

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

DECISION

Due Process Hearing for MR

Date of Birth: xx/xx/xx

File Number: 8474/07-08/KE

Dates of Hearings:

April 2, 2008, April 24, 2008, September 17, 2008, October 16, 2008

OPEN HEARING

Parties:

Philadelphia School District
440 North Broad Street
Philadelphia, PA 19130

Ms.

Representatives:

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Date Transcript/Exhibits Received:

October 17, 2008

Date of Decision:

October 21, 2008

Hearing Officer:

Ronald Fischman, Ed.D.

BACKGROUND

Student, now a teen age resident of the Philadelphia School District, was identified in 2004 as a special education student with an Other Health Impairment, an Attention Deficit/Hyperactivity Disorder. Student attended grade 8 at the [redacted] Middle School until late November, 2007. Since the beginning of the 2007-2008 school year, Student engaged in various inappropriate behaviors despite repeated, attempted interventions of school personnel such as meetings with Student and Student's parent and revisions in Student's behavioral plans.

On November 29, 2007, Student was found by a school police officer roaming the halls of the school with a black magic marker in Student's hand. In running from the police officer, Student encountered the school's principal and punched him rather than follow the principal's direction to go with him to his office. Student's behavior led to a Manifestation Determination Hearing to determine if the student's behaviors were a result of Student's Other Health Impairment, an Attention Deficit/Hyperactivity Disorder. The Manifestation Determination Hearing found that the student's manifested behaviors were not the result of Student's Attention Deficit/Hyperactivity Disorder and recommended a more restrictive educational setting in a special education program in a remedial disciplinary school.

The parent contends that the student's behavior is, indeed, a manifestation of Student's Attention Deficit/Hyperactivity Disorder and that the student has repeatedly demonstrated oppositional behaviors such as difficulty with school authority and difficulty in remaining in Student's assigned classroom. The parent maintains that such behaviors are repeatedly well documented by the School District over a period of time. The parent asserts that the School District has created minimally effective behavioral plans for the student for at least the past four school years. Yet, the student continued to act in an oppositional and impulsive manner, not in a premeditated manner, consistent with Student's special education classification, Attention Deficit/Hyperactivity Disorder. Thus, the parent asserts that the incident of November 29, 2007 was a manifestation of the student's disability.

FINDINGS OF FACT

1. A senior staff psychologist and Supervisor of School Consultation Services with the [redacted] Institute is an expert in educational and developmental psychology (NT 50-52).
2. The student's inappropriate behaviors of November 11, 2007 which were documented on November 29, 2007 had a relationship with Student's special education classification, Other Health Impaired, Attention Deficit/Hyperactivity Disorder (NT 60,75, E 1).
3. The parent did not attend a conference on December 10, 2007 as requested by School District personnel (E1, page3).
4. The School District's initial evaluation of the student when Student was in Grade 5 indicates that the student had behavior problems in school since grade one (NT 64-67, 69, 72; E 13).

5. The student was diagnosed with Attention Deficit/Hyperactivity Disorder when in grade 5 at the [redacted mental health] Clinic (NT 64; E13).
6. The student continues to take medication for Attention Deficit/Hyperactivity Disorder (NT 64).
7. With behavioral rating forms provided by School District personnel in 2004, the student's Parent indicated clinically significant issues with conduct, behavioral issues, with inattentive behavior and with significant depression (NT 68, 177, E 13).
8. In grade 5, the student's inappropriate behaviors and elopement from class often occurred when the student was asked to complete written assignments or when the student did not get Student's own way (NT 70; E 13).
9. In 2004, school personnel noted that while the student's behaviors were of concern, they did not rise to the level of a diagnosis of emotional disturbance (NT 71; E13).
10. Attention Deficit/Hyperactivity Disorder is a disorder of self regulation and of impulse control which is often accompanied by oppositional behavior and difficulty in verbalizing thoughts and feelings and planning ahead (NT 73-75,104, 111; E 4, E 11).
11. The student continues to have difficulty with remaining in class, with peer interaction, with compliance to school authorities, and with difficulty in focusing attention, especially with tasks that do not interest Student (NT 91, 98, 103-104; E 9, E10, E 11).
12. The student is making minimal progress in Student's general education program due to the impact of Student's disability, Attention Deficit/Hyperactivity Disorder (NT 91, E 9).
13. As a result of the student's having been enrolled in a School Based Behavioral Health (SBBH) program when Student was in grade 7, the student made progress in remaining in class for the duration of the class, and the student's suspension rate was reduced from 10 days during the previous year to only 3 days during the school year of the Individual Education Program, 2005-2006 (NT 95-98, 100, 109,129-130,208-209, 249-250; E 10, E 14, E 17).
14. Instead of listing consequences of the student's behavior, the Functional Behavioral Assessment of September 19, 2005 lists attempted interventions (NT 104, 121,123-125; E 3, E11, E 17).
15. The Manifestation Determination Report describes the student's need for resource room support for reading and math, but that report does not mention the School District's many behavioral improvement plans for the student's inappropriate and oppositional behavior (NT 118. E 3).
16. The Manifestation Determination Report stated that the student's having punched the principal of the middle school in a stairwell had no direct and substantial relationship with the student's disability, an Attention Deficit/Hyperactivity Disorder (NT 117-118, E 3).
17. Daily behavior monitoring reports provided by staff of the School Based Behavioral Health program were specific and signed daily by the student's school teacher and parent until October 30, 2006 (NT 128-129; E 14).
18. After October 30, 2006, school district personnel did not provide daily behavior reports for the student in a complete manner and often during the

- following school year, 2007-2008, the daily behavior reports were not completed at all (NT 130-131; E 14).
19. In the School District's educational evaluation report, dated December 7, 2007, the District's psychologist, bilingual in [LANGUAGE REDACTED] and English, assessed the student's social and emotional functioning with brief projective assessments which provided a subjectively interpreted assessment of the student's feelings of aggression, ego expansive tendencies, anxiety and suspicion and over sensitivity to social opinion (NT 136; E 7).
 20. In her assessment of the student, the School District's bilingual psychologist did not use norm referenced behavioral rating scales (NT 136).
 21. The School District's psychologist did not provide a detailed history of the student's behaviors during Student's school career (NT 138).
 22. Input forms provided by the District's school psychologist were returned by staff with minimal input for the student's educational report of December, 2007(NT 140; E6).
 23. In an interview with the parent's psychologist and the Parent just before the second hearing session on April 24, 2008, the student denied that Student hit the principal when Student encountered him in the stairwell of the middle school (NT 146).
 24. The student claimed that the black magic marker with which Student was found was for use in a school mural project in which the student was participating (NT 147).
 25. The student did not mention to the Parent's psychologist that Student was supposed to be in class when Student was found in the school's stairwell (NT 147).
 26. The student claimed that Student had left the building and was returning to class (NT 148).
 27. The student's Parent withdrew the student from the School Based Behavioral Health program, a program in which Student was making behavioral progress (NT 95-98, 100, 129-130, 150; E 10, E 14).
 28. The School District had agreed to fund a private, independent psycho-educational evaluation; however, the Parent's expert psychological witness is not aware of the status or progress of that evaluation and has not spoken with that evaluating psychologist (NT 152-153).
 29. The student was transferred from the [redacted] School to the Middle School due to School Based Behavioral Programs (SBBH) at that school to address unspecified behavioral problems NT 177, 305).
 30. Depending upon the student's need for support, the amount of time that Student spent in regular education was varied in accordance with the student's demonstrated need (NT 178).
 31. The parent alleges that during a "serious incident" with SBBH, the student had fractured several ribs (NT 184-185).
 32. While the Director of Special Education for the Central East Region of the Philadelphia School District was aware of this "serious incident," she was unaware of any injuries sustained by the student (NT 185).

33. The Director of Special Education for the Central East Region of the Philadelphia School District did not have day to day, direct contact with the student (NT 186-187).
34. The Individual Education Plan for the student was implemented in the school by educational staff who work directly with the student and was supervised by the school's principal, the Local Educational Authority representative (NT 187).
35. The student had an IEP and Functional Behavioral Assessment (FBA) prior to the fall semester of 2007 which were modified to provide further academic support and to work with the student's verbally aggressive behaviors, elopement from class, and with emerging inappropriate behaviors, using an iPod in school, an infraction of the School Code of Conduct (NT 196-198, 209, 249).
36. Special education staff attempted to employ positively oriented behavioral strategies to decrease the student's frequencies of inappropriate behaviors with the assistance of the regional case manager (NT 199, 204).
37. During the 2006-2007 school year, the student progressed in Student's special education program with no severe behavioral problems with support from SBBH personnel from September, 2006. The student's oppositional and elopement behaviors increased in April, 2007 when Student began to bring the iPod to class (NT 208-209).
38. The student's teacher during the 2006-2007 school year intervened by having conversations with the student about the appropriateness of bringing an electronic device to school; however the student continued to bring the iPod to school and to demonstrate other inappropriate behaviors such as not reporting to class, eloping from class, and roaming the hallways of the school while listening to the iPod (NT 209-211, 215).
39. During the latter part of his 2006-2007 school year, the student and Student's teacher developed verbal behavioral contracts to guide Student's behavior in class and in the school (NT 224, 228).
40. The student's teacher for the 2006-2007 sent home with the student daily progress/behavior reports until January 30, 2007 (NT 232-233).
41. Some of the written daily reports sent home with the student were not returned, and on some occasions, the daily reports were presented verbally rather than in writing (NT 233).
42. The student's behavioral contract was developed by the student with a worker from SBBH (NT 236).
43. The principal of the Middle School knew the student as a result of responding to school radio notifications by non-teaching assistants or school police about the student's disruptive behaviors in the school building (NT 241, 257).
44. At times, the student's interaction with the principal was compliant while at other times it was oppositional and defiant (NT 244).
45. The principal stated his opinion that there was no other placement or school to provide the educational supports for the student when Student was acting oppositionally and defiantly, and the principal did not discuss alternative placements for the student with members of the IEP team (NT 251).

46. A school police officer (SPO) found the student marking lockers and cursing before the student left the school (NT 254).
47. When re-entering the school, the student met the school principal and a SPO (NT 254).
48. The principal blocked the student from leaving the area without touching Student, and the student punched the principal in his chest (NT 255).
49. The principal asked the SPO to accompany the student to his office without handcuffing or arresting the student (NT 256).
50. When the Parent requested that SBBH services be stopped, the principal provided a special services assistant to support and re-direct the student (NT 258-259).
51. The principal was aware of the student's classification as a student in need of specially designed instruction for "Other Health Impairment, "Attention Deficit/Hyperactivity Disorder (NT 264-266; E13).
52. The student's educational and behavioral plan were monitored on a daily basis by the educational team, consisting of vice principal for Student's grade level, members of the special education team, the special education case worker and the regional special education director, and the school's special education liaison (SEL) (NT 273).
53. The SEL reported directly to the school's principal about the student's progress in academic and behavioral areas (NT 274).
54. The principal investigated an incident of defiance that led to physical restraint of the student by members of the SBBH program to keep Student from eloping from the building by meeting with SBBH personnel, but he is unaware of the student's having sustained an injury to Student's ribs as a result of this incident (NT 277, 279-280; 310).
55. The student has been taking medication for AD/HD since at least grade 6 (NT 299).
56. During the eighth grade school year, 2007-2008, the student's dosage was changed from two doses, one in the morning and one during school hours, to one double dose at home in the morning (NT 300).
57. The student has been under the continuous care of a psychiatrist since grade 6, and continues to see a therapist several times a month at the same agency from which student receives psychiatric treatment (NT 303-304; 310).
58. Parent initiated psychiatric and psychological services for Student when Student entered the Middle School (NT 305).
59. Parent alleged that 3 SBBH staff members physically restrained the student behind closed doors after the student attempted to defend self from the aggressive actions of another student, causing the student to fracture Student's ribs for which Student required medical treatment (NT 306-307; 310).
60. The Parent alleged that the student told her that Student could not tell the truth about the school incident because Student was threatened by staff that if Student did, they would have Student's Parent arrested (NT 308).
61. Parent alleged that she removed the student from the SBBH program at the recommendation of the special education director for the East Central Region of the school district (NT 309).

62. Parent alleged that school staff had permitted the student to bring the iPod to school on certain occasions; however, she could not name a specific person at the middle school who gave such permission (NT 316;319-320).
63. Parent alleged that while school personnel called her on a daily basis about the student's behavioral infractions, they never informed her that the student brought the iPod to school ((NT 317).
64. The Parent alleged that the principal cursed at the student when he encountered Student in the stairway of the school with a magic marker in Student's hand ((NT 326).
65. The Parent alleged that the student was allowed by the vice principal to have magic markers in the hallway to work on a school mural ((NT 326).
66. The student's therapist at the Center is the director of the [ethnic-specific] treatment program at that facility (NT 337-338).
67. The therapist has a degree of Medical Doctor from the [country redacted] and a Master's Degree in counseling from a joint program between the Inter-American University and the Philadelphia Community College (NT 339-340).
68. The student's therapist is not a licensed physician in Pennsylvania (NT 347).
69. The student's therapist has no professional licensure or public school certification as a social worker or counselor in Pennsylvania (NT 402).
70. The therapist has seen the student monthly or on a more frequent basis if necessary since 2003 (NT 348).
71. The therapist opined that his diagnosis of the student as confirmed by two psychiatrists is an Attention Deficit/Hyperactivity Disorder (NT 348).
72. In a Comprehensive Biopsychosocial Re-evaluation of the student dated January 4, 2005, a Center psychiatrist lists the Axis I diagnoses of the student as an Oppositional Defiant Disorder (ODD) and secondarily under Axis I, an Attention Deficit/Hyperactivity Disorder (NT 371, E 26A).
73. More recent psychiatric updates are available; however, the student's therapist did not bring them to this hearing (NT 370, 398-399).
74. The student told the therapist at Center that the principal attacked Student while Student told a private licensed and school certified psychologist, engaged by the Parent, that Student did not strike the principal (NT 146, 366).
75. The student's therapist had no contact with school personnel even though he testified that it is the norm for a therapist to work with the client's, now known as a consumer's, school program because the student's Parent did not see the need for the therapist to contact school personnel (NT 403-404).

ISSUES

1. Are the student's inappropriate and oppositional behaviors in school a direct manifestation of Student's Other Health Impairment, an Attention Deficit/Hyperactivity Disorder?
2. Did the School District provide a Free, Appropriate Public Education for the Student?

IV. DISCUSSION AND CONCLUSION OF THE LAW

Student, now of teen age, has demonstrated behavioral and learning problems since Student attended grade one of an elementary school of the Philadelphia School District (PSD). When Student was in grade 5 in the PSD, Student was evaluated both by personnel of the PSD and personnel of the Center (FoF 4, 5). These evaluations both concluded that Student suffered from an Oppositional Defiant Disorder and Attention Deficit/Hyperactivity Disorder (AD/HD) (FoF 6, 72).

Student's inappropriate behaviors were characterized by significant conduct issues, elopement from class and from the school itself, inattentive behavior, significant depression and impulsive behavior (FoF 7,8). While PSD personnel noted that these behaviors were "of concern," they did not deem these behaviors to rise to the level to necessitate a diagnosis of severe emotional disturbance (FoF 9).

The student continued to have difficulty with focusing attention, remaining in class when frustrated and complying with school authorities (FoF 11). Student was making minimal progress in Student's educational program (FoF 12) until Student was enrolled in a School Based Behavioral Support Program (SBBH), a service contracted by the PSD. In that program, Student demonstrated considerable improvement in remaining in class and in significantly reducing the number of incidents of school suspension (FoF 13). The student's Parent insisted that the student be removed from the SBBH program, alleging that members of the SBBH staff inappropriately restrained the student, causing the student to fracture Student's ribs (FoF 59). The Parent also asserted that she removed the student from the SBBH program upon the recommendation of the Special Education Director of the East Central Region of the PSD at that point in time (FoF 61). Neither of these two allegations was substantiated by medical record, educational record or by witnesses during this hearing. When the SBBH services were terminated at the request of the Parent, the middle school's principal provided a special services assistant to support the student's appropriate behaviors and to re-direct the student's inappropriate and inattentive behaviors (FoF 50).

School staff did complete daily behavioral reports to be sent home until October 30, 2006. After October 30, 2006, school personnel were not compliant in completing daily reporting forms to be sent home to inform the parent of her child's behavior that day in school (FoF 18). At times, those daily reports were provided orally to the parent by the teacher. At other times, when the signed, completed reports were sent home, they were not signed by the parent and returned to school, an indication that the parent had received the report (FoF 41). Teachers for the student did not complete and return input forms, disseminated by the PSD's bilingual school psychologist, in her evaluation of this student (FoF 20).

The student's educational staff did employ positively oriented, behavioral strategies to attempt to help the student decrease inappropriate behaviors and modify those strategies as necessary (FoF 29, 30).

On November 11, 2007, a school police officer (SPO) found the student in the hallway with magic markers, drawing on lockers (FoF 46). The student eloped from the school building, and as Student re-entered the school building, the student encountered the school's principal and a SPO (FoF 47). The principal directed the student to go to his office, and blocked the student's leaving the building without touching the student. The student then punched the principal in the chest (FoF 48). In an interview with a licensed psychologist, who is also a certified school psychologist, engaged by the parent just before the first hearing session on April 2, 2008, the student denied that Student hit the principal (FoF 23), while Student told Student's therapist at Center that the principal attacked Student (FoF 74). Similarly, in Student's discussion of the encounter with the middle school principal, the student did not mention that Student had left the school building and was returning to the building when Student encountered the principal (FoF 25). Thus, the student's descriptions of the incidents to a consulting school psychologist and to Student's therapist are inconsistent.

The therapist who has been working with the student since 2003 (FoF 70) holds no professional mental health licensure or certification in Pennsylvania. Although he had available to him notes and recent evaluations of the student, he presented only two psychiatric reports, dated 2003 and 2005. This therapist had no input in either of the two reports presented. The second psychiatric report dually diagnosed the student as having an Oppositional Defiant Disorder along with an Attention Deficit/Hyperactivity Disorder (E 26, 26A). Apparently, PSD personnel were not aware of these reports, most probably because the student's Parent and more recently the student did not give consent for the therapist or the agency to release these psychiatric reports and more current updates to PSD personnel (FoF 75)

While the Diagnostic and Statistical Manual of the American Psychiatric Association Fourth Edition, Text Revision¹ does list hyperactivity and impulsivity as two among other symptoms of Attention Deficit/Hyperactivity Disorder, it does not list physical aggressiveness as a symptom of this disorder. Thus, the student's having struck the middle school principal as Student encountered him while returning to school is not a manifestation of an Attention Deficit/Hyperactivity Disorder.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that upon the student's return as a registered student in the School District of Philadelphia, the School District will place Student in a full time learning support class with a one to one assistant to accompany the student when Student is in the school and away from the direct supervision of Student's teacher. This interim placement will last no longer than sixty (60) calendar days. During those sixty (60) calendar days, a multidisciplinary evaluation team will obtain educational and behavioral records from Student's previous educational placement and conduct a complete educational evaluation report to include an intellectual,

¹ *Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition, Text Revision*. American Psychiatric Association, Washington, D.C., 2000.

reading, mathematics, graphomotor social interaction and emotional assessments with a functional behavioral analysis based upon Student's performance in Student's interim educational placement. The School District will provide an Individual Educational Program for Student as indicated by the strengths and needs determined by that educational evaluation report.

Date

Hearing Officer