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Decision

Due Process Hearing for A.H.
Date of Birth: xx/xx/xx
File Number: 6097/05-06KE

Date of Hearing:
December 9, 2005

OPEN HEARING

Parties:
Parent

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Date Transcript Received:
Date of Decision:
Hearing Officer:

December 12, 2005
December 19, 2005
David F. Bateman, PhD

I. BACKGROUND

Student is a [teenaged] student eligible for special education and related services identified as needing emotional support. He currently attends [a day school, hereafter Day School]. Student attended a residential treatment facility as a result of a plea agreement for the 2004-2005 school year, but ran away from the facility. He was sent to the residential treatment facility after assaulting a teacher at [Day School]. [Day School] is a self-contained day school for students labeled as needing emotional support affiliated with the School District of Philadelphia [School District]. In November 2005, Student was engaged in a serious incident at school necessitating his being admitted into the emergency room. The District commenced with a manifestation determination meeting finding that his behavior was not a manifestation of his disability.

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 hearing was held shortly after the U.S. Supreme Court issued their decision in the *Schaffer v. Weast* matter shifting the burden to the party filing for the hearing. Additionally, this hearing was held in the middle of a major snowstorm, and this hearing officer greatly appreciates the efforts made by all to attend.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently [teenaged]. (P-4).
2. Student is a resident of the School District eligible for special education and related services as a student with emotional disturbance (P-3).
3. Student attends [Day School]. The school he attends is a special education high school, designed for students who are labeled as requiring emotional support (NT 105, 118) affiliated with the School District.
4. An evaluation report was completed on December 14, 2004 (P-3). This evaluation report found Student eligible for special education as a student with an emotional disturbance. This was a reevaluation of Student.
5. A student evaluation record was completed at the request of the parent. This was completed December 14, 2004 (P-2, S-1). This report indicated Student is of average intelligence but that the primary factor preventing educational progress continues to be serious emotional disturbance.
6. An IEP was developed for Student on January 4, 2005 (P-4). The IEP provides for full-time emotional support service at [Day School].
7. He previously left [Day School] (NT 111) due to a court order as a result of an [redacted] on a teacher (NT 143). Student was ordered to attend a residential facility. He ran away from the residential facility (NT 143). He started to attend [Day School] in September 2005 at the request of the Parent (NT 143).

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.

8. A biophysical evaluation was completed on September 8, 2005 (P-1). Mr. E completed the evaluation. The evaluation suggests a diagnosis of conduct disorder (P-1, p. 6). The report was received on November 30, 2005 (NT 99). The report also includes a history of [redacted] behaviors towards teachers and other students. The report also included a description of discharge criteria.
9. Student was suspended for two days on September 12, 2005 (NT 62). He was caught smoking on the school grounds.
10. There were numerous incidents involving Student and the school personnel over the past three months (P-6). Incidents including smoking on school grounds, talking back to staff, harassing other students, reckless endangerment and threats, disruption of school, and offensive language.
11. On November 10, 2005, Student engaged in numerous acting out behaviors that culminated with [redacted] (NT 46-48).
12. Student was suspended on November 10, 2005 for five days (P-6, p. 45, 46). These suspensions arose from the serious incidents (NT 138).
13. A manifestation report was issued on November 22, 2005 (P-9, S-2). The school determined the actions and behaviors were not a manifestation of the disability. Counsel at the manifestation meeting represented the Parent.
14. After the manifestation determination meeting, the school issued a NOREP on November 22, 2005 for a full-time emotional support to occur at a location subject to the code of conduct (P-10, S-3). The Parent disagreed with the NOREP stating the disability was a manifestation of his disability.

15. Student was suspended on December 1, 2005 for five days as a result of continued problems in school (NT 56; S-4). Student was not following verbal prompts, [redacted], refusing to complete work, using profanity, and using the phone. Additionally, the teacher reported she felt threatened by his behavior (NT 174).

III. ISSUES PRESENTED

Was the manifestation determination held by the District appropriate?

Is Student a danger to himself and others?

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.

Student's Educational Placement

Before there is a discussion regarding the manifestation determination process, a review of the necessary components of the law is appropriate. It will start

with a discussion of the rationale for a manifestation determination, and the steps that are a part of the process.

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). The IDEA according to the United States Supreme Court in that case, further requires that the public school program, in order to be appropriate for the eligible student, provide access to specialized instruction and related services which are “reasonably calculated” to provide the student with some 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. Scoot*, 62 F.3d 520 (3rd Cir., 1995).

At issue in the instant matter is discipline, with respect to which federal law 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 student's 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. See 20 U.S.C. 1415(k)(4) – (7); C.F.R. 300.520 – 300.523.

§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.

There was no real dispute on this record as to the appropriateness of the IEP, nor regarding the fact that the manifestation determination indicated he understood his behavior (P-9, S-2). Any challenge to the IEP would fail as it is, therefore, presumptively appropriate procedurally and substantively, while on the same basis specialized instruction with related services pursuant to it produced progress commensurate with Third Circuit standards. The team, at the manifestation determination meeting, indicated that it was recommending Student be disciplined as a student without a disability. The issue in front of this Hearing Officer was the appropriateness of the manifestation determination report(s), as generated by the District, with respect to whether or not the behavior in question was a manifestation of the student's disability.

The manifestation determination reports as generated by the District are well supported by the evidence presented for not only the meeting, but also for this Hearing. It is clear that Student has had problems in the past, hence the identification as a student in need of emotional support services (FF:4). However, the record clearly shows that he understands the behaviors expected by a student in the school. There was an indication of long standing similar behaviors manifested by Student, and there was indication from his teachers that the IEP was being implemented (NT 127-128). Absent any documentation that the IEP was implemented, the IEP was implemented appropriately.

This is his third school year at [Day School]. He started about January 2004, but left the program shortly thereafter because [of aggressive behavior] (NT 143). As a part of the plea agreement in that case attended a residential treatment facility, but

ran away (NT 143). His mother then sought to have him enrolled back in the [Day School] in September 2005 (NT 143). The [Day School] accepted him and continued to implement the previous IEP.

[Day School] is a self-contained school for students identified as needing emotional support. As the director described Student, "Student would not be in the program if he was not aggressive." (NT 105, 118).

Student started back at [Day School] September 2005 at Parent request (NT 143). It is clear there were problems during September/October with Student being involved in numerous infractions (FF:10). There was no new behavior plan because the Parent requested moving Student to a more restrictive placement, and the school had initiated the process, initiated a NOREP (NT 112). The Parent requested a more restrictive placement in mid-October. The waiver and NOREP were sent October 15, and when it was not returned, a meeting was scheduled for November 17 (NT 11-113). Counsel for the Parent sought to attend the meeting, and the meeting was rescheduled (NT 114).

The specific incident that resulted in the District conducting a manifestation determination report involves an incident where Student became uncontrollable. [Redacted.] It is clear he gave thought to his actions, having de-escalated and [redacted].

The manifestation determination meeting was held and the District found his behavior was not a manifestation of his disability. The Parents disagreed to the determination made by the District, but also stated she did not think the [Day School] was an appropriate placement for him (NT 234-235).

The school had previously suspended him for a total of 12 days (NT 56, 62, 65, 138, 140). After the manifestation determination meeting, he was suspended for five days (NT 138). The school issued a NOREP for a new placement after the manifestation determination meeting, resulting in the present due process hearing (NT 137).

After the manifestation determination meeting, Student continued to have behavioral outbursts. His teacher described an incident on November 30, 2005 where she felt threatened [redacted].

The director of the school described him as physically [redacted] toward staff (NT 143, S-4). She also added that he is dangerous because he does not respond to verbal prompts (NT 89) and easily escalates very quickly (NT 145). The school staff stated they are scared due to behaviors, his history of following through with actions, and then the threats he has made to others (NT 48, 103, 194)

It is clear Student's current placement is not working. The representatives from the school and his Parent both state he needs to be in a different environment (NT 235-236). The District seeks to have him treated with the student code of conduct and placed in a different environment. The Parent requests an unnamed approved private school. Given the frequency of the problems manifested by Student, the long history of the problems, [and recent behaviors], it is clear a different environment is warranted. It is also clear he is a danger to himself and others.

There was little evidence submitted indicating Student's behavior plan was not being implemented. It needs a new behavior plan-one appropriate for the new school he will be attending. Specifically, Student has a problem when he is held.

This came through very clear as a part of the testimony from the school officials and from Student (NT 254). The school has as its policy de-escalation policies and procedures that every one is trained to use (NT 77). The student and the Parent should note that if these procedures do not address the problem and Student is potentially dangerous to himself and others he may need to be restrained for his, and the other students, good (NT 274).

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 is appropriate. Therefore, he needs to be disciplined according to the student code of conduct. Additionally, it is clear Student is a danger to himself and others and he needs to be educated in a more restrictive setting.

Date

Hearing Officer