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Decision

Due Process Hearing for NK
Date of Birth: xx/xx/xx
File Number: 7522/06-07KE

Dates of Hearings:
April 27, 2007; May 15, 2007

CLOSED HEARING

Parties:

Representative:

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Date Transcript Received:
Date Closing Arguments Received:
Date of Decision:
Hearing Officer:

May 22, 2007
June 5, 2007
June 20, 2007
David F. Bateman, PhD

I. BACKGROUND

Student is a xx-year-old student eligible for special education and related services identified by the District as a student with a learning disability who is also eligible for a Section 504 plan as a student with ADHD. He currently attends [redacted] high school. He and his friends were in the hall of the high school on February 21, 2007 when Student asked his Spanish teacher to say “limonada” and to say it “sexy like you do in class.” When she protested, he then proceeded to make physical gestures around her. As a result, Student was suspended for ten school days. In contemplation of possibly removing him for additional days, the District convened a manifestation determination meeting wherein they found his actions were not a manifestation of his specific learning disability in math.

The Parent disagreed with the manifestation determination report as completed by the District, and requested a due process hearing. The hearing was held to determine if the behavior was a manifestation of his disability, and to determine if he was a danger to himself or others. This was the second due process request regarding this issue. The first request was filed immediately after the incident and was withdrawn because a settlement appeared imminent. The present due process hearing was filed several weeks later when negotiations broke down.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (S-3).
2. Student is a resident of the School District of Cheltenham Township eligible for special education and related services identified by the District as having a learning disability and eligible for a Section 504 as a student with ADHD (S-3, 4).
3. On September 16, 1998 Student was registered for school in the Cheltenham Township School District. On the form the Parent indicates Student has ADD/ADHD (P-4).
4. Student's grade 1 and 2 report cards indicate problems with attention, disruptions, relationships with other students, and overall concerns about social skills (P-5).
5. In elementary school, Student was provided in-school wraparound services (P-6 and P-7). The expected outcomes included reduction of disruptive behavior and improved social skills.
6. Student's grade three report card from the 1999-2000 school year indicates grades of mostly C's and B's, along with comments about his need to focus more on his school work (P-8).

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents evidentiary exhibits will be designated "P" followed by the relevant exhibit number. References to findings of fact will be designated "FF" followed by the relevant fact number.

7. Student's report card for fifth grade from the 2001-2002 school year indicates grades of mostly B's. Comments from the teachers include: behavior is disruptive; does not accept responsibility for his own actions; needs to improve self-discipline; shows improvement; demonstrates understanding of required readings; participates well in class; demonstrates exceptional mastery of subject matter; shows creative ability; shows qualities of leadership; tends to be too social; and just missed lower grade (P-9).
8. Student's report card for sixth grade from the 2002-2003 school year indicates grades of mostly B's. Comments from the teachers include: makes fine effort; participates well in class; assignments are incomplete and not turned in; needs to improve self-discipline; just missed lower grade; needs to improve listening skills; shows improvement; needs to produce thoughtful, careful work; shows qualities of leadership; tends to be too social; makes fine effort; needs to improve self-discipline; and show creative ability (P-16).
9. During the 2003-2004 and 2004-2005 school years he attended the [redacted] Charter School. Letters from the school indicate he is a quiet young man, and he is a model of respect for others as well as his consistent strive to achieve (S-1).
10. Student's report card for ninth grade from the 2005-2006 school year indicates grades of mostly B's. Comments from the teachers include: possesses excellent work habits; participates well in class; makes fine effort; insufficient effort in class work and/or homework; major class work/projects is (are) incomplete; and quality of work is declining (P-10).

11. On December 8, 2006 the Parent signed an authorization to release information and included statements regarding ADHD and problems with impulse control (P-12).
12. Teacher comments on January 31, 2007 indicates Student is a student who is regularly disruptive, needs help with getting on-task, does not work well in group settings (P-15).
13. During the 2006-2007 school year he received several discipline referrals. The referrals were the result of his not showing an ID card, problems interacting with the nurse, and not attending study hall and lying about his whereabouts (S-2).
14. An evaluation report was completed on February 5, 2007 (S-3). This evaluation report found him eligible for special education and related services as a student with a math learning disability.
15. Teacher comments in the evaluation report include: (Algebra 1 teacher) he does not stay on task, distracts others at times, and does not work well in group settings; (Health Teacher) he does not follow directions, stay on task, work well in a group setting, and is disruptive; he seeks attention from his peers and at times make inappropriate comments about the girls in the class; (Spanish Teacher) he has trouble staying in his seat, staying on task, working in a group setting, and frequently, is disruptive (S-3).
16. On the WISC-IV Student received a full scale IQ of 100, verbal comprehension IQ of 110, and a perceptual reasoning IQ of 88 (S-3, p. 4).

His lowest scores were received on the processing speed index, with a standard score of 83.

17. On the WIAT-II Student received a standard score of 113 in reading, and an 84 in mathematics (S-3, p. 6).
18. On the BASC-2, Student rated himself in the at-risk range for anxiety, sensation seeking, and relations with parents. Student's father rated in the clinically significant range in most of the areas. Two of his teachers rated him at-risk for attention problems, and one rated him clinically significant for bullying (S-3, p. 9).
19. The evaluation report states he exhibited significantly inappropriate behaviors in the 2nd grade; currently, inappropriate behavior is sporadic and not pervasive across subjects and teachers. The evaluation report concludes Student does demonstrate a specific learning disability in the area of mathematics and meets the criteria for a classification under special education regulations at this time (S-3, p. 11).
20. An IEP was developed on February 13, 2007 (S-4). The IEP includes goals and objectives relating to mathematics.
21. On February 21, 2007 Student was accused of sexually harassing his Spanish teacher in violation of the student code of conduct when he engaged in a series of interactions with the teacher including verbal exchanges and subsequent actions/gestures over a period of time. Student asked the teacher to say "lemonade" in Spanish and when the teacher said the word he said, "No, Señorita. You have to say it sexy like you do in class." When the teacher

would not say the word Student came up and danced behind her in a sexual way (grinding)². (S-5, 6, 10; P-6; N.T. p. 71).

22. On February 22, 2007 the District suspended Student for ten days (S-7).
23. On February 22, 2007 Student wrote a letter of apology to the teacher stating he thought she knew he was joking (S-9), after previously stating he thought she knew he was joking (S-8).
24. The District completed a manifestation determination worksheet on February 27, 2007 (P-3). The team concluded the behavior was not a manifestation of his disability.
25. The District completed a manifestation determination worksheet on March 23, 2007 (S-10). The team concluded the behavior was not a manifestation of his disability.
26. On March 28, 2007, Dr. I wrote Student presented to the clinic with features of Attention Deficit Hyperactivity Disorder. These symptoms include easy distractibility, disruptive behaviors, poor impulse control and problems in unstructured settings. These behaviors have been prominent since he was in second grade. He is to continue attending the outpatient clinic for the titration of current medication (P-13).
27. An expedited due process hearing was filed in March, 2007 and later withdrawn (NT 206-207). The Parents withdrew their request for an expedited hearing on the present due process request because he was attending school (NT 206).

² He did not make physical contact with the teacher.

28. District records indicate multiple discipline violations over the past 18 months (S-11).
29. The Parent provided a letter to the District on March 5, 2007 indicating a diagnosis of ADHD (S-12). This diagnosis indicates he has had ADHD since 1999.
30. The District provided a permission to evaluate on March 26, 2007 (S-13). The evaluation would consist of a psychiatric evaluation, functional behavioral assessment, parent input, teacher input, and record review. The evaluation came at the request of the Parent.

III. ISSUES PRESENTED

Was the manifestation determination held by the District appropriate?

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because Student's Parent disagrees with the manifestation determination meeting made by the District. The District maintains that it has at all times satisfied the substantive and procedural requirements of the IDEA and Pennsylvania special education law with regard to the provision of special education and related services to Student. Therefore, it continues, there are no legal grounds to justify the relief sought by the Parent in this proceeding, and the determination his behavior was not a manifestation of his disability was appropriate.

Appropriateness of the IEP

The educational standard to which the District is held is clearly established by statutes and the courts. The IDEA does not require states to develop IEPs that “maximize the potential of handicapped children,” but requires the provision of “some” educational benefit to satisfy the Free Appropriate Public Education (FAPE) entitlement in IDEA. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). According to the United States Supreme Court in that case, the public school program, in order to be appropriate for the eligible student, must provide access to specialized instruction and related services which are “reasonably calculated” to provide the student with some educational benefit. The student, then, must both have a disability, and require specialized instruction and/or related services in order to derive meaningful educational benefit. *Id.* at 207-208. In the Third Circuit, this has been adopted through holdings that the student must receive more than “trivial” or “de minimus” benefit, through an IEP that provides a “basic floor of opportunity.” *See Polk v. Central Susquehanna School District*, 853 F.2d 171 (3rd Cir., 1998), and *Carlisle Area School District v. Scott*, 62 F.3d 520 (3rd Cir., 1995). At issue in the instant matter is discipline, with respect to which federal law, specifically IDEA, enables administration of school-wide discipline plans including immediate options or crisis situations involving drugs, weapons, or danger of physical harm. The law is constructed to assure proper administration and maintenance of a safe school environment.

When contemplating a removal action involving such disciplinary issues, it is the responsibility of the District to notify the parents, advising them of the schools intentions and their rights. This allows the parents, the IEP team, and all other involved parties to determine if a relationship exists between the child's behavior and his or her disability, as identified through the IEP process, at a manifestation determination meeting. That meeting must be initiated at the time of the action to remove, but never more than 10 days thereafter.

Manifestation determination review is a mechanism requiring all parties to review events of school rule infractions or misconduct (cumulative ten-day rule), a weapons violation, or a drug/controlled substance violation for the purpose of determining whether the infraction is a result of the student's disability. The findings of this determination may be either that:

- (1) The behavior subject to the disciplinary action is a result of the students disability or,
- (2) The behavior subject to the disciplinary action is not a manifestation of the student's disability.

When conducting the determination the team must review and consider all information available including:

- (1) All evaluation and diagnostics results (including what the parent provides now),
- (2) All observations of the child, and
- (3) All components of the IEP as well as the educational placement.

After the review of all information available, the team determines that:

- (1) The IEP was appropriate and implemented correctly according to all components stipulated,
- (2) The student's disability did not impair his ability to understand the impact and consequences of the behavior subject to the action, and
- (3) The student's disability did not impair his ability to control his own actions at the time.

If after the review, the manifestation determination team concludes that the IEP was deficient or not implemented according to prescription then actions to remedy the situation must occur. However, if the team finds that the school did comply with an appropriate IEP, then it may proceed to assess whether the behavior subject to disciplinary action was a manifestation of the student's disability. If the team concludes that it was not, the student would be subject to the conditions of discipline set forth in the schools' disciplinary code. In that event, the District must then forward the student's disciplinary records to the person(s) who will administrate the school discipline. Parents of the student with the disability may always request an expedited due process hearing to challenge the results, findings, or rulings of that manifestation determination team. The "stay put" rule for placement, before the interim alternative educational placement, is in effect throughout any such due process hearing period unless the student is a danger to self or others.

§300.532 Appeal.

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the

current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.

(b) Authority of hearing officer. (1) A hearing officer under §300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may--

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes the child would be dangerous if returned to the original placement.

The Parents in this case argued the regulations of IDEA 2004 are not controlling, but the regulations of Chapter 12 (See Parents Closing at 5).

Specifically:

Nearly five months after IDEA 2004 was put into effect on July 1, 2005, Pennsylvania's State Board of Education, in December 2005, adopted new Chapter 12 regulations regarding discipline. These new Chapter 12 regulations specifically adopted federal IDEA-1997 regulations which were promulgated on March 12, 1999 and stated:

“(a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. **Exclusions affecting certain students with disabilities shall be governed by §§ 14.143 (relating to disciplinary placements) and 34 CFR 300.519-300.529 (relating to discipline procedures).**” (Emphasis added) 22 Pa. Code Section 12.6.

It is not surprising that the Pennsylvania legislature adopted IDEA-1997 regulations (despite the passage of the reauthorized IDEA 2004), as the legislature had previously adopted these IDEA-1997 regulations on June 9, 2001 under Chapter 14. See, 22 Pa. Code Section 14.102, which states:

“(a) It is the intent of the Board that children with disabilities be provided with quality special education services and programs. The purposes of this chapter are to serve the following:

(1) To adopt Federal regulations by incorporation by reference to satisfy the statutory requirements under the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400-1419) and to ensure that:

(i) Children with disabilities have available to them a free appropriate public education which is designed to enable the student to participate fully and independently in the community, including preparation for employment or higher education.

(ii) The rights of children with disabilities and parents of these children are protected.

(2) To adopt, except as expressly otherwise provided in this chapter, the requirements of 34 C.F.R. Part 300 (relating to assistance to states for the education of children with disabilities) as published at 64 FR 12418-12469 (March 12, 1999). The following sections are incorporated by reference.

.....

(xxi) 34 C.F.R. 300.519-300.529 (relating to discipline procedures).”

A review of recent Pennsylvania Appeals Panel decisions since the implementation of the Chapter 12 regulations shows a use of the federal regulations-

not the Chapter 12 regulations.³ Therefore, this Decision will focus on the rules and regulations followed by the recent Appeals Panel Decisions.

The Parents also argue, the manifestation determination hearing took place prior to District making the determination to expel Student (NT 294) and that the District has yet to determine whether or not it intends to expel Student (NT 310). The IDEA language therefore does not limit when a manifestation determination meeting may occur in a situation where there has not yet been a change in placement. The language also does not specify whether the determination is made before or after the decision, but simply ensures a prompt determination within ten days if there was or there will be a change in the child's placement for disciplinary reasons.⁴

In this hearing there was abundant evidence of Student's ADHD (FF:3, 4, 5, 6, 26). Despite the numerous mentions of problems in school by his teachers (FF:15), there was no diagnosis of ADHD found in the recent evaluation report (FF:14). Student does have a diagnosis of ADHD from a medical professional (FF:26), and there is clear evidence of him exhibiting these problems from a very young age (FF:3, 4, 5, 6, 7). Given the behavior problems he has exhibited, one would expect an IEP to reflect methods of dealing with the issues he presents.

This Hearing Officer agrees with the Parents (Parents Closing at page 8) that the February 13, 2007 IEP contained:

Present Education Levels that were vague and inadequate in describing how Student was functioning socially/emotionally, and in the classroom. S-4.

³ *In Re Educational Assignment of N.S., Spec. Educ. Op. 1717 (2006). In Re Educational Assignment of D.S., Spec. Educ. Op. 1719 (2006). In Re Educational Assignment of C.S., Spec. Educ. Op. 1725 (2006). In Re Educational Assignment of N.R., Spec. Educ. Op. 1792 (2006).*

⁴ See for example, *In Re Educational Assignment of J.S., Spec. Educ. Op. 1804 (2007).*

No meaningful summary of how Student's ADHD/ADD affected his involvement in the classroom. Id.

Goals which did not address Student's emotional needs. Id.

No Specially Designed Instruction to address Student's behavior needs Id.

No Related Services of counseling, social skills or psychological services. Id.

No Functional Behavior Assessment or Behavior Management Plan. Id.

This Hearing Officer agrees with the Parents that his behavior was a manifestation of his disability. This hearing officer was convinced by descriptions of his behaviors indicative of his impulsivity over many years, especially the comments from his recent teachers (FF:15). Given the fact that this student has impulsive action problem that is clearly documented over time, that the individuals who are his teachers describe numerous behavior problems, a clear medical diagnosis of ADHD, all indicate his behavior was a manifestation of his disability. This Hearing Officer believes behavior exhibited by the student is a manifestation of his disability.

The behavior that caused Student to be the subject of a disciplinary consequence, which led to a manifestation determination, occurred in the hallway with other students who were exhibiting similar behavior. It is clear Student's behavior was caused by, or had a direct and substantial relationship to his disability.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the manifestation determination report developed by the District for Student was inappropriate.

Date

Hearing Officer