

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

Due Process Hearing for:

Student's Name: KS
Date of Birth: xx/xx/xx
Dates of Hearing: January 22 and February 8, 2007
Type of Hearing: Closed
ODR #: 7144/06-07 KE

Parties to Hearing:

Parent:

Mrs. Date Record Closed: February 18, 2007
Date of Decision: March 8, 2007
Hearing Officer: Ambrose Finnegan, Ed.D.

School District:

Bethlehem Area

District Representative: Hollie John, Esquire
Parent Representative: Angela Aliana-Murphy, Esquire

Background

Student is a student in the Bethlehem Area School District (“District”). She moved into the District at the beginning of the 2005-06 school year. During the course of the school year, she received detentions and suspensions for behaviors primarily associated with the theft of cell phones. She was ultimately expelled from the District in the Fall of the 2006-07 school year as a consequence of these behaviors.

The parent initiated these proceedings in response, at least in part, to this expulsion, and claimed the District was negligent in meeting its Child Find requirements to have identified the student as eligible for special education services.

Findings of Fact

1. The student is a xx year old, ninth grade student in the District. (N.T. 6-7)
2. The parties agreed to waive conducting a resolution meeting. (N.T. 9)
3. The parent is seeking the following remedies in this matter: that the student be provided a free and appropriate public education (“FAPE”); that the student be placed in a full time placement within a small setting addressing her social-emotional needs; and that an award of compensatory education be made. (N.T. 10-11)
4. The student was seen by a private psychologist from May 2006 through June 2006 for a total of approximately six sessions. The student presented for counseling due to being depressed, having a poor self-image and having manifested disciplinary concerns at school due to the inappropriate use of, and obsession with, school computers and the theft of cell phones. (N.T. 30-38, 56-57)
5. The student denied any suicidal ideation in her sessions with the private psychologist. (N.T. 36)
6. The private psychologist opined that the student’s misconduct regarding the use of school computers and the stealing of cell phones was prompted by the student’s depression, sense of loneliness and desire to maintain contact with others. (N.T. 39-41, 51)
7. The private psychologist recommended that the student be in a school placement that affords a small class setting and the opportunity to achieve success. (N.T. 42-43)
8. The student’s mother signed a consent form to allow the private psychologist to discuss the student’s situation with school officials in or about April 2006. The school did not make contact with the private psychologist until December of 2006. (N.T. 45-46)

9. Due to the student's positive feelings about being in the school setting, she may not have appeared depressed in that setting during the fall of 2006. The student also often does not manifest evidence of depression in one to one interactions. (N.T. 47, 62, 64)
10. The private psychologist was not familiar with the requirements of the Individuals with Disabilities Act ("IDEA") to determine eligibility for special education. (N.T. 53-55, 74)
11. The private psychologist wrote her report concerning the student in December 2006. The report dealt with observations and conclusions reached in the sessions with the student between April and June 2006, however. (N.T. 57-58; P#1)
12. The student moved into the District in the fall of 2005 as an eighth grade student. (N.T. 76)
13. The student's grades were in the 'C'-'D' range at her previous school as a sixth and seventh grader before transferring into the District. The student's grades as an eighth grade student in the District in 2005-06 were primarily 'C's' with 1 'B-' and one 'F' in Science. (N.T. 77; SD #2-3)
14. The student received a lot of academic assistance from her sister.(N.T. 79-83)
15. The student has lived in several different districts over the years, and has tended to experience difficulties in forming friendships throughout her school history. The pattern continued when she moved into the District in 2005. (N.T. 84-96)
16. During the 2005-06 school year the student began to regularly communicate with an older man using school computers and cell phones she took from other students. (N.T. 96-102, 106-107, 157, 269-270, 302; SD #22)
17. Her misuse of school computers and her stealing of cell phones resulted in her receiving detentions and suspensions during the 2005-06 school year. (N.T. 100-103; SD #7)
18. The student's mother eventually contacted the police in April 2006 about the student's stealing cell phones. She was consequently arrested for stealing the cell phones. (N.T. 101-103, 108-110; SD #12)
19. The student's mother indicated she inquired of school officials whether the school could offer any programs of assistance to the student at or about the time of her arrest, and was told no programs were available. It was at this point that the student's mother sought counseling from the private psychologist referenced above. (N.T. 105-106)
20. The student was placed on detention and suspension numerous times during the 2005-06 school year, the majority of such actions occurring during and after March 2006. Evidence presented at a Disciplinary Due Process Hearing before the District's School

Board in September 2006 indicated that the student “had a history of disciplinary problems in school during the 2005-06 school year, which resulted in twenty-eight days of detention...nine days of in-school suspension and five days of out-of-school suspension...” [School District Exhibit #19, page 4 of 8]. Documentary evidence at School District Exhibit #29 conflicts slightly with the number of suspensions specified at the Disciplinary Due Process Hearing. Her in-school suspensions involved attendance at a program called Character, Academic and Motivation Program (“CA/MP”). (N.T. 111-114, 128, 203,319; SD # 5, 6, 14, 15, 16, 17, 19, 23, 29, 30)

21. School officials held a conference with the student’s mother during the 2005-06 school year wherein they indicated the mother should monitor the student closely due to an apparent letter the student wrote which stated she wanted to kill herself. (N.T. 114-116)
22. The student had not been referred to, or considered for, special education in prior districts that she attended. (N.T. 132-133)
23. The District was not aware that the student had been stealing cell phones until informed of such by the student’s mother on or about April 2006. (N.T. 102-105, 133, 173, 208)
24. The student was expelled from the District by action of the School Board in October 2006. The student has had the opportunity to attend an alternative program, [redacted] (“Program”), during her expulsion period, but has declined to attend this program in favor of receiving homebound instruction. The parties have agreed that the student will receive homebound instruction pending the result of these proceedings. The parties have further stipulated that the Program provides educational services for 2 ½ hours two evenings per week. (N.T. 134, 284, 287-289; SD #20)
25. The student had been attending ninth grade at one of the District’s high schools at the time of the expulsion, and her grades for the first marking period in this ninth grade placement were ‘A-’ in English, ‘C-’ in Spanish and ‘B-’ in Algebra. She had evidenced no absences during this period of time. (SD #28, 31)
26. In response to a request by the student’s parent, the District conducted an evaluation of the student in December, 2006. The evaluation included a review of the student’s records, interviews with the parent and District staff, and administration of a variety of assessments and surveys. (N.T. 145-150; SD #21, 28)
27. The student responded well to the formal evaluation process which occurred over two days. (N.T. 153-154, 159-160, 194)
28. The student reported that she enjoyed attending the High School and denied any social difficulties during the period of time she attended the High School. (N.T. 155; SD #28)
29. The student achieved a Full Scale IQ within the average range of ability on the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”). (N.T. 160-163; SD #28)

30. The student's performance on an achievement test, the Wechsler Individual Achievement Test – 2nd Edition, which corresponds to the WISC-IV, indicated skills in the average range of ability in the Reading, Math and Writing Composite areas being assessed by the Test. The student did least well on the Math Reasoning portion of the Test. A report from the math teacher who taught the student during the time she attended ninth grade indicated that the student achieved within the 'B-/C+' range and that she had the potential to be a 'B+/A-' student if she applied herself on a consistent basis. (N.T. 164-170; SD #28)
31. Reports from both her eighth and ninth grade teachers indicated that the student generally posed no behavioral problems in class. (N.T. 170-172, 205; SD #28)
32. The school psychologist characterized the student's disciplinary infractions and suspensions during the 2005-06 school year as being primarily connected to the student's theft of cell phones. The school psychologist's Evaluation Report referenced a portion of the District's Disciplinary Due Process Hearing to support this conclusion. (N.T. 174-176; SD #19, 28)
33. On a variety of personality-like scales completed by the student's mother, the student herself and some of her teachers, the student presented herself as having low self-esteem, the student's mother viewed the student as being depressed and the teachers discerned no clinically significant problems in the student. (N.T. 177-184, 199-201, 205-206; SD #28)
34. The school psychologist and multidisciplinary team did not believe that the student was a student with a disability requiring specially designed instruction. (N.T. 188-191; SD #28)
35. The student denied suicidal ideation to the school psychologist. (N.T. 199)
36. The student reported ingesting pills in or about June 2006 in an apparent suicide attempt. (N.T. 198-201)
37. The Hearing Officer ordered that the student receive a psychiatric evaluation prior to convening the second session of the Hearing. (N.T. 215, 223-224)
38. During the psychiatric evaluation, which was conducted on January 30, 2007, the student indicated she had occasional suicidal ideations, and she stated she had tried to overdose on Tylenol on several occasions. Her mother, however, disputed details of the reported overdose attempts. (N.T. 239, 254-255)
39. The psychiatric evaluation evidenced a diagnosis of Dysthymic Disorder, a chronic low grade depressive condition. This diagnosis agreed with the diagnosis rendered by the private psychologist who treated the student in the Spring of 2006. (N.T. 240-245, 254, 257; SD #32; P #1)

40. A psychiatric diagnosis of Conduct Disorder was also made due, at least in part, to a history of stealing and rule violation across different milieus, home, school and society. The stealing of the cell phones was viewed as purposeful on the part of the student. (N.T. 241-244; SD #32)
41. The student has feelings of inadequacy, poor self-esteem and poor self-confidence. She deals with problems through avoidance or acting out. (N.T. 260-261; SD #32)
42. The student was adjudicated as delinquent due to her stealing of cell phones at school during the 2005-06 school year. (N.T. 267-270)
43. The student's probation officer felt the student was more upbeat and positive, and had evidenced a significant change in her outlook from when he met her in July, when she attended High School during the first quarter of the 2006-07 school year before she was expelled from school. (N.T. 276-277)
44. The student stole the cell phone of the guidance counselor who had worked with her throughout the 2005-06 school year. The guidance counselor wrote a Victim Impact letter dated August 6, 2006 for the Court as part of the student's adjudication proceedings. In this letter the guidance counselor expressed feelings of hurt at the student's stealing of her cell phone and indicated she felt the student should receive intensive counseling as would be provided at an inpatient facility. The guidance counselor believed the student would be placed at either an inpatient facility or a juvenile detention center, and the guidance counselor believed the inpatient facility would be the better of the two placement options. (N.T. 296-304; P #2)
45. During the second half of the 2005-06 school year, the student's grades began to deteriorate. It was also during this time that the incident involving inappropriate usage of one of the school's laptop computers and the cell phone thefts occurred. (N.T. 300-306)
46. The guidance counselor made recommendations to the student's mother about outside of school counseling sources during the Spring of the 2005-06 school year. The guidance counselor was in frequent contact with the student's family during this period of time. (N.T. 291-294; P #2)
47. In her English and Science Eighth grade classes during the 2005-06 school year, the student evidenced average academic abilities in these two academic level classes. She presented no behavior problems in these classes. Her grades began to deteriorate in both classes during the second semester of the year. Her grades in these two subject areas during the second semester were attributed to, at least in part, absences due to her in- and out - of - school suspensions. (N.T. 314-338; SD #28)
48. The parties stipulated that there were no issues presented by the student during the period of time she attended High School in 2006-07. (N.T. 339)

49. The record was closed on February 18, 2007. The Hearing Officer indicated he may exceed the 15 day period to provide his opinion on this matter. (N.T. 230-231, 340)

Issues

1. Did the District violate its Child Find obligations with regard to the student?
2. If the District did fail to meet its Child Find obligations, how should that failure affect the student's placement.
3. If the District did fail to meet its Child Find obligations, should the requirements of a Manifestation Determination Review ("MDR") have occurred?
4. Did the District conduct an appropriate evaluation of the student in December 2006?
5. Is the student entitled to compensatory education?

Discussion and Conclusions of Law

The threshold issue for the Hearing Officer is whether the District met its Child Find obligations in the Spring of the 2005-06 school year.

Child Find requirements in the IDEA impose an affirmation obligation upon school districts to identify, locate and evaluate all students with disabilities within their jurisdiction. 34 C.F.R. §300.111(a) (1)

It is clearly obvious that in the Spring of the 2005-06 school year, beginning in March 2006 and intensifying in April 2006, that the student was manifesting behaviors that negatively impacted her academic progress and ultimately prompted her arrest for theft. (FF: 4, 6, 17, 20, 42, 44, 45, 47). During this period of time should the District have conducted an evaluation of the student to determine her eligibility for special education services? For the reasons enumerated below, it is held that the District was not negligent in addressing its Child Find obligations and an evaluation was not warranted.

The student only enrolled in the District at the beginning of the 2005-06 school year (FF: 12). The student did not enter the District as an identified student (FF: 22), and her grades during the first semester of the 2005-06 school year were consistent with grades achieved in her previous school districts (FF: 13). The activities that had become disruptive to the student's life, primarily her involvement with a man and her theft of cell phones, did not even become known to the District until April 2006 (FF:16, 18, 23, 45). Finally, there was preponderant consensus from the student's teachers that, while in class during 2005-06, the student manifested few if any behavioral concerns and her grades, which had been adequate through the first semester of the

year, only began to suffer when consequences due to the theft of cell phones ensued (FF: 13, 31, 45, 47).

I am left to conclude that the District clearly had no reason to suspect that the student required an evaluation prior to the Spring of 2006. Prior to that time, there was absolutely no evidence rendered which suggested the parent had either requested an evaluation or had engaged in discussion with anyone within the District concerning the student's eligibility for special education services. See In Re: The Educational Assignment of W.P., Special Education Opinion 1580 (2005).

When the parent did inform the District of her concerns about the student's behavior, the District did suggest a therapist who subsequently worked with the student and her mother, and, as indicated in the record, clearly had a positive impact upon the student and the parent-student interactions (FF: 9,19, 28, 43, 46). Indeed, when the student attended High School during the Fall of the 2006-07 school year, both academically and behaviorally there were no problems or concerns evidenced (FF: 28, 31, 43, 48).

For all the above reasons, it is held that the District met its Child Find obligation in 2005-06.

This is not to suggest that the student did not have emotional and social needs that needed to be addressed. Her feelings of inadequacy and poor self-esteem, her suicidal ideation – the exact prominence and significance of which were difficult to discern with certitude in the record, and the actions that prompted her arrest, are, and were, legitimate concerns for the parent (FF: 5, 6, 15, 18, 21, 33, 35, 38, 41). The record indicated, however, that the District did assist the parent in obtaining the necessary psychological assistance the student required to address behaviors being manifested outside the instructional process itself.

Having found that the District did not abrogate its Child Find requirements in 2005-06, it is also held that the student was not an eligible student for special education services under the IDEA during that school year.

At the request of the parent, the District did conduct an evaluation of the student in December 2006 (FF: 26). While not specifically addressed in the record, the request for the evaluation and the subsequent compliance with the request by the District is presumed, correctly or incorrectly by the Hearing Officer, to be influenced by the implementing IDEA regulation at 34 C.F.R. §300.534 which reads:

- (a) General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge...that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

- (b) Basis of Knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred –
- (1) The parent of the child expressed 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 and related services;
 - (2) The parent of the child requested an evaluation of the child pursuant to §300.300 through §300.311; 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 school education of the agency or to other supervisory personnel of the agency.

It has already been addressed above, in referencing Special Education Opinion 1580 (2005), that the criteria for the District to have had knowledge of the student being a child with a disability had not been established.

Nonetheless, as noted, the District conducted an evaluation of the student in December 2006 (FF: 26). The evaluation indicated that the student had average cognitive abilities (FF: 29), evidenced academic skills within the average range of ability (FF: 30), and reported that teachers indicated that the student both had the potential to be a good student if she applied herself on a consistent basis and posed few behavioral concerns within the classroom setting (FF: 30-31).

Social emotional assessment validated reported feelings of low self-esteem in the student and further emphasized the parent's concern that the student was depressed (FF: 33). A subsequent psychiatric evaluation offered concurrence with the diagnosis of Dysthymic Disorder by the private psychologist who had seen the student in the Spring of 2006 (FF: 37, 39). Dysthymic Disorder was described as a chronic low grade depressive condition (FF: 39). The psychiatric evaluation also concluded that the student evidenced a conduct disorder and that her theft of cell phones was a purposeful behavior by the student (FF: 40).

The parent argued that the student has an emotional disturbance ("ED") in accordance with the IDEA description of this disability, or in the alternative, should be considered as eligible for special education services as a student with Other Health Impairment ("OHI"). Given the record as a whole, it is not believed that the student meets either of these disability groups. Testimony would seem to suggest that the parent primarily considered the student to be ED.

To be eligible to receive special education and related services, a student must have a disability as defined by the IDEA and, due to this disability, require instruction, services, or both, which

cannot be provided with modification of the regular school program. 34 C.F.R. §300.8. More specifically, the regulations, at 34 C.F.R. §300.8 (c) (4), define ED as follows:

(4) (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted...
(Emphasis added)

Even acknowledging that the student had strained interpersonal relationships with at least some peers and that she was prone to feelings of depression (FF: 4, 15, 21, 33, 36, 38, 39, 41), the testimony of both the private psychologist and psychiatrist who evaluated the student did not describe a “pervasive mood of unhappiness or depression”. The private psychologist indicated, in fact, that the student does not always manifest evidence of depression and even may not appear depressed (FF: 9). The diagnosis of both the private psychologist and psychiatrist also concluded that the student had Dysthymic Disorder, a low grade depressive state (FF: 39; P #1).

More persuasive than even the lack of evidence suggesting a pervasive mood of depression was the fact that no evidence suggested that any feelings of depression were manifested “over a long period of time and to a marked degree that adversely affect(ed) [the student's] educational performance.” As the record clearly establishes, the student's academic difficulties last year corresponded to a specific time period, the Spring of the year, during which she was arrested for stealing cell phones (FF: 17, 18, 20, 42, 45). With support from among others, her mother and a psychologist, the student returned to school in 2006-07 and evidenced no problems either academically or behaviorally (FF: 4, 28, 28).

For the above reasons, it is held that the student does not qualify as a student with ED eligible for special education and related services under IDEA.

For much the same reasoning, it is also held that the student does not present as a student with OHI which is described at 34 C.F.R. §300.8 (c)(a) as:

...having limited strength, vitality, or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment...

There was absolutely no evidence rendered which would suggest the student met the OHI criteria.

Thus, it is held, along with the multidisciplinary team (FF: 34), that the evidence is both preponderant and based upon highly credible witnesses that the student is not a child with a disability and that the evaluation conducted in December 2006 was appropriate and comprehensive in nature. 34 C.F.R. §300.304 (c) (4), (c) (6).

The parent, in her closing, suggested that, in lieu of determining the student to be a child with a disability in the context of the IDEA, the student should, in the alternative, be considered as a handicapped student under Section 504 of the Rehabilitation Act and its counterpart in Pennsylvania, Chapter 15 of the School Code.

While Chapter 15 eligibility was not identified as a specific issue in this matter, it was addressed in the District's evaluation and in testimony (N.T. 190-191), and merits discussion and consideration.

A student is considered a protected handicapped student under Chapter 15 if she "has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program." 22 PA Code §15.2.

For the same reasons that the student was held not to be a child with a disability under the IDEA, it is also held that the student is not a protected handicapped student under Chapter 15 of the Pennsylvania Code.

Having determined that the student is not a child with a disability under the IDEA, the question of conducting a manifestation determination becomes moot. 34 C.F.R. §300.530(e) only requires a manifestation determination when a district is considering discipline that would result in a change in placement of a child with a disability. That is held not to be the case in this matter because the student was not deemed to be a child with a disability.

Finally, again, having found the student not to be eligible for special education and corresponding FAPE, it is held that the student is not entitled to compensatory education.

Thus, it is held that the District has prevailed on all the issues due to the preponderant evidence rendered and the degree of weight accorded to testimony of witnesses.

The parent, however, is to be lauded for her determination to address the student's needs.

Order

On this the 8th day of March 2007, it is hereby ordered that:

1. The District did not violate its Child Find obligations with regard to the student.
2. Having determined that the District did not violate its Child Find obligations, there are no IDEA related requirements that would affect the student's placement or impact the implementation of the District's Student Code of Conduct.
3. There was no requirement for the District to conduct a manifestation determination of the student's behavior.
4. The District conducted an appropriate evaluation of the student in December 2006.
5. The student is not entitled to compensatory education.

Ambrose Finnegan, Hearing Officer

March 8, 2007