

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.

Pennsylvania
Special Education Hearing Officer

DECISION

IN RE: A STUDENT RESIDING IN THE
CENTENNIEL SCHOOL DISTRICT

Date of Birth: [REDACTED]

Date of Hearing: 09/16/08

CLOSED HEARING

ODR No. 9181/08-09 LS

Parties to the Hearing:

Parents
[REDACTED]

School District
Centennial School District
433 Centennial Road
Warminster PA 18974-5448

Date Record Closed:

Date of Decision:

Representative:

Parent Attorney:
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Doylestown, PA 18901

School District Attorney:
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September 24, 2008

October 9, 2008

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

This case was commenced when Parents submitted a due process complaint to the Office for Dispute Resolution on or about August 18, 2008, in accordance with two decisions of the United States District Court for the Eastern District of Pennsylvania. The Court ordered the parties to return to the administrative hearing level for a factual/legal determination of two issues: 1) The procedures provided to the Student in connection with the District's November 2007 decision to expel him for a serious violation of District rules; 2) whether such procedures fulfilled the District's obligation to provide due process protections to this Student under §504 of the Rehabilitation Act of 1973, and its implementing regulations.

A half day hearing session was held on September 16, 2008. Although this case was originally designated an expedited case, it did not truly fit within that category since it does not involve an issue of immediate discipline. The expulsion proceedings in the School District and the original due process hearing proceedings arising from that series of events occurred approximately a year ago. The Student is currently enrolled in a private school at his Parents' expense for the second school year. Accordingly, with the agreement of the parties, the "expedited" designation was removed at the due process hearing.

ISSUES

1. What process did the Centennial School District provide to Student in connection with reaching and carrying out its decision to expel him from the School District for a serious infraction of School District rules?

2 Did the process Centennial School District provided to Student in connection with his expulsion satisfy the requirements of due process under §504 of the Rehabilitation Act?

FINDINGS OF FACT

1. Student is a [] year old child, born []. He is a resident of the Centennial School District. (Stipulation, N.T. p.11).
2. A due process hearing decision issued in January 2008 determined that Student is not a child with a disability as that term is defined in the IDEA statute and regulations. 20 U.S.C. §1401, et seq.; 34 C.F.R. §300.8. (District Court Decision, *Centennial School District v. Phil L. and Lori L. ex rel. Student L.*, 559 F. Supp. 2d 634 (E.D. Pa 2008)).
3. The determination that Student is not an eligible student under the IDEA statute was appealed to and affirmed by the Pennsylvania Special Education Appeals Panel and was not further appealed. (District Court Decision, *Centennial School District v. Phil L. and Lori L. ex rel. Student L.*, 559 F. Supp. 2d 634 (E.D. Pa 2008)).
4. Student has a current diagnosis of ADHD. In the decision issued after the prior due process hearing, Student was found to be a protected handicapped student under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a), 34 C.F.R. §104.36, 22 Pa. Code §15.2. The School District's appeal of that determination is pending in the United States District Court for the Eastern District of Pennsylvania. (District Court Decision, *Centennial School District v. Phil L. and Lori L. ex rel. Student L.*, 559 F. Supp. 2d 634 (E.D. Pa 2008)).
5. The School District has never considered Student to be a protected handicapped student, entitled to services under §504 of the Rehabilitation Act. (Stipulation, N.T. p. 48).
6. In May 2007, Student was accused of a serious infraction of School District rules, resulting in proceedings which concluded with his expulsion from the School District. (N.T. p. 49; P-14).
7. Immediately after the incident, Student was suspended for 10 days. Parents received a letter informing them that a pre-expulsion hearing would occur on June 7, 2008. The purpose of the pre-expulsion hearing was to develop the facts of the incident for which discipline could be imposed and to develop a recommendation to the School Board concerning the action that should be taken as a result of the incident. (N.T. pp. 51, 77, 131; P-4)
8. The attendees at the hearing included: Student; Parents; Student's school counselor; the high school principal; an assistant high school principal; the Director of

Secondary Education,¹ whose function was to provide to the School Board the District administration's recommendation as to whether an expulsion hearing should proceed. The hearing summary included the underlying information used to reach that conclusion. (N.T. pp. 53, 125, 163; P-4)

9. At the pre-expulsion hearing, which lasted approximately an hour, Student's Parents presented two letters from a clinical psychologist who treated Student. The first letter described Student's diagnosis of ADHD, the medication prescribed for it, the effects of ADHD when Student was not medicated, *i.e.*, instances of "impulsive acting out," and the beneficial effect of the medication on Student's behavior and concentration. He expressed the opinions in the letter that Student presented no danger to self or others and that the incident likely resulted from the effects of ADHD. In the second letter, the psychologist noted that Student reported that s/he had not taken the prescribed medication on the day of the incident. (N.T. pp. 55, 58, 59, 64; P-4 at pp. 6-9)

10. Student prepared a letter of apology and description of a difficult school history to present at the pre-expulsion hearing. In the statement, student confirmed the benefits of the medication taken for ADD.² Student noted that the positive effects appeared to be diminishing, resulting in the decision not to take the medication consistently in the weeks prior to the incident, and also noted that the lack of medication was obvious on the days the medication was not taken. (N.T. p.60—62, 78, 79; P-4, pp. 10—12)

11. Student's Father read a statement that he had prepared prior to the pre-expulsion hearing. In his statement, he detailed the history of Student's struggles with school, the eventual ADD diagnosis, the beneficial effects of the medication prescribed for Student, Student's failure to take the medication regularly for several weeks, including on the two days prior to the incident and the day of the incident. Student's Father expressed the opinion that the absence of the medication was a factor in the lapse in judgment that the incident represented. (N.T. pp. 62, 79; P-4, pp. 13, 14)

12. The purpose of the letters and the statements was to alert the District to Student's ADHD, as well as to Student's and Parents' belief that Student's conduct with respect to the incident for which expulsion was being considered could have been caused by that disability because of Student's failure to take the medication consistently in the days and weeks prior to the incident. (N.T. pp. 79—82, 85, 86; P-4)

13. The District administrator who conducted the pre-expulsion hearing accepted and considered all of the information, oral and written, provided by Student's Parents. The administrator also received and considered the facts of the incident; information which is included in pre-expulsion hearing reports as a matter of standard practice, such as prior

¹ On July 15, 2008, the administrator who conducted the pre-expulsion hearing became the Acting Superintendent of the District and currently holds that position. (N.T. p. 124)

² Student and Father described Student's condition as "ADD" while all other documents in the record refer to it as "ADHD." The description of the symptoms and effects, however, are consistent. *See* P-4, P-8. The difference in terminology, therefore, is insignificant.

discipline records, grade reports, Student Assistance Program (SAP) referral and any additional information/comments from the guidance counselor and high school administrators. The purpose of admitting such information into the record is to include all information helpful in reaching a decision. (N.T. pp.138, 139, 146--148, 150, 151, 155, 156, 159, 160--164; P-4)

14. After considering the information presented by Parents concerning Student's ADD/ADHD and the facts surrounding the incident, the administrator concluded that Student's conduct was not related to the ADD/ADHD diagnosis. The recommendation to the School Board was that Student's conduct was serious enough for expulsion, and that Student should be scheduled for an expulsion hearing. (N.T. pp.139, 147—151, 155, 156; P-4, P-5)

15. Had Student been identified as an IDEA eligible student, or as a protected handicapped student under §504 of the Rehabilitation Act prior to the pre-expulsion hearing, a manifestation determination review would have been conducted at the building level. If that procedure had been omitted for an eligible or protected student, the pre-expulsion hearing would have been postponed until the manifestation determination review was completed. No manifestation determination review was conducted because Student had not been identified as an eligible or protected student. (N.T. pp.127, 128—130, 133, 134, 140, 153, 154)

16. The expulsion hearing before the School Board, originally scheduled for July 26, 2007, was postponed twice and finally conducted on November 14, 2007. In the interim, additional evaluations were conducted to determine whether Student was eligible for services or accommodations under either the IDEA statute or §504. (N.T. pp. 70; P-5, P-7, P-8, P-10, P-12, P-14)

17. The August 2007 §504 evaluation report concluded that Student has a disability as that term is defined by the Rehabilitation Act, but that the disability does not substantially limit or prohibit his participation in or access to Student's school program, and did not require that Student be provided with services, aids or accommodations. (N.T. pp. 70, 71; P-8)

18. The pre-expulsion hearing summary was admitted into evidence at the expulsion hearing, including the documents submitted by Student, Father and the treating psychologist at the pre-expulsion hearing. The August 2007 evaluation reports were also admitted into evidence at the expulsion hearing. Student was represented by counsel and testified at the hearing, as did Father. Both stated that Student has a disability. The School Board rejected their request for a manifestation determination. The School Board adjudication noted that Student has been diagnosed with ADHD and had been determined not to be IDEA eligible. The adjudication did not discuss whether Student was a protected handicapped student under §504, and did not otherwise discuss whether the conduct in question was related to the ADD/ADHD diagnosis. (N.T. pp. 72—74, 96—98, 100, 152; P-14)

DISCUSSION AND CONCLUSIONS OF LAW

In the first round of administrative proceedings concerning this student, which took place late in 2007, a different hearing officer determined that the Student is not IDEA eligible, but is a protected handicapped student under §504 of the Rehabilitation Act. (F.F. 2, 3, 4; 22 Pa. Code §15.2). Parents now contend that Student's expulsion from the District should be rescinded because it failed to conduct formal proceedings specifically directed toward determining whether the incident was a manifestation of Student's disability.

The School District's Expulsion Process

The facts adduced at the September 2008 due process hearing in this matter are not disputed and establish that the pre-expulsion and expulsion hearing procedures the District provided to Student are the same as those provided to any student accused of a serious violation of District rules for which expulsion is the ultimate penalty. (*See, e.g.*, N.T. pp. 130, 131). Those procedures consist of an informal pre-expulsion fact-finding hearing, which results in a report and recommendation to the School Board, followed by a formal expulsion hearing if that is the District administration's recommendation. (F.F. 7, 8, 13, 16, 18)

There was an opportunity at the pre-expulsion hearing to present any/all information which may have affected the administration's recommendation to proceed, or not, to an expulsion hearing. Student and Parents provided considerable information concerning Student's troubled school history, the ADD/ADHD diagnosis, its effects on Student's conduct, the effect of taking and not taking the medication prescribed to control the ADD/ADHD, and the opinion of Student's treating psychologist that inconsistent use

of the prescribed medication allowed Student's disability to negatively influence Student's behavior with respect to the incident. (F.F. 9, 10, 11, 12, 13). The District administrator who conducted the pre-expulsion hearing testified that she explicitly considered whether Student's ADD/ADHD diagnosis affected Student's conduct with respect to the incident. (N.T. pp. 147—151). Her testimony was both credible and uncontradicted. The administrator's testimony and demeanor left the impression that she is both careful and thorough in performing her duties, and there is no reason to disbelieve her testimony that she did take into account and seriously weigh the information concerning Student's diagnosis in reaching her conclusion. (F.F. 14) She also gave plausible reasons for rejecting the conclusion that Student's conduct with respect to the incident was caused or substantially affected by ADD/ADHD as a result of failing to take the prescribed medication on the day of the incident. She noted that the thrust of the psychologist's letters and the statements presented by Student and Father was that Student's primary symptom is impulsive behavior, and she did not consider the incident an impulsive act. (N.T. pp. 148—150)

At the expulsion hearing, which was stenographically recorded, there was an opportunity to be represented by counsel and to present additional evidence, including the reports of evaluations conducted subsequent to the incident. (F.F. 18; P-5) The hearing itself was delayed until the evaluations were conducted and the reports received. (F.F. 16). The final decision to expel Student from the District was made by the School Board after the hearing, and the basis for its decision was presented in a written adjudication consisting of findings of fact, discussion, conclusions of law and decision. (P-14)

**Adequacy of the School District's Expulsion Process as a §504
"similar process" to an IDEA Manifestation Determination**

Parents' contend that the District's procedures with respect to determining whether Student should be expelled were inadequate to fulfill its § 504 obligation to provide Student with a "similar process" to an IDEA manifestation determination. The essence of Parents' arguments are: 1) that they did not receive notice that the pre-expulsion hearing conducted by the District would include determining whether the incident for which expulsion was considered was caused by or was substantially related to Student's identified disability, ADD/ADHD; 2) the pre-expulsion/expulsion hearing process could not fulfill the District's §504 obligation because there was no separate hearing or other proceeding specifically directed toward considering and determining the effect of Student's disability on the conduct in question. The Parents, therefore contend that with respect to the manifestation issue, both notice and an opportunity to be heard were insufficient.

Sufficiency of Notice

In support of the inadequate notice argument, Student's Father testified that he did not realize that he could potentially prevent Student's expulsion by "bring[ing] up the issue that his actions were related to his disability at that time [the pre-expulsion hearing]." (N.T. p.65) Although he may have had no specific knowledge of the "manifestation" terminology, he most certainly did assert that Student's behavior should be excused because of the ADD/ADHD diagnosis. He also testified that he would have handled the pre-expulsion hearing much differently had he known that he would explicitly have the opportunity to raise Student's disability as a bar to the discipline, such as having an attorney and the psychologist accompany him to the pre-expulsion hearing. The final expulsion decision, however, was not made at that meeting but at the formal

expulsion hearing several months later. By then, Parents were aware of the manifestation determination terminology and were represented by counsel. Parents were explicitly notified that they could present witnesses at the expulsion hearing, yet they did not have the psychologist testify at that hearing. (P-14, p. 2: “Testifying on behalf of the student were ...father [] and the student.”) The decision not to present the testimony of the psychologist or someone else knowledgeable concerning the symptoms of ADD/ADHD and the effects on Student of not taking the prescribed medication is particularly puzzling in light of the August 2007 evaluation report that concluded that Student has a disability but was determined not to be a protected handicapped student. Nevertheless, at the expulsion hearing, Student’s Father reiterated the effects of the ADD/ADHD on Student, the benefits of the medication for alleviating the symptoms and Student’s failure to take it in the weeks leading up to the incident. (N.T. pp. 73, 97, 151, 152). Student’s Father also asked for a manifestation determination at the expulsion hearing, which the Board denied. (N.T. p. 73) Nothing, however, prevented Parents from presenting testimony concerning Student’s disability at the expulsion hearing.

With respect to the adequacy of notice in this case, there is no dispute that Parents received notice of both the pre-expulsion hearing and expulsion hearing with ample time to consider and compile any and all information and testimony they wished to present at both hearings. Moreover, by the time of the expulsion hearing, they were certainly aware that the District had concluded that Student was neither IDEA nor §504 eligible and, therefore, that it was highly unlikely that the District would provide Student with a formal manifestation determination hearing. Consequently, the expulsion hearing was Parents’ final opportunity to convince the School Board that it should not discipline

Student in a manner that amounted to a change of placement based upon conduct related to a disability. Moreover, whether or not Parents had explicit notice that Student's disability would be considered as a reason not to expel Student, they made absolutely certain that the District knew about Student's disability and that they, Student and the treating psychologist were convinced that the effects of his ADD/ADHD led to the conduct for which the District wanted to expel Student. In light of the overwhelming evidence that Student and Parents took the opportunities afforded them at the pre-expulsion and expulsion hearings to present such information, concluding that the notice they received was inadequate because the District did not explicitly invite them to provide disability-related information would engraft a much more stringent requirement on the "notice" component of due process than is warranted, at least by the facts of this case.

Sufficiency of Hearing Procedures

There are two troubling aspects to the expulsion proceedings in this case with respect to whether the due process protections the District provided to Student meet the §504 standard for a protected student, should that determination be affirmed by the Court. First, the evidence establishes that the District's means of fulfilling its due process obligation to §504 protected students who are subject to a disciplinary change of placement is to conduct a manifestation determination review. As the Court pointed out in its June 2008 decision, a formal manifestation determination review in accordance with 34 C.F.R. §531(e) of the IDEA regulations is not required, but it is a recognized means of fulfilling §504 due process requirements. *Centennial School District v. Phil L. and Lori L. ex rel. Student L.*, 559 F. Supp. 2d 634 (E.D. Pa 2008).

The only reason there was no manifestation determination hearing in this case is that the District did not believe Student was protected under §504. (F.F. 15) This raises the question whether the District should also have followed the IDEA procedures for a student “not determined eligible.” 34 C.F.R. §534. Such procedures were discussed at length in a Massachusetts due process hearing decision, *In Re: A Student in the Greater Lowell Technical High School*, 45 IDELR 28 (Mass. SEA 2006). There, in a factually similar situation involving both IDEA and §504 issues, the hearing officer concluded that the student did not meet the criteria for receiving a manifestation determination as a potentially eligible student. The hearing officer noted that in order to claim the protections provided by that provision of the IDEA statute, the district must have knowledge that the child is a child with a disability (here, a protected §504 eligible student) “before the behavior that precipitated the disciplinary action occurred.” 34 C.F.R. §300.534(a).³ A district is “deemed” to have such knowledge:

if, before the behavior that precipitated the disciplinary action occurred –

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education services;

(2) The parent of the child has requested an evaluation of the child pursuant to 300.300 through 300.11; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of the agency or to other supervisory personnel of the agency

34 C.F.R. §534(b).

³ The hearing decision was issued before the IDEA implementing regulations were finalized and adopted. The standards set forth here are taken from the regulations which, are, of course, substantively the same as the underlying statute.

In concluding that the student in the *Lowell* case did not meet the standards for IDEA “not determined eligible” protection, the hearing officer concluded that the parents did not express concerns in writing or request an evaluation **before the incident for the condition they later contended was a manifestation of the student’s disability**. The hearing officer noted that an evaluation for a different suspected disability which occurred prior to the incident was insufficient to meet that requirement, and that the student did not meet any of the other criteria. Moreover, the hearing officer concluded that the district’s pre-incident knowledge that the student had ADD and academic difficulties was insufficient to meet the statutory standards for entitlement to a manifestation determination based on a suspected disability. Finally, the hearing officer concluded that a manifestation determination review was not required prior to completion of the evaluation that was requested after the incident, and any stay of disciplinary proceedings would continue only until the district completed the evaluation and concluded that the student was not IDEA eligible. At that point, the district was permitted to proceed with the discipline.

The situation here is analogous. Although Student had been diagnosed with ADD/ADHD prior to the incident, and had been evaluated for a learning disability, there was no request to evaluate Student for §504 eligibility and a service plan/accommodations prior to the discipline incident. Consequently, although Student would have received an IDEA-type manifestation determination review had the District considered him a §504 protected student, and even if the District’s use of that procedure in the §504 context extended the protections of §534 to a “not determined eligible” §504 student, the District was not required to provide Student with the IDEA-type

manifestation determination review it provides to §504 students. The District fulfilled any possible legal requirements for protecting a “not determined eligible” § 504 student by completing a post-incident evaluation for §504 eligibility and staying the disciplinary adjudication until after the evaluation was completed and Student was determined not to be a protected student.

The second troubling aspect of the District’s expulsion process involves the Board’s focus on Student’s IDEA ineligibility in discussing the possible effect of his ADD/ADHD on the proceedings. The Board adjudication did not acknowledge the §504 evaluation, even to the extent of saying that it, too, concluded that Student is not a protected student despite the conclusion that he has a disability, and, therefore, no consideration need be given to it prior to proceeding with the discipline.

On balance, however, the record establishes that the District gave due consideration to whether Student’s conduct “was caused by, or had a direct and substantial relationship to, the ...disability.” 34 C.F.R. §300.530(e)(1)(i), which is the substantive IDEA standard for assuring that a student is not disciplined for disability-related conduct. The procedural due process protections of notice and an opportunity to be heard are directed toward assuring that the substantive standard is met. Here, the District’s procedures assured that it considered whether Student’s conduct was related to the disability. Although the District’s pre-expulsion hearing is not ordinarily the forum for determining manifestation, the District administrator in charge of making the administration’s recommendation to the School Board heard and considered the effects of Student’s ADD/ADHD on the conduct for which Student was subject to discipline and rejected that argument “on the merits.” (F.F. 14) There is no evidence contradicting the

administrator's testimony that she found the connection implausible based upon the circumstances of the incident in relation to the ADD symptoms cited by Parents and Student's treating psychologist as causing the behavior.

In addition, the final expulsion hearing was delayed pending an evaluation of Student for both IDEA and §504 eligibility. Although the Board focused on the finding of no IDEA eligibility and seemed to reach its conclusion on that basis alone, the essential facts leading to the conclusion that the District's procedures met §504 standards are that Student had likewise been found ineligible for §504 protections as a result of the evaluation, no final disciplinary action was taken prior to completion of that evaluation and the relationship of Student's disability to the conduct in question had been explicitly considered at the pre-expulsion hearing.

CONCLUSION

Based upon the facts and circumstances of this case with respect to the hearing procedures provided to Student prior to expelling him, the Centennial School District met the standards for providing due process protections to a §504 eligible student "similar" to those afforded by a formal IDEA manifestation determination review. There was adequate notice for both the pre-expulsion hearing and expulsion hearing. Prior to the final adjudication at the expulsion hearing, the Parents knew that the District had concluded that Student had a §504 disability and that the District had nevertheless concluded that such disability did not make Student a protected handicapped student. Nothing prevented Parents from using their opportunity to be heard at the expulsion hearing to present the live testimony of Student's doctor or treating psychologist to attempt to persuade the School Board that discipline was inappropriate based upon

Student's disability. The effects of Student's ADD/ADHD on the conduct for which Student was disciplined had also been explicitly considered by the District at the pre-expulsion hearing and rejected as a basis for excusing or mitigating Student's conduct with respect to the incident for which discipline was imposed.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

October 9, 2008