

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

Child's Name: [REDACTED]

Date of Birth: XX/XX/XX

Date of Hearing: February 23, 2009

CLOSED HEARING

ODR No. 9668/08-09 KE

Parties to the Hearing:

Parents:
[REDACTED]

Polly Lamison, Director of Special
Education
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School District:

Date Record Closed: February 23, 2009

Date of Decision: March 2, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[REDACTED]¹ (Student) has requested an expedited due process hearing to challenge the Eastern York School District's (School District's) decision to expel Student for the remainder of the 2008-2009 school year for violation of the Code of Student Conduct. Student, who has not been identified as a student with a disability, contends that the School District should have evaluated Student and conducted a manifestation determination before imposing discipline. For the reasons described below, I find for the Student.

ISSUES

Whether the Student should have received a manifestation determination required under federal regulations applicable to children not determined to be eligible for special education?

FINDINGS OF FACT

1. Student, whose date of birth is XX/XX/XX, is a 7th grade student in the School District. (N.T. 30)²

2006-2007 (5th Grade)

¹ All future references to [REDACTED] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² References to "N.T." are to the notes of transcripts of the hearings in this matter. References to "HO", "P" and "SD" are to the Hearing Officer, Parent, and School District exhibits, respectively.

2. On or about February 1, 2007, the School District transferred Student to a different 5th grade teacher at the request of Student's father, because the teacher appeared to be blaming Student for many disciplinary problems. (N.T. 34, 55; P1; P18) Among Student's problem behaviors were several warnings to remain seated and not call out in class (P42; N.T.100), inattentiveness and disrupting class (P43; 100) and throwing rocks at another student. (N.T. 99)
3. At a meeting to discuss the transfer, Student's father's girlfriend requested that Student be screened for attention deficit hyperactivity disorder (ADHD). (N.T. 33-35, 46, 122) This prompted a request from the School District's Instructional Support Team (IST) for an Attentional Screening. (SD7; N.T. 201)
4. On March 9, 2007, the School District conducted an Attentional Screener for ADHD. (SD7; P1; N.T. 35, 55, 172, 207) Parent responses on the Attention Deficit Disorder Evaluation Scale (ADDES) and the Connors Behavior Rating Scale, Revised (Connors Scale) were average, while teacher responses were in the significant range for hyperactivity, impulsivity, oppositional behavior, and ADHD. (N.T. 97) These results appeared inconclusive to the school psychologist because the screening produced clinically significant results across multiple school settings, but not in both home and school environments. (N.T. 184) Apparently because these results appeared inconclusive, the School District recommended that Student's parents take the screening results to their primary medical provider for further discussion and assessment of Student's behavioral concerns. (P1; N.T. 35-36, 47-48)

5. At the end of the School year, Student's 5th grade teachers recommended Student for the middle school's Jump Start program. (N.T. 166)

2007-2008 (6th Grade)

6. In this school district, middle school starts with 6th grade. (N.T. 128) The Jump Start program is a 6th grade program for students who need assistance transitioning from elementary school into middle school. (SD8; N.T. 63) The program has a maximum of 15 students in the class, and teachers intervene with problem behaviors. (N.T. 129)
7. Successful students can successfully transition out of Jump Start and into the regular middle school setting after 45 days. (N.T. 129; SD8) Student entered the Jump Start program at the end of September 2007 and remained in the Jump Start program the entire school year. (N.T. 59-60, 130)
8. On or about April 28, 2008, Student's father shared some concerns with the School District that Student might be stressed by Student's mother's decision to move out of state with some siblings. (N.T. 60, 64, 134) Father and School District discussed whether Student had ADHD and it was noted that there had been a School District screening the year before with a recommendation for private consultation that the family did not follow up. (N.T. 145)
9. At that time, no one explicitly asked the School District to perform an evaluation of Student. (N.T. 146) Instead, Student was referred to the Student Needs Assistance Program. (SNAP) SNAP is a referral to either a drug and alcohol counselor or a mental health counselor for three, one-hour sessions, at the end of which the counselor makes a referral to the parent for any follow-up. (N.T. 60,

- 133) Although Student was referred to SNAP at the end of 6th grade, it was too late in the school year for Student to meet with a counselor. (N.T. 61, 135)
10. The School District also performed a functional behavioral analysis (FBA) to identify behaviors of concern and come up with a behavior plan to address those behaviors. (N.T. 69) On May 21, 2008, parent and School District met to discuss the FBA and create a behavior modification contract with Student that was implemented by Student's teachers and reviewed. (SD6; N.T. 39, 64-65, 70, 77; P71; P72; P74)
11. The School District believes that, because Student's grades were pretty average through 6th grade, it had no reason to suspect that Student might be a student with a disability. (N.T. 66) The School District refers students for evaluation if their behaviors significantly impact their academic performance or their peers' academic performance, for example if students' grades slip more than usual as a result of the transition to middle school, or if other students are constantly distracted by a child's behavior in class. (N.T. 68)
12. At the end of the school year, Student's 6th grade teachers saw some behavioral improvement, but still had some concerns. (N.T. 168-169) These behaviors included at least 2 out of school suspensions, 6 in-school suspensions, and 7 detentions. (N.T. 169-170) School District personnel and Student's parents decided to place Student into the 7th grade alternative education program. (N.T. 138, 156)

2008-2009 (7th Grade)

13. Because there is no Jump Start program for 7th grade, Student was assigned to its 7th grade equivalent, the in-house alternative education program. (N.T. 78, 136; P19-P33) That program has a maximum of 12 students to a single teacher. (N.T. 136, 140)
14. Student also had 3 SNAP sessions with a guidance counselor, after which Student was referred for outpatient mental health counseling. (N.T. 135)
15. During the first half of the school year, Student had 8 disciplinary referrals, including insubordination, misbehavior in in-school suspension, bus misbehavior, and bullying. (N.T. 160; SD2,p.4; SD3,p.4)
16. On or about January 8, 2009, Student ingested a pill that Student received from another student. (N.T. 42) Student fell asleep at the desk, and was groggy, disoriented and stumbling when awakened by a teacher. (SD2,p.4) Student continued to appear disoriented, very lethargic, complained of leg pain, and appeared to wake up off and on. (N.T. 151) The School District called emergency services and Student was taken to a hospital. (N.T. 152)
17. On January 23, 2009 Student was expelled from school for the remainder of the 2008-2009 school year for violation of the Code of Student Conduct. (N.T. 152, 155; SD2)
18. On February 2, 2009, the Office for Dispute Resolution (ODR) received Student's February 1, 2009 request for expedited due process hearing. (HO2)
19. On February 13, 2009, I denied the School District's motion challenging the sufficiency of the complaint, and I denied the School District's motion to postpone the expedited proceeding. (HO2)

20. On February 23, 2009, I conducted the expedited due process hearing.
21. At the due process hearing, Student presented the expert testimony of Mr. B, a licensed clinical social worker with a master's degree in social work and 22 years professional experience, the last 15 years working with ADHD population. (N.T. 85-86, 92) Mr. B has presented on ADHD topics at conferences and in local school district trainings, he has testified as an expert on ADHD in county courts as well as in 5 or 6 special education proceedings. (N.T. 88, 105-107)
22. Mr. B reviewed Student's school records, including the March 9, 2007 Attentional Screener, and credibly testified that Student's acting-out behaviors at school have been longstanding, and were not simply the result of adjustment problems from elementary to middle school. (N.T. 113) Mr. B credibly testified that academic success or failure is not necessarily a symptom of ADHD, because grades of students with ADHD can be variable, vacillating up and down. (N.T. 102)
23. The school psychologist who administered the March 7, 2007 Attentional Screener attended the due process hearing and testified that she would have called a team meeting based upon the record that she heard at hearing. (N.T. 207) I perceive this to mean that she would have recommended an educational evaluation of Student.
24. Exhibits HO1 and HO2 were admitted into the record. Exhibits P1-P62, and P71-P85 were admitted into the record. P63-P70 were not admitted into the record. (N.T. 209) Exhibits SD1-SD8 were admitted into the record. The first page of Exhibit SD9 was not admitted into the record. The remainder of SD9, as well as

SD10-SD13 were admitted into the record. (N.T. 211) The record was closed on February 23, 2009.

DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act (IDEA) provides that, within 10 school days of a school district decision to change a disabled student's placement because of a violation of a code of student conduct, the student's IEP team must determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability or was the direct result of the school district's failure to implement the IEP. 20 USC §1415(k)(1)(E); 34 CFR §300.530(e) If the behavior is determined not to be a manifestation of the child's disability, then the child may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 1415(k)(1)(C); 34 CFR §300.530(c) If the behavior is determined to be a manifestation of the child's disability then, with limited exceptions, the IEP team must either modify any existing behavioral intervention plan or conduct a functional behavioral assessment and develop a behavioral intervention plan. 1415(k)(1)(F); 34 CFR 300.530(f) Parents challenging a manifestation determination are entitled to an expedited due process hearing. 1415(k)(3)(A), (k)(4)(B); 34 CFR §300.532(c); 22 Pa. Code §14.162(q)(4)

A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct, may assert any of the protections afforded to children with disabilities if the school district had knowledge, or is deemed to have had knowledge, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

The school district may be deemed to have had pre-existing knowledge that the student was a child with a disability if: 1) the student's parent expressed to the teacher or to supervisory or administrative personnel, a written concern that the child was in need of special education and related services; 2) the student's parent requested an evaluation; or 3) the child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, either directly to the director of special education or to other supervisory personnel of the agency. 20 USC §1415(k)(5); 34 CFR §300.534

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, Student bears the burden of persuasion because Student alleges entitlement to a manifestation determination from the School District.

In this case, Student argues that the School District must be deemed to have had pre-existing knowledge that Student was a child with a disability, and therefore the School District should have conducted a manifestation determination before expelling Student. Student contends that parents did make a written request in writing for an

evaluation of Student when they signed written permission for the Attentional Screening for ADHD. Student also argues that School District authorities were aware of Student's consistent misbehaviors and academic failures and should have sought further evaluation of Student. Student notes that both parents and teachers raised concerns about Student's behaviors.

The School District argues that it cannot be deemed to have had any pre-existing knowledge because Student's parent never expressed a written concern to any School District personnel, Student's parent never requested an evaluation, and Student's teacher or other school district personnel never expressed specific concerns about a pattern of behavior demonstrated by Student, either directly to the director of special education or to other supervisory personnel of the agency. 20 USC §1415(k)(5); 34 CFR §300.534 The School District also argues that Student's expert witness, Mr. B, did not explicitly state that the School District should have deemed Student to be a child with a disability before January 8, 2009. The School District argues that its behavioral interventions were regular education interventions, that Student's grades were average, and that there were no red flags suggesting to the School District that Student was in need of special education.

I do not believe that I can conclude that Student's parents expressed their concerns in writing, or made a written request in writing for an evaluation of Student, because there is no evidence of such written concerns or request. While it is undisputed that the School District conducted an Attentional Screening for ADHD, and common practice is to require parental permission before such testing, I cannot point to evidence in the record supporting such a finding. No one explicitly asked the School District to perform an evaluation of Student. (N.T. 146)

I do, however, believe that the record supports a finding that Student's teachers or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by Student, either directly to the director of special education or to other supervisory personnel of the agency. This satisfies the third prong of the "deemed to have knowledge" provision of 20 USC §1415(k)(5) and 34 CFR §300.534.

Specifically, in February 2007, the School District's IST requested an Attentional Screening of Student on the basis of Student's behaviors. (SD7; N.T. 201) At the end of 5th grade in spring 2007, Student's teachers recommended Student for the middle school's Jump Start program on the basis of Student's behaviors. (N.T. 166) One year later, in May 2008, the School District was prompted by Student's behaviors to conduct an FBA and create a behavior modification contract. (SD6; N.T. 39, 64-65, 70, 77; P71; P72; P74) Finally, based upon Student's behaviors, School District personnel recommended in May 2008 that Student attend the 7th grade alternative education program. (N.T. 138, 156) I conclude that these pre-January 2009 School District actions constitute expressions, by school district personnel to supervisory personnel, of specific concerns about a pattern of behavior of the Student.

Thus, I conclude that, for manifestation determination purposes, the School District must be deemed under 34 CFR §300.534 to have had knowledge that Student was a child with a disability before the January 2009 behavior that precipitated Student's expulsion. Consequently, Student was entitled to a manifestation determination pursuant to 34 CFR §300.530 before Student was expelled from school. Failure to conduct such manifestation determination was a violation of 34 CFR §300.530. Pursuant to my

authority under 34 CFR §300.532(b)(2)(i), I will order that the School District return Student to the placement from which Student was removed.

CONCLUSION

School District actions in this case constituted expressions by school district personnel to supervisory personnel of specific concerns about a pattern of behavior of the Student. Thus, for manifestation determination purposes, the School District must be deemed to have had knowledge that Student was a child with a disability before the January 2009 behavior that precipitated Student's expulsion. Because Student was entitled to a manifestation determination before expulsion, the School District's failure to conduct a manifestation determination was a violation of 34 CFR §300.530. Pursuant to 34 CFR §300.532(b)(2)(i), the School District must return Student to the placement from which Student was removed in January 2009.

ORDER

The School District shall return Student to the placement from which Student was removed on January 23, 2009.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

March 2, 2009

