. (N.T. at 35, 38, 103, 116-117)
14. On March 10, 2006 STUDENT improperly and in an unauthorized manner used district computer equipment, obtained and used administrative passwords, modified and destroyed software, gained access to District servers, had hacking software installed on his computer, and turned off monitoring software. Once he thought he had been detected, STUDENT attempted to cover his tracks by making the computer he was using inoperable. (N.T. at 38-39, 52, 57, 82, 85-92; S-9)
15. Subsequent investigation by the District's Coordinator of Technology and Media Services found that STUDENT had engaged in similar behavior over an extended period of time. (N.T. at 85-86; S-9)
16. Student's behavior on and preceding March 10, 2006 were a violation of School Board policy regarding appropriate computer use and are subject to disciplinary action by the District. (N.T. at 52; S-9)
17. An IEP team meeting was held on March 30, 2006 to determine whether or not Student's behavior subject to disciplinary action was a manifestation of his disability. In attendance at that meeting were STUDENT, his father, the Director of Pupil Services, a school psychologist, the

itinerant emotional support teacher, a regular education teacher, the District's at-risk counselor, and an assistant principal. (N.T. at 54-56, 115; S-10)

18. The IEP team concluded that the behavior subject to disciplinary action was not a manifestation of Student's disability. Student's father and the District's at-risk counselor disagreed with that conclusion. (N.T. at 63-65; S-10)

19. On or about May 3, 2006, Student's father contacted the District and requested a due process hearing to challenge the conclusion of the IEP team that Student's behavior was not a manifestation of his disability. (N.T. at 71-72; S-11)

Issue

Was the behavior of STUDENT subject to disciplinary action by the School District a manifestation of Student's disability?

Discussion

The present hearing was originally requested by Student's father. N.T. at 5; S-11 Following the request for a hearing, the District's Director of Pupil Services completed a complaint notice requesting a due process hearing, noting that the hearing had been requested by the parent, and submitted that notice to the Office for Dispute Resolution (ODR). N.T. at 6, 71-72; S-11, HO-2 At about the same time the Director of Pupil Services contacted Student's father and requested that he complete a complaint notice. N.T. at 6; S-12. A complaint notice was not completed by Student's father.

Neither of Student's parents, nor STUDENT, attended the due process hearing. N.T. at 5, 12 Prior to the hearing, Student's father had been sent two hearing notices from ODR with the correct date and time for the hearing, three letters from this hearing officer with the correct date and time for the hearing, and had been left two voice-mail messages from this hearing officer with the correct date and time for the hearing. N.T. at 6-10; HO-3, HO-4, HO-6, HO-7, HO-9

Neither of Student's parents contacted the hearing officer prior to the hearing. Neither parent indicated to the hearing officer or to ODR that they could not or would not attend the hearing. N.T. at 11-12 Following procedures developed by ODR (see Pennsylvania Special Education Dispute Resolution Manual, Chapter 8, Section 802) the due process hearing for STUDENT proceeded as scheduled.

The sole issue that was heard at the hearing was whether or not Student's behavior subject to disciplinary action was a manifestation of his disability. Because STUDENT had previously been identified as a student with a disability [Facts 2, 3] and because STUDENT was receiving services as a student with a disability [Facts 5, 6, 10, 11, 12] this hearing officer had jurisdiction over this matter. 34 C.F.R. § 300.525 The jurisdiction that a hearing officer has is limited, however. The hearing officer's charge is not to determine whether or not the behavior did occur,

that is to be left to the disciplinary procedures in place within a school district. His charge is merely to determine whether or not the behaviors in question were a manifestation of the student's disability.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) U.S.C.A. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," §1400(d)(1)(A). Under IDEIA, school districts must create an "individualized education program" (IEP) for each child with a disability. §1414(d). If, as the result of a violation of a code of student conduct, a school district plans to change the placement of a previously identified child with a disability, the school district must first complete a manifestation determination. §1415(k)(1)(E) Manifestation determinations are governed by §1415(k)(1)(E) of the IDEIA which states:

- (i) IN GENERAL- Except as provided in subparagraph (B), 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 local educational agency's failure to implement the IEP.
- (ii) MANIFESTATION- If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

In Federal Regulations that predate the 2004 revisions to the IDEIA, hearing officers are instructed as to what their inquiry should consist of when a parent disagrees with a manifestation determination. 34 C.F.R. § 300.525(a) Although the Regulations predate the IDEIA, until new Regulations are issued the old Regulations provide valuable guidance. 34 C.F.R. § 300.525 states:

Parent appeal.

- (a) General.
 - (1) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement under §§ 300.520–300.528, the parent may request a hearing.
 - (2) The State or local educational agency shall arrange for an expedited hearing in any case described in paragraph (a)(1) of this section if a hearing is requested by a parent.

(b) Review of decision.

- (1) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of §300.523(d).

34 C.F.R. § 300.523 states:

Manifestation determination review.

- (a) General. If an action is contemplated regarding behavior described in §§ 300.520(a)(2) or 300.521, or involving a removal that constitutes a change of placement under § 300.519 for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children—
 - (1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and provided the procedural safeguards notice described in § 300.504; and
 - (2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.
- (b) Individuals to carry out review. A review described in paragraph (a) of this section must be conducted by the IEP team and other qualified personnel in a meeting.
- (c) Conduct of review. In carrying out a review described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel—
 - (1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including —
 - (i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;
 - (ii) Observations of the child; and
 - (iii) The child's IEP and placement; and
 - (2) Then determine that—
 - (i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
 - (ii) The child's disability did not impair the ability of the child to

understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

- (d) Decision. If the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section were not met, the behavior must be considered a manifestation of the child's disability.
- (e) Meeting. The review described in paragraph (a) of this section may be conducted at the same IEP meeting that is convened under § 300.520(b).
- (f) Deficiencies in IEP or placement. If, in the review in paragraphs (b) and (c) of this section, a public agency identifies deficiencies in the child's IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies.

The requirements for review found in the Federal Regulations can be summarized as four questions that must be answered by the hearing officer. Each of those will be considered below.

1. In relationship to the behavior subject to disciplinary action, were the student's IEP and placement appropriate? (34 C.F.R. § 300.523(c)(2)(i))

STUDENT had been making progress during his high school career. Following various placements in elementary and middle school, [Fact 5] he was placed in a full-time emotional support class for ninth grade. [Fact 6] After demonstrating improvement in his behaviors, during the spring semester of the 2004-2005 school year STUDENT was included at the high school for a math class. [Fact 6] Because his behavior continued to show improvement, at the start of tenth grade STUDENT was included for biology, computer class, and lunch. [Fact 6]

STUDENT showed continued improvement during the partial inclusion placements [Fact 8] and, as a result, was fully included in January 2006. [Facts 10, 12, 13] Although some behavioral concerns were raised regarding completion of assignments, study habits, and organizational skills, [Fact 9] and although a reevaluation concluded he still qualified as a student with an emotional disturbance, [Fact 9] on January 18, 2006 the IEP team recommended that STUDENT be fully included with itinerant emotional support. [Fact 10] That recommendation was accepted by Student's father on January 18, 2006. [Fact 12]

Nothing in the reevaluation and nothing in the most recent IEP suggests that STUDENT required anything different than what was contained in his IEP. The single goal in the IEP was focused on the completion of assignments (both in-class and homework), being organized and bringing materials to class, and maintaining grades. [Fact 11] Whatever other behaviors that may have been a concern when STUDENT was younger, [Fact 4] were no longer a concern. STUDENT had done a good job with the gradual transition from the full-time emotional support class to more and more inclusion and, as of January 2006, was ready for full inclusion. In fact, after the

change in placement to full-time inclusion STUDENT continued to act appropriately, except for the behavior in question. [Fact 13]

There is nothing in the record to suggest that the January 18, 2006 and/or the placement in the January 18, 2006 NOREP were not appropriate. At the hearing an instructional advisor, the itinerant emotional support teacher, and the Director of Pupil Services all testified that the IEP in place at the time of Student's behavior was appropriate.

It is the conclusion of this hearing officer that the IEP and placement were appropriate.

2. In relationship to the behavior subject to disciplinary action, was the student's IEP being implemented? (34 C.F.R. § 300.523(c)(2)(i))

At the hearing an instructional advisor, the itinerant emotional support teacher, a school psychologist, and the Director of Pupil Services all testified that the IEP in place at the time of Student's behavior was being implemented. Nothing in the record suggests otherwise.

It is the conclusion of this hearing officer that Student's IEP was being implemented.

3. Did the student's disability impair his or her ability to understand the impact and consequences of the behavior subject to disciplinary action? (34 C.F.R. § 300.523(c)(2)(ii))

On March 10, 2006 STUDENT improperly and in an unauthorized manner used district computer equipment, obtained and used administrative passwords, modified and destroyed software, gained access to District servers, had hacking software installed on his computer, and turned off monitoring software. Once he thought he had been detected, STUDENT attempted to cover his tracks by making the computer he was using inoperable. [Fact 14] Subsequent investigation by the District's Coordinator of Technology and Media Services found that STUDENT had engaged in similar behavior over an extended period of time. [Fact 15] Student's behavior on and preceding March 10, 2006 were a violation of School Board policy regarding appropriate computer use and are subject to disciplinary action by the District. [Fact 16]

There is nothing in the record that suggests that STUDENT could not understand the impact and/or consequences of his behavior on and preceding March 10. Prior to starting the computer class in the fall of 2005, STUDENT received instruction on School Board policy regarding appropriate use of the computer. [Fact 7] STUDENT was also required to pass a test on that policy before continuing in that course. [Fact 7] Nothing in the record suggests that STUDENT could not understand that policy, nothing suggests that STUDENT could not understand that the policy applied to the behavior in question, and nothing suggests that STUDENT could not understand the impact and consequences of violating that policy.

At the hearing an instructional advisor, school psychologist, and the Director of Pupil Services all testified that STUDENT understood the rules about computer use and an instructional advisor, the itinerant emotional support teacher, school psychologist, former full-time emotional

support teacher, and the Director of Pupil Services all testified that STUDENT understood the consequences of his actions.

It is the conclusion of this hearing officer that STUDENT understood the impact and consequences of his behavior.

4. Did the child's disability impair the ability of the child to control the behavior subject to disciplinary action? (34 C.F.R. § 300.523(c)(2)(iii))

The behavior in question was clearly complex, not impulsive. It consisted of multiple activities, [Fact 14] completed on multiple dates, [Fact 15] and included attempts to cover his tracks when STUDENT realized he had been detected. [Fact 14] There is nothing in the record that suggests that STUDENT could not control those behaviors.

At the hearing an instructional advisor, school psychologist, and the Director of Pupil Services all testified that Student's behavior was not caused by his disability and an instructional advisor, the itinerant emotional support teacher, school psychologist, former full-time emotional support teacher, and the Director of Pupil Services all testified that STUDENT was able to control his behavior.

It is the conclusion of this hearing officer that Student's disability did not impair his ability to control his behavior.

After answering each of the above questions and after a careful review of the entire record before me, including all exhibits and all testimony recorded in the transcript of the hearing, it is the conclusion of this hearing officer that the behavior that is subject to disciplinary action by the District is not a manifestation of Student's disability. The behavior in question was not caused by nor did it have a direct and substantial relationship to Student's disability, (U.S.C.A. §1415 (k)(1)(E)(i)(I)) nor was it the result of the District's failure to implement the IEP. (§1415 (k)(1)(E)(i)(II))

Accordingly we make the following:

ORDER

The behavior of STUDENT subject to disciplinary action by the School District was not a manifestation of Student's disability.

Gregory J. Smith
Signature of Hearing Officer