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DECISION

Due Process Hearing for JS

ODR File No. 7228/06-07 LS

Date of Birth: xx/xx/xx

Date of Hearing: January 12, 2007 –Closed Hearing

Parties to the Hearing:

(Parent)

South Eastern School District
377 Main Street
Fawn Grove, PA 17321

(Parent)

Representative:

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: January 12, 2007

Date of Decision: January 24, 2007

BACKGROUND:

Student [hereinafter Student] is a xx-year-old (date of birth xx/xx/xx) eighth grade student whose Parents reside within the South Eastern School District [hereinafter School District].

On or about November 7, 2006, Student ingested two prescription pills given to him by a fellow student and took two pills at home the following morning. Student knew that these pills were taken by the friend for his ADHD. The School District held an informal disciplinary hearing on November 13, 2006, at which time Student was suspended and the matter referred to the Superintendent of Schools. On January 3, 2007, a student disciplinary hearing was held before a committee of the Board of School Directors. It was concluded that the conduct at issue was not a manifestation of Student's ADHD and that Student was subject to expulsion for violating the Code of Student Conduct prohibiting being under the influence of drugs at school and possession of drugs at school.

The primary issue to be determined at this expedited due process hearing is whether or not the actions of accepting and ingesting the friend's prescription drugs are a manifestation of Student's disability. A preliminary issue is whether or not Student is entitled to the manifestation protections contained in IDEA 2004, namely whether or not he is eligible for services under the IDEA. The parties have agreed that Student is entitled, at the least, to a Section 504 Plan.

ISSUES:

1. Is Student entitled to an IEP under the IDEA or entitled only to a Section 504 Plan?
2. Was Student's conduct a manifestation of the disability?

FINDINGS OF FACT:

Background

1. Student is a xx-year-old (date of birth xx/xx/xx) who resides with Father within the School District. Student is currently in the eighth grade at [redacted] Middle School [hereinafter Middle School]. (SD 1).
2. On December 19, 2006, through counsel, Parents requested an expedited Due Process Hearing. (SD 7).
3. Both counsel participated in a pre-hearing telephone conference on January 4, 2007 during which there was general agreement about the issues to be decided by the Hearing Officer.
4. A hearing scheduled for January 8, 2007 was continued because of the unavailability of School District counsel. A closed hearing was held January 12, 2007. (N.T. 4).
5. The Hearing Officer received exhibits SD 1 through SD 12. Although the record does not contain a formal request to admit these exhibits, there was no objection by Parents' counsel and they are deemed admitted as presented.
6. The School District called four witnesses: the school principal, an eighth grade social studies teacher, the school psychologist, and a seventh grade counselor. The Parents called three witnesses: Father, Mother, and Student.
7. The parties stipulated to the following: (1) Parent received all the required procedural safeguards from the district; (2) Student was diagnosed on 11/21/06 with ADHD or ADD-inattentive type; (3) Student was born on xx/xx/xx; (4) the date of Student's disciplinary offense was approximately 11/7-11/8/06; (5) the investigation by the School District of Student's offenses was on approximately 11/7 to 11/8; (6) Student has been out of school since 11/08/06; (7) a conference to review the initial evaluation done on the Student was on 12/13/06; (8) a manifestation determination meeting was held on 12/21/06; (9) the team determined that the offense was not a manifestation of his ADHD diagnosis. (N.T. 6-7).

8. Student has a mental impairment, namely Attention Deficit Disorder – Inattentive Type [hereinafter “ADD”] or Attention Deficit Hyperactivity Disorder [hereinafter “ADHD”] which is supported by medical records, testing, and observation. (SD 10-1; stipulation of the parties).

9. Student’s ADD – inattentive type or ADHD affects Student’s learning. (SD 10-1).

10. Student’s difficulties with organization, attention span and distractibility substantially affect his ability to complete work in a timely and efficient manner thereby affecting his classroom performance and grades. (SD 10-1).

11. Ms. G, Guidance Counselor, met with Student when he was a seventh grader because his teachers were concerned that he was not doing well and suspected that there may be a lack of motivation. (N.T. 106-107).

12. The counselor described Student as a polite young man who did not seem to have a lot of interest in doing well. (N.T. 107-108).

13. The Hearing Officer finds that the Parents’ testimony and the testimony of teachers, as well as the documentary evidence from teachers and those who have observed Student in the classroom, are credible and convincing that Student’s disorganization, impulsivity, and attention problems are impediments to Student’s learning and social behavior in school. (See, *e.g.*, N.T. 120, 130, 132-133, SD 6-2).

14. Parents did not consult a pediatrician, counselor, or family doctor regarding Student’s behaviors and inattentiveness. (N.T. 134).

15. On or about November 7, 2006, administrators at the Middle School learned that a seventh grade student had given an eighth grade student pills at the bus stop. (N.T. 12; SD 11-2).

16. After first denying it, Student admitted that he had received the pills, taken two on the bus the morning of November 7, and two more at home on November 8 before coming to school. (N.T. 12; SD 1-1).

17. Student talked to his friend on the bus who had ADHD and told him that he was having problems concentrating. The friend told Student that he knew “what you could take for this problem” and told Student that it worked for him. Student did not know that it was illegal to take this medicine and he thought that one could simply buy this medicine from a store. Student stated: “I just wanted to get it because I thought it would help me pay attention.” (N.T. 139, 137).

18. The pills taken by Student were Metadate, a generic time-released version of the prescription medication, Ritalin, an ADHD medication. (N.T. SD 11-2).

19. Student was suspended from school for three days starting November 8, pending an informal hearing which was held on November 13, 2006. Student was further suspended for an additional seven days and the matter was referred to the Superintendent of Schools. (N.T. 12-13; SD 11-2).

20. Student was charged with violating the District's Code of Conduct, namely being under the influence of drugs at school and possession of drugs at school. (SD 2-1).

21. As a result of a January 3, 2007 student disciplinary hearing, the School Board accepted the recommendations of the Disciplinary Hearing Committee and Student was excluded from school, school-sponsored activities, and all School District property for the remainder of the 2006-2007 school year. It was determined that Student was to be placed in an appropriate alternative education facility for the remainder of the school year and that any reentry was to be under a standard one-year probationary period. (SD 11).

22. During the disciplinary hearing process, Student's attorney requested testing for Student. This testing was completed by the school psychologist, Ms. P, who issued a draft report on December 4, 2006. (SD 6).

23. Student is of average intelligence and performed quite well in school until approximately the sixth grade, when he received D's in math and science. By the seventh grade, Student was getting D's in communication arts, reading, and social studies and an F in math. (N.T. 93).

24. The only intervention offered to Student was referral to a student assistance program or CARE Team. (N.T. 95). Any evaluation as part of the student assistance program would not involve special education or a 504 evaluation in any way. (N.T. 110-111).

25. The only previous discipline of Student has been one detention for chewing gum on the bus and a few lunch detentions given by individual teachers. (SD 9-3).

26. The school psychologist concluded that Student's test results do not support a specific learning disability or a need for special education services. She made recommendations for aiding in school success such as special assistance in math class, preferential seating, encouragement of better organization, and positive reinforcement to rebuild self confidence in school. (SD 6-6). The Hearing Officer does not accept the conclusion that Student has no need for special education services.

27. The School District conducted a manifestation determination review only under Section 504. (SD 9-4). Team members included the Communication Arts Teacher, Coordinator of Special Education, School Psychologist, Principal, Solicitor, Father, and attorney for Student. The committee, with Father and Student's attorney disagreeing, concluded that the conduct was not a manifestation of the Student's disability.

28. As of the date of the hearing before this Hearing Officer, the School District had offered to develop a 504 Plan and introduced into evidence a draft 504 Plan, but no such plan is yet in existence. (See SD 9-4).

29. The proposed 504 Plan adopts, in large part, the suggestions of the school psychologist. (Compare SD 6-6 with SD 10-2).

30. Recommendations from the school psychologist contained in the draft 504 Plan call for strategies to permit Student to catch up in mathematics, to organize his work, and to keep him away from high distraction areas in the classroom. (SD 10-2).

31. The Hearing Officer finds that Student needs special education and related services to assist Student to catch up to his grade level in mathematics and to deal with his attention deficit problems in the classroom. He may need services to help him cope with his emotional difficulties and assist him in developing appropriate behavior management.

32. The school psychologist has suggested such things as "chunking of assignments into smaller sections with frequent due dates," "opportunities to have math concepts reviewed and re-taught, perhaps through the after-school tutoring program," and the use of a "reference sheet with examples of how to complete problems such as re-grouping and subtraction, steps in multiplication and division." (SD 6-6).

33. The Hearing Officer finds that specific methods of teaching mathematics and the chunking of assignments are tantamount to specially designed instruction that constitutes "special education and related services" for purposes of eligibility under the IDEA 2004.

CONCLUSIONS OF LAW

1. Parents satisfied their burden of proving that the Student is a "child with a disability" under Section 602(3)(A) of the Individuals with Disabilities Education Improvement Act (hereinafter "IDEA 2004"), 20 U.S.C. §1401(3)(A).

2. Student is in need of special education and related services as a child with a disability under IDEA 2004.

3. Student's conduct was a manifestation of his disability based upon the definition contained in IDEA 2004.

4. The School District has failed to identify Student as a child with a disability.

5. Student has failed to receive those needed services required for the provision of a free appropriate public education (referred to as "FAPE").¹

DISCUSSION OF ISSUES

1. Is Student entitled to an IEP under the IDEA 2004 or entitled only to a 504 Plan?

The parties have stipulated, and the Hearing Officer must accept, that Student was diagnosed on 11/21/06 with ADHD or ADD – inattentive type. (N.T. 6-7). This diagnosis would satisfy the requirement of an "other health impairment" under the IDEA 2004, 20 U.S.C. §1401(3)(A)(i). On the Behavior Assessment System for Children, Second Edition (BASC), Student scored in the "clinically significant" range for attention problems on the self report, parent form, and teacher form. (SD 6-8 through 9). All four teachers ranked Student above the 94th percentile in attention problems. (SD 6-9). This testing confirms that Student has an attention deficit. The school psychologist found no indication of a specific learning disability. (SD 6-5).

¹ The issue of compensatory education as a remedy for the failure to provide FAPE is not before this Hearing Officer and has never been requested by the Parents.

The school psychologist's report (SD- 6) carefully reiterates the consistent problems Student has had in paying attention in class and with an inability to focus. She testified that Student is of average intelligence and performed quite well in school until approximately the sixth grade, when he received D's in math and science. By the seventh grade Student was getting D's in communication arts, reading, and social studies and an F in math. (N.T. 93). The only intervention offered was referral to a student assistance program or CARE Team. (N.T. 95). Any evaluation as part of the student assistance program would not involve special education or a 504 evaluation in any way. (N.T. 110-111).

After hearing all of the evidence in this case, it is clear that Student has exhibited difficulties in class and that these difficulties have apparently been observed over a substantial period of time. The school psychologist notes throughout her written report that teachers observed easy distraction, a general lack of attention, and a tendency to be unable to focus. Under the section of her draft report entitled "current classroom based assessments and observations, local and/or state assessments, and observations by teachers and related service providers" the school psychologist states: "General consensus is [Student] does not work on his assignments, does not focus or pay attention, and seldom completes his work." (SD 6-2). The Student did well in elementary school, but it is troubling that the academic record shows a steady decline in grades, particularly in the seventh grade, including an F in math. (N.T. 93).

At one point, the School District recommended that Student be evaluated by a Student Assistance Program, but this program customarily evaluates only the need for counseling. When specifically asked whether or not this assessment would involve special education or Section 504 evaluations in any way, the counselor testified unequivocally that it would not. (N.T. 110-111).

Parents testified that they, too, recognized Student's difficulties in memory and concentration. Student would be sent to retrieve something and would return asking what it was that he had been sent for. (N.T. 120). Mother testified that Student had a very hard time with his homework, particularly with concentrating on it, and that he would get frustrated and give up. (N.T. 130). Father testified that at one point Student actually pulled out all of his eyelashes and that it took quite a long time for them to grow back. (N.T. 120).

In spite of these consistent observations that should have suggested the need for a more formal evaluation of whether or not Student had a disability or needed specially designed instruction, Student apparently fell through the cracks. Even the ADHD diagnosis might never have occurred without the pill-taking incident.

The Hearing Officer is satisfied that Student is eligible for services under IDEA 2004. He has a disability and he is in need of special education and related services. The Hearing Officer accepts the draft report of the school psychologist with the exception of the conclusion that Student does not need specially designed instruction. The psychologist's own suggestions border on "specially designed instruction" in and of themselves. Based upon the scores on the BASC, the IEP team is expected to address how the attention problems affect learning,

particularly in the math area, and devise appropriate strategies for remedying the deficiencies in this area.

The psychologist's report is internally inconsistent in that she recognizes the need for, and recommends that, Student receive special help in mathematics, including the re-teaching of math concepts, but contends, nevertheless, that Student does not need "specially designed instruction." A review of the draft 504 Plan suggests that this Plan contains some of those same strategies that would—and should—be in an appropriate IEP.

It is also clear to the Hearing Officer that the School District has failed properly to consider the extent to which Student's emotional problems affect his academic and interpersonal needs. The IEP team should obtain critical information regarding these behavioral and emotional issues to help guide it in the preparation of an appropriate IEP.

2. Was Student's conduct a manifestation of the disability?

Having determined that Student is eligible for services under the IDEA 2004, the Hearing Officer must apply the criteria set forth in this federal statute. Where a student's conduct was "caused by, or had a direct and substantial relationship to" or "was the direct result of the local educational agency's failure to implement the IEP" conduct resulting in potential disciplinary action must be determined a manifestation of the child's disability. 20 U.S.C. §1415(k)(1)(E).

In this case, Student was charged with violating the School District's disciplinary code for being under the influence of drugs at school and possession of drugs at school. (SD 2-5;

SD 11-1). This charge surrounds Student's receipt of four pills from a fellow student. He took two pills on the bus on one day and ingested the other two pills the following morning. These facts are largely undisputed and Student acknowledges that he received the pills and took them. (SD 1-1).

Both the School District and Student's counsel concentrated largely on whether the conduct was "caused by" the ADHD. Much was made of whether or not the taking of these pills represented an impulsive act, presumably based upon the premise that ADHD includes symptoms of impulsivity. The Hearing Officer is inclined to believe that the circumstances of this case do, indeed, indicate impulsive conduct. However, even if the action is not deemed to be impulsive, the taking of medication to help Student concentrate has a "direct and substantial relationship" to the ADHD, using the test set forth in IDEA 2004. Student recognized that he had a problem with focus and concentration. He discussed this problem with a classmate who offered medication designed to improve these same symptoms. Student engaged in some self-medication which he hoped would alleviate the problems.

This decision in no way criticizes a strict drug policy applicable to all students. However, the Hearing Officer must find that the action of possessing and ingesting the pills had a direct and substantial relationship to the ADHD condition. Consequently, the action was a manifestation of the disabling condition. In every sense, the actions here meet the legal test and the Hearing Officer finds that the conduct was a manifestation of the ADHD.

This Student has been out of school entirely for more than two months. He should be returned immediately to school. Further, an IEP Team should be convened as soon as possible to determine what services should be provided to this eligible Student.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Student shall be returned immediately to his regular education classes at the Middle School.
2. Within fifteen (15) school days, the School District shall convene an IEP meeting to determine the type of specially designed instruction needed by Student to assure that he receives FAPE.

Date: January 24, 2007

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