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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: JB

Date of Birth: xx/xx/xx

Dates of Hearing:
May 9, 2007; May 10, 2007
CLOSED HEARING
ODR #7563/ 06-07 KE

Parties to the Hearing:

Ms.

School District of Philadelphia
440 North Broad Street
Suite 313
Philadelphia, PA 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Deborah Greenfield DeLauro, Esquire
Office of General Counsel
School District of Philadelphia
440 North Broad Street, Third Floor
Philadelphia, PA 19130

May 10, 2007

May 23, 2007

William F. Culleton, Jr., Esquire

INTRODUCTION

Student is a xx year old eligible student of the Philadelphia School District (District), currently assigned to the eighth grade at [redacted] School, a remedial disciplinary school operated by a private provider under contract with the District. (NT 72-10 to 73-8.) The Student previously received resource room services and a behavior plan with school based behavioral health services, at [redacted] Middle School, for identified Specific Learning Disability and Emotional Disturbance. (NT72-22 to 24, 73-9 to 18, 74-22 to 75-15.) The District transferred the Student from Middle School after finding that he had committed two assaults and several other breaches of the District's Code of Conduct.

The Student's mother, (Parent) requested due process to contest the transfer, arguing that the Student's behavior was a manifestation of his disability, and that the {Disciplinary} School was not an appropriate placement. The District asserts that the behavior was not a manifestation of the Student's disability, and that the placement and attendant supportive services are appropriate.

PROCEDURAL HISTORY

The District and Parent signed a reevaluation report dated November 10, 2007. (P-9.) They signed an IEP dated January 10, 2007, which was revised on February 21, 2007. (NT 74-11 to 21; P-4.) The District suspended the Student on March 21, 2007. The IEP team signed a Manifestation Determination on March 26, 2007. On March 30, 2007, the IEP team signed a second Manifestation Determination and the District assigned the Student on a forty-five day interim basis to a remedial disciplinary school, effective April 9, 2007. Effective April 30, 2007, the District re-assigned the Student to a placement in the Disciplinary School.

ISSUES

1. Did the District fail to provide appropriate procedural protections to the Student and the Parent, or otherwise fail to follow the procedures required by law in connection with the Manifestation Determinations?
2. Did the District err in finding that the Student's conduct was not a manifestation of his disability, because either:
 - 1) the Student's behavior was the direct result of the District's failure to implement the Student's IEP; or
 - 2) the Student's conduct was caused by, or directly and substantially related to, his disability?

3. Was the placement of the Student in a remedial disciplinary school appropriate?

FINDINGS OF FACT

1. On November 10, 2006, the District issued a reevaluation report for the Student, in which it identified the Student with Specific Learning Disability and Emotional Disturbance. (P-9 p. 11.)
2. The Student had been diagnosed with Oppositional Defiant Disorder and Disruptive Behavior Disorder. The Student had witnessed domestic violence against his mother. There was a history of one suspension for fighting in the previous school year. (P-9 p. 2, 3, 4, 6, 7.)
3. The RER noted that the Student had difficulty managing his emotions effectively in school, and that he tends to get angry quickly. It noted that when the Student is angry, he tends to curse and be disrespectful toward others. The Student admitted to hitting a wall with his fist when angry. He was taking boxing lessons, and wanted to be a professional boxer. (P-9 p. 2, 3, 5; S-2 p. 1.)
4. The student's behavior in school predominantly consisted of defiant and disruptive behavior, but not violent behavior. He was not motivated to engage in classroom work, and he did not interact well with adults. He was not noted to have difficulty with peer relationships. (NT 198-5 to 18, 200-21 to 22; P-9 p. 3, 5, S-2 p. 1.)
5. The District issued an IEP dated January 10, 2007, placing the Student in Learning Support with resource room for reading and literacy and school based counseling. Behavioral goals included better attendance and classroom participation, and addressed disruptive behavior in the classroom. Interventions included preferential seating, daily report, school based counseling, Functional Behavioral Assessment and Behavior Support Plan. (P-4 p. 4, 14, 15, 20, 25 - 27.)
6. The Student received the services offered in his IEP, including interventions from the School Based Behavioral Health Program at Middle School. (NT 126-17 to 133-10, 135-12 to 136-2, 152-9 to 153-16, 165-8 to 166-13, 173-3 to 12, 185-17 to 23, 201-24 to 25, 207-25 to 208-2; S-1, S-2.)
7. In January 2007, the Parent filed a complaint with the Pennsylvania Bureau of Special Education, Division of Compliance Monitoring,

alleging among other things that the District was not implementing the IEP. The investigation found that the District was implementing the IEP. (P-8.)

8. The IEP was modified on February 21, 2007, and the Parent signed it on February 23, 2007. (NT 74-11 to 21; P-4 p. 1.)
9. During the 2006-2007 school year, the Student was disciplined twelve times for misconduct consisting primarily of refusal to comply with staff directions, leaving class without permission, and defiance toward school staff. He was suspended once for pushing another student. (NT 147-2 to 8; P-2 p. 3, S-1, S-2.)
10. The District found that, on March 14, 2007, the Student had assaulted another student in a stairwell of the Middle School, by kicking and punching the other student. (NT 120-2 to 17, 133-14 to 22, 134-19 to 20; P-6 p. 3, 4.)
11. The District suspended the Student, to begin on March 21, 2007, after PSSA testing, and recommended assigning him on an interim basis to a remedial disciplinary placement, [redacted]. (NT 134-2 to 15, 134-15 to 135-2, 172-24 to 173-22; P-6 p. 3 - 4, S-5.)
12. On March 20, 2007, the District notified the Parent that she was invited to a manifestation determination meeting scheduled for March 26, 2007. Procedural safeguards were included in the notice. The Parent did not respond. (NT 121-13 to 122-25, 123-7 to 124-3, 154-3 to 155-25; P-3.)
13. The District convened a manifestation determination meeting on March 26, 2007. The Parent did not attend, but sent her adult daughter with authority to participate, on grounds that she was in the hospital due to an accident. (NT 121-9 to 12, 123-25 to 124-3; P-1, P-6.)
14. Members of the IEP team reviewed the Student's record to an adequate extent, noting the Student's strengths and weaknesses, and his disciplinary record. (NT 120-24 to 121-8, 124-22 to 24; P-6.)
15. The team concluded that the Student's assaultive behavior was not a manifestation of his disability. The Parent's adult daughter indicated on behalf of the Parent that she disagreed with this conclusion and signed for the Parent. The District provided a Procedural Safeguards Notice and NOREP to the Parent's adult daughter during the manifestation determination meeting, and

explained the determination and the Parent's procedural rights to the daughter. (NT 138-21 to 139-6, 161-19 to 162-11; P-1, P-6.)

16. The District found that on March 23, 2007, the Student assaulted another student off school grounds while that student was walking home from school. The Student was found to have joined with at least two other individuals in the assault and was found to have kicked and stomped on the other student while he was on the ground. At the time, the Student was on suspension for the incident on March 14, 2007. (NT 139-20 to 147-1; P-7.)
17. The District suspended the Student and assigned the Student to an interim remedial disciplinary placement, [redacted], effective April 9, 2007. (NT 173-17 to 22, 186-15 to 18; S-5.)
18. Nothing in the written victim report of the incident suggested that the Student's assaultive behavior was impulsive or the result of an inability to control his behavior. (S-3.)
19. The District invited the Parent to a manifestation determination meeting scheduled for March 30, 2007. The Parent did not attend or seek an alternate date. (NT 147-13 to 148-17; P-5, p.2, P-7 p. 8, S-5 p. 4.)
20. The team reviewed the Student's record to an adequate extent, noting the Student's strengths and weaknesses, and his disciplinary record. (NT 149-3 to 152-8, 168-20 to 171-24, 185-6 to 11; P-7.)
21. On March 30, 2007, the District invited the Parent to a meeting scheduled for April 10, 2007, to discuss the transfer of the Student to the remedial disciplinary school. (NT 77-24 to 78-4; P-10, S-5 p. 3.)
22. The District's regional Discipline and Truancy Liaison met with the Parent concerning the assignment on April 12, 2007, offered her a choice of two remedial disciplinary schools, and reviewed with her other options, such as a charter school, home schooling and taking the Student out of the District. (NT 178-19 to 180-3.)
23. The regional liaison recommended the Disciplinary School because of its reputation for successfully educating children with special education needs. (NT 178-19 too 179-2, 186-4 to 12.)
24. On April 27, 2007, during the resolution process prior to the hearing, and at the request of the Parent's counsel, the District re-assigned the Student to the Disciplinary School, also a remedial

disciplinary setting, on a permanent basis, effective April 30, 2007. (NT 180-4 to 25, 186-19 to 23; P-2 p. 2, 5, S-5.)

25. The Parent did not bring the Student to either [redacted disciplinary school] or Disciplinary School; the Student is presently at home without services. (NT 178-19 to 181-1.)
26. On May 9, 2007, an official at the Disciplinary School interviewed the Parent regarding her concerns about the school. The Disciplinary School provided a student handbook to the Parent. (NT 113-5 to 11, 98-20 to 101-15, 180-4 to 23; P-10.)
27. The District plans to and is able to implement the Student's IEP and the services offered therein at the Disciplinary School. (NT 184-23 to 185-5, 185-24 to 186-12.)

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdiction

In her opening statement, the Parent, who appeared pro se, argued that the hearing officer should find that the Disciplinary School was not an appropriate placement for the Student. She asserted that the neighborhood was dangerous and that the school's rules of conduct were "military" in style and would not appropriately provide for the Student's individual needs. (NT 56-16 to 57-4.) The District responded that the hearing officer does not have jurisdiction in an expedited hearing under 20 U.S.C. §1415(k) to review the appropriateness of the disciplinary placement. (NT 69-4 to 70-15.) The hearing officer received the Parent's evidence on this issue but reserved judgment. (NT 70-16 to 22.)

The hearing officer finds ample authority for reviewing the appropriateness of a placement under 20 U.S.C. §1415(k). The statute, at subparagraph (A), provides that the parent of a child with a disability "who disagrees with any decision regarding placement, or the manifestation determination ... may request a hearing." 20 U.S.C. §1415(k)(3)(A). It then explicitly states: "A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A)." 20 U.S.C. §1415(k)(3)(B)(i). Moreover, the statute authorizes the hearing officer in a hearing under these subsections to order a change in placement of the child. 20 U.S.C. §1415(k)(3)(B)(ii). It is clear that these issues are appropriate in an expedited hearing. 20 U.S.C. §1415(k)(4)(B). The applicable regulations track this language. 34 C.F.R. §300.531. Thus, the law clearly authorizes the hearing officer in an expedited matter like this to review the appropriateness of the student's placement.

Procedural Deficiencies

The Parent complained about the procedure utilized by the District in finding that the Student's behavior was not a manifestation of his disability. Her chief complaint seemed to be that she had not agreed to the transfer. (NT 56-3 to 7, 77-8 to 17.) However, the law does not require a parent's consent for a disciplinary transfer, as long as the transfer is consistent with the school district's disciplinary protocols for all children, and the behavior is not a manifestation of the child's disability. The Parent's refusal to consent is not relevant to whether or not the District's procedures were correct.

It can be inferred that the Parent's procedural complaint is that she did not personally participate in the two manifestation reviews, (FF 13, 19), as required by statute. 20 U.S.C. §1415(k)(1)(E). However, in this case, the District had an obligation - and had full authority - to act, despite the Parent's non-participation. The law provides a limited time frame for convening a manifestation determination meeting - within ten school days of the decision to change the student's placement. 20 U.S.C. §1415(k)(1)(E)(i). There is no exception to this time frame - even when the parent has a reasonable excuse for failing to attend. Thus, if a parent does not participate after being given reasonable opportunity, the parent's non-participation cannot reasonably be found to be a basis for overruling a manifestation determination. Here, the evidence shows that the District made every reasonable effort to obtain the Parent's participation in the manifestation review. (FF 12, 13, 15, 19, 21, 22, 24, 26.)

The hearing officer gives less weight to the Parent's assertion of procedural irregularities and lack of notice, based in part upon his observation of the documents that the Parent offered into evidence. Many were in fragments, and some were duplicates. The Parent obviously did not store her documents with sufficient care so as to have a reliable record of what she had received and what she had not received. Since the District has a record of having provided the appropriate notices, and since its witnesses credibly testified that they were provided, the clear weight of the evidence is that the District complied with the procedures required in the law. (FF 12, 14, 15, 19, 20, 21.)

The record proves without doubt that the Parent received notice of the first manifestation review, because she sent her adult daughter in her place. (FF 13.) Moreover, the District reasonably relied upon the statement of the Parent's adult daughter that she was attending with the Parent's authorization. (FF 13,15.) Although the Parent's reason for non-attendance was that she was in the hospital, nothing in the record suggests that the District failed to respond reasonably to a request for a new date within the ten school day period for manifestation review. Rather, the record shows that there was no such request; the Parent sent her daughter instead. (FF 13.) Although the Parent claims that she did not know the purpose of the meeting, this is contradicted by the documentary record - the Invitation plainly stated that the manifestation review would be discussed - and the hearing officer gives little weight to the Parent's claim that she did not know of the purpose for the meeting. (FF 12.)

The Parent claims similarly that she did not know of the second manifestation review meeting, and the record shows that she did not attend it, nor did she request an alternate date. (FF 19.) The hearing officer gives little weight to the Parent's claim that she did not know of the meeting, because it was contradicted by the testimony of the District's principal, whom the hearing officer found to be credible. The Principal testified that the notice was sent by certified mail. (FF 19.) Given the diminished weight the hearing officer assigns to the Parent's testimony on this point, the record shows by more than a preponderance of evidence that the Parent received notice of the second manifestation meeting. Therefore, the District provided a reasonable opportunity for her to participate, and her non-participation does not vitiate the validity of the manifestation determination.

The Parent also complains that the District gave her no information about the proposed placements at [redacted disciplinary] and Disciplinary School, and that she was given only two choices of placement. (NT 77-8 to 17.) The evidence showed that the District had, at the request of the Parent's counsel¹ reassigned the Student from [redacted disciplinary] to Disciplinary School, and in the process had arranged an interview for the Parent with an administrator at Disciplinary School. (FF 22, 24, 26.) The Parent herself introduced literature describing the program at Disciplinary School. (FF 26.) Thus, the District did not fail to inform the Parent regarding the remedial placement. It had no obligation to offer her a choice of settings, assuming that the District's choice was an appropriate setting. The fact that the District chose to offer a second choice contradicts the Parent's complaint, and suggests to this hearing officer that the District made its decision with due care and attention to its obligation to listen to the Parent and choose a placement that addresses the individual needs of the Student.

Implementation Of The IEP

The Parent complained that the IEP was not implemented prior to the disciplinary actions. (NT 78-17 to 79-17, 81-7 to 20, 84-17 to 86-3, 88-15 to 90-15, 92-10 to 93-4.) If such a failure directly resulted in the two assaults that the District found to have occurred, then, by definition, the behavior would have been a manifestation of the Student's disability. 20 U.S.C. §1415(k)(1)(E)(i)(II), §1415(k)(1)(E)(ii). However, the Parent had only one basis for alleging that the services offered in the IEP were not implemented: she was told so by the Student. (NT 85-20 to 86-3, 88-22 to 89-10.)² This is plainly unreliable hearsay

¹ The Parent had retained counsel who negotiated with the District. However, this attorney withdrew from representation prior to the hearing itself.

² The Parent cited one other source of information about a very specific and irrelevant part of the IEP: access to the classroom computer for completing assignments. Regarding that, the Parent claimed that one of the Student's teachers had admitted to her that the Student's assignments had not been placed in understandable form on the computer. Putting aside whether or not this was required by the IEP, (NT 196-1 to 197-8) - or even possible - this hearing officer finds this aspect of the IEP irrelevant to the Student's behavior in this matter. The Parent provided no

on the face of this record. The Student did not testify. His alleged statements in this regard are not corroborated by independent evidence anywhere in the record. The Student is not a reliable source of information, because he has an interest in avoiding personal responsibility for his chronic truancy, defiance of school staff, and disciplinary violations for which he is being and has been punished. Moreover, the District's witnesses and the documentary record contradicted this assertion. (FF 5, 6, 7, 8.) Thus, the hearing officer gives no weight to the Parent's assertions that the IEP was not implemented.

Relationship Of Behavior To Disability

The only argument that the Parent offered on the relationship of the behavior to the Student's disability is her belief that the specially designed instruction in the IEP would have been sufficient to prevent the Student from assaulting other children. (NT 96-10 to 97-14.) However, the Parent offered no more than her own unsupported opinion, and this was contradicted by the District's testimony and the documentary record, which indicated that the Student's defiant and disruptive behavior escalated despite all interventions. (FF 4, 5, 6, 9.) The record shows that a new approach was and is needed.

The record discloses no relationship of the Student's disability to his behavior. The District's witnesses all testified credibly that the Student was identified with Emotional Disorder based upon defiant, oppositional behavior toward adults. (FF 1, 2.) Although there had been one incident of discipline for fighting and one for pushing, the District's witnesses uniformly testified that the Student's pattern of behavior was not violent. (FF 2, 3, 4.) Thus, his disability was not characterized by violent behavior. Rather, the Student's behavior was characterized by absences, running away from staff, attention-seeking disruptions in class, and defiant violation of rules. (FF 1, 4.) In fact, his relationships with other students were considered to be non-problematic. (FF 4.) There was no clinical diagnosis suggesting a conduct disorder or impulse control disorder causing angry, violent outbursts on a frequent basis.³ (FF 1, 2.)

Moreover, the witness statements describing the second incident do not suggest any reason to think that the Student's behavior was the product of an irresistible impulse or sudden anger. (S-3.) Thus, there is no basis in the record for this hearing officer to contradict the judgment of the District officials who were intimately acquainted with the Student's day to day behavior and whose manifestation determinations in this case are based upon expert knowledge and experience.

Appropriateness of Placement

evidence to show a relationship of this part of the IEP to the Student's behavioral problems, and this hearing officer has no reason to think that there could be such a link.

³ The RER noted a self report that the Student would pound a wall with his fist when angry, (FF 3.); however, when asked about his symptoms at home, the Parent did not even mention this. (NT 104-11 to 105-11.) The hearing officer finds no basis in this record to conclude that the Student's identified disability had manifested itself in violent behavior, especially assaulting a peer.

As noted above, the Parent alleged that the Disciplinary School was an inappropriate placement because she believed that the neighborhood was dangerous and that the school's rules of conduct were "military" in style and would not appropriately provide for the Student's individual needs. (NT 56-16 to 57-4.) This was the entirety of the Parent's evidence on this issue. On the other hand, the District presented testimony of a most credible disciplinary specialist that the Disciplinary School had a very good reputation for educating children with special education needs and that the witness knew of specific cases in which the Disciplinary School had been successful with such students. (FF 23.) Moreover, the District's witnesses testified credibly that Disciplinary School was able to - and would - implement the Student's IEP while he was at the school. (FF 27.) The Parent offered no independent fact witness or expert witness to provide a basis for her negative beliefs about the placement, basing them instead upon hearsay statements of anonymous people she interviewed on the street near the school, and upon observations of security provisions without any knowledge of how those security provisions are implemented in fact. Thus, the weight of the District's evidence is far greater than that of the Parent and the hearing officer finds no basis to question the appropriateness of the placement in this matter.

ORDER

1. The District followed appropriate procedures in finding that the Student's behavior was not a manifestation of his disability.
2. The District's determination that the Student's behavior was not a manifestation of his disability is affirmed.
3. The placement of the Student in a remedial disciplinary school was appropriate.

May 23, 2005

William F. Culleton, Jr., Esq.
Hearing Officer