

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Torrington Board of Education

Appearing on behalf of the Parent: pro se

Appearing on behalf of the Board: Attorney Michael P. McKeon
Sullivan, Schoen, Campana & Connon, LLC
646 Prospect Avenue
Hartford, CT 06105-4286

Appearing before: Attorney Deborah R. Kearns, Hearing Officer

FINAL DECISION AND ORDER

ISSUE

- I. Whether the Local Educational Agency (LEA) properly determined, the behavior which resulted in discipline was not a manifestation of the child's disability?

PROCEDURAL HISTORY

The parent requested a due process hearing on January 24, 2005 to dispute the Individualized Education Program (IEP) Team conclusion that behavior for which the child was receiving discipline is not a manifestation of her disability. The parent did not make an expedited request. The prehearing conference convened on January 31, 2005. Another prehearing conference convened on February 3, 2005. A hearing was assigned for January 11, 2005. The parent requested another date for hearing because she had to attend others matters on her daughter's behalf. The parties agreed the hearing would proceed on February 14, 2005. The date for final decision is March 10, 2005.

SUMMARY

The parent/child appeals pursuant 20 U.S.C. § 1415(k)(6) the IEP team determination that the child's behavior was not a manifestation of her disability. The child is facing disciplinary action for violating the school Code of Conduct. The child has been in special education since the early elementary years, the IEP never included a behavior intervention plan. The child's record characterizes the child as polite, well-behaved and hard working. The child was given an additional diagnosis 1.5 years ago, which is often associated with problematic behaviors. Neither the school team nor the parent made any

request for a behavior intervention plan, because the child never exhibited behavior problems in the school setting.

FINDINGS OF FACT

There is no dispute between the parties that the child has been identified and continues to be disabled since her early school years with a primary disability of language impairment and therefore eligible to receive specialized instruction and services pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 et seq. (Exhibit B-1, B-5)

A psychological evaluation conducted 2/27/01 concludes the child is in the slow learner/borderline range. The evaluation states the child's verbal reasoning and comprehension skills associated with utilizing language to acquire, recall and process information, are well below average. The child may experience difficulty assessing social situations and responding appropriately. (Exhibit B-1)

A triennial evaluation, conducted May 2004 concludes the child had significant receptive and expressive language deficits. The evaluation does not make program recommendations. The results of the Woodcock-Johnson III Test of Achievement, ranks the child's overall skills in the very low range. The results of the Test of Oral Language places the child in the 2.9 age equivalency, understanding directions is age equivalency of 3.3 years. (Exhibit B-4p.10-13)

Review of the Individualized Education Program (IEP) documents from school years 2002-2003, 2003-2004, 2004-2005 are noteworthy. The child was able to progress spending significant class time with typical peers. The child consistently demonstrates good behavior despite the deficits shown on her tests results. (Exhibit B-1,B-2,B-3,B-4)

For 2001-2002 the annual review reports the child had an excellent year, she spent 4.65 hours per week in special education and 25 hours per week with non-disabled peers. She made honors level grades in the last marking period and demonstrated growth. (Exhibit B-2)

In 2002-2003 the child was able to participate in regular education for English and Biology, and the resource room for Math and History. She is described as hard working and well behaved, she is attending outside counseling. No additional information is provided as to the issues for counseling, the child's progress or if there is anything addressed in counseling which impacts on the child's education or her ability to benefit from her education. The child spends 6.6 hours per week in special education and 28.4 hours per week with non-disabled peers. High School Performance Reports show average peer relationships and average behavior. The speech and communication goals are primarily focused on academic concerns for class participation and work completion presumably written expression. The child's discipline record reports only minor infractions. The IEP documents do not reflect that program or behavior modifications

were requested by the school or by the parent and denied by the school team. (Exhibit B-3, p.3)

In 2003-2004 the child attended Bristol Tech (BTEC). She was mainstreamed for all classes. The child is described as hard working, and well behaved. She continued to demonstrate weak written expression. The record indicates she is in group and family counseling. No additional details are provided about the nature of the mental health issues there are no reports, attachments or addenda from the parent or a health care provider to alert the school to symptoms of the child's disability, request intervention or plan behavior strategies should the child experience symptoms in the school setting. The record does not contain modifications to address mental health or communication deficits. The child chose to leave BTEC but there was no disciplinary action pending which prompted her return to the LEA school. The parent testifies she reported the child's mental health diagnosis to the IEP team. Her testimony is credible but there is nothing to support whether the change in diagnosis required any school intervention. There are no physician reports or treatment recommendations in the record. (Exhibit B-4, Testimony, Parent)

In October 2004 the team developed an IEP for the child's return to the LEA High School. The report describes the child's behavioral strengths, as polite, hard working, and well behaved in school. Her behavioral weaknesses are reported as, needs directions repeated, concerns with math skills and written expression. The child's need to have directions repeated appears to be a work production strategy. The record states the child is attending outside counseling and her mental health status and medications are listed in the school records. There are no treatment updates or program recommendations from therapists. The record does not reflect that the parent made any request for interventions that were denied at the IEP meeting. The record does not have an addendum to the IEP meeting minutes. The child is scheduled to spend 31.2 hours per week with non-disabled peers and 3.8 hours per week in special education instruction for English and written expression. The parent points out that one of the child's academic goals is to follow teacher directions the first time asked. There is no additional information or progress reports in the record to elaborate on the precise problem the goal was designed to address. The behavior management section of the child's program modifications, Exhibit B-5 p.3, is limited to positive reinforcement. Prior to the disciplinary action no one sought help from the school team to cope with the child's behavior. (Exhibit B-5, Testimony, Parent)

The parent testifies she is unaware of the child's status as a slow learner with low achievement levels. In particular she cites the Test of Written Language the Spontaneous Section, Exhibit B-4 p.11. The evaluation concludes the child has a significant deficit in her receptive and expressive language skills. The evaluation notes tests results are consistent with the child's past performance. All of the IEPs offered into evidence include written language goals. The parent's signature appears on the IEP documents confirming the parent has attended most of the child's IEP meetings. At the IEP meetings the child's current performance levels, progress and evaluation results are reviewed. (Exhibit B-1, B-2, B-3, B-4, B-5, Testimony, Parent, Testimony, Special Education Supervisor)

The parent testifies the child has a medical appointment for treatment of bipolar disorder because she has not been taking her medication. The doctor's report, Exhibit B-8 p.9, recommends the child take her medication and go to counseling. The parent testified the child gets defiant when you invade her space. (Exhibit B-8, Testimony, Parent)

The step-parent reports he has seen home behavior similar to the behavior for which the child is being disciplined. The child will get in your face and holler at you, he states they have pushed for testing. The step-parent states he was unaware the child had not been taking her medication. She hides her medication but she has not been taking it for three to four months. The child was attending school for either three or four hours per day with parental and school permission to leave when she was not in class. (Testimony, Step-father)

The child is being disciplined for a confrontation with a teacher as provided in the memorandum, Exhibit B-7. The teacher who claims she was assaulted did not appear at the hearing and could not be cross-examined or questioned. It is troubling that there is no information as to whether or not the teacher had any knowledge of the child's special education status or whether she was aware the child had recently been attending school for 3 to 4 hours a day with permission from the parent. It is noteworthy the incident took place in front of a police officer, who is assigned to the school. The police officer spoke to the child on the teacher's behalf prior to the child pushing the teacher. The police officer was present to lend support to the teacher if the incident presented a matter of safety. The child was credible in her testimony that the teacher was the one who first touched the child. Two students, who were with the child at the time of the incident, were not interviewed. A copy of the school policy which the child violated is not part of the record. (Exhibit B-7, B-8, Testimony, Student, Testimony, Assistant Principal)

The Assistant Principal, reports the child is well-behaved, the school Code of Conduct prohibits wearing outer clothing in school. The investigation reports Exhibit B-8 p. 17 provides the details. The Assistant Principal interviewed the teacher. The witnesses to the incident were not interviewed, nor does the investigation include a statement from the police officer who witnesses the event. In fact, there is no statement from the teacher in the record. As the person responsible for the investigation, the Assistant Principal prepared a Memorandum of the event on January 3, 2005 for the Principal, Exhibit B-7. (Exhibit B-7, B-8, Testimony Assistant Principal)

The Special Education Supervisor, testified the student is receiving services for Speech and Language Impairment. The child chose to return to the high school, she was not excluded from BTEC. The schedule provides for five periods a day, one of which is an 80 minute enhancement period. The parents of seniors have the option of permitting them to leave school for the enhancement period. The child is currently attending high school under Stay Put, and participating in a PAVE program, which explores career objectives. The child does not have a behavioral identification because her behavior has never been an issue in the school setting. The IEP states the child is well behaved and polite, the

records state her diagnosis and status but there is no programming for the diagnosis because there has been no impact in the school setting from the disorder. At the manifestation determination the team determined the behavior for which the child was being disciplined was not a manifestation of her behavior. There has been no expulsion hearing because the parents challenged the result of the manifestation determination. In response to the parent's claim that she never received a copy of the IEP summary, Exhibit B-4, the Special Education Supervisor testifies both the parent and the child receive a copy within five days of the IEP meeting. (Exhibit B-4, B-5 pp.1-5, B-8, Testimony, Special Education Supervisor)

The child's special education teacher, states the child does not have a behavior identification. She receives specialized instruction in expressive language. The teacher has observed the child in class. The teacher is aware of the child's diagnosis but has not seen any emotional outbursts from the child, or other adverse impact on behavior or ability to study or learn. The child receives program modifications, Exhibit B-5, p.9 and weekly monitoring by a case manager. The teacher believes the conduct for which the child is receiving discipline is not related to her disability. He believes her IEP is appropriate, that she understands the consequences of her behavior and that she is able to control her behavior. The child has never engaged in this type of conduct before. He believes she should be able to graduate this year. (Exhibit B-5, p.9, Testimony, Special Education Teacher)

The Interim Director of Student Services states there is no recommendation for expulsion. She expects she will graduate on time. (Testimony, Interim Director of Pupil Personnel Services)

The Manifestation IEP concludes the behavior for which the child is receiving discipline is conduct not related to her disability. The conduct is a violation of the Code of Conduct which normally results in expulsion. At the Manifestation IEP, the team reviewed the child's evaluations records and teacher reports. The child's therapist and psychiatrist presented a joint letter dated January 6, 2004. The letter describes symptoms which may occur as the result of having the child's diagnosis. Unfortunately, the report is quite vague as to what if any symptoms or reaction the child is actually having or for which she is receiving treatment. The report fails to draw a nexus between the child's behavior and her diagnosis. The report does not contain any direct observation of any of the symptoms identified in the report nor does it state that the parent or child has reported symptoms for which the therapists or psychiatrist are providing intervention. Furthermore the therapists make no request to include specific strategies in a behavior intervention plan, for the child in the school setting. The therapists did not appear at the hearing for cross-examination. (Exhibit B-8 p.9)

CONCLUSIONS OF LAW

1. There is no dispute between the parties that the child is identified as a child with a disability and therefore entitled to receive specialized instruction and services in the provision of a free and appropriate public education pursuant to The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et. seq.* and its regulations at 34 C.F.R. § 300.520-300.528 and Connecticut General Statutes § 10-76 *et. seq.*
2. The school team conducted a manifestation determination review authorized by 20 U.S.C. § 1415(k)(4) and concluded the child's conduct was not a manifestation of her disability. IDEA provides the child/parent may appeal the IEP team manifestation determination as provided in 20 U.S.C. § 1415(k)(6) and 34 C.F.R. § 300.525. The parent had not requested an expedited hearing in their claim for due process.
3. 20 U.S.C. § 1415(k)(6) (B)(i) and 34 C.F.R. § 300.525(b) requires the hearing officer to determine whether the local educational agency (LEA) has demonstrated that the child's behavior was not a manifestation of the her disability consistent with 20 U.S.C. § 1415(k)(4)(C). The hearing officer is subject to the standards required of the IEP team in making its determination that the conduct was not a manifestation of the child's disability. Such determination can only be made after consideration of all relevant evaluations, other information supplied by the parent/child, observations of the child; and review of the child's IEP. A determination must then be made that, in relationship to the behavior, the child's IEP and placement were appropriate. A further requirement is a determination that the child's disability did not impair the child's ability to understand the impact and consequences of the behavior subject to disciplinary action; or impact the child's ability to control the behavior.
4. Applying these standards to the review of the IEP team manifestation determination the relevant exhibits and testimony provided in the record follows: (1) The evaluations are a school psychologist's report, dated 2/27/01, Exhibit B-1, pp. 20-21, conducted as part of a triennial review and a speech and language evaluation dated May 2001, Exhibit B-1, pp. 17-19, prepared to plan the child's IEP for the Grade 8. (Exhibit B-1)

The conclusion required by 20 U.S.C. § 1415 (k)(4)(C)(ii)(II) is that the child's history did not require behavior interventions, supplementary aids and supports in order to be able to participate in the general curriculum. The child's disability did not impair her ability to understand the impact and consequences her actions or her ability to control her behavior.

The parent/child had the opportunity to present information which impacts on the child's behavior at the manifestation determination as required by 20 U.S.C. § 1415(k)(4)(C)(I). The parent and step-parent testify the child has engaged in similar behavior at home, she gets in your face and hollers and gets very upset if you get in her face by grabbing her. The school record include evaluations conducted to plan the child's IEP, a triennial exam in 2001 and another in 2004, Exhibit B-1, B-4. Prior to the disciplinary action evaluations focused on the child's language deficits.

The child's record does not include reports of problem behaviors, disciplinary reports or evaluations designed to analyze behavior, such as Functional Behavior Assessment. The Parents said they were surprised by the content of the child's record. The record acknowledges the child's diagnosis but does not reflect any discussion about problematic behaviors. Absent from the record is any report of behavior which required unusual intervention or even suggested behaviors observed at home required a school plan should they occur in the school setting. The record does not contain any written communications from the parent or the child's therapist requesting the school team address behavior or change their approach to the child. There is nothing in the minutes and IEP documents which indicate such verbal requests for a behavior intervention plan by the parent were denied.

The child's therapist report presented at the manifestation IEP described behaviors that any person who has the child's diagnosis could exhibit. The therapist's letter did not provide any information that the behaviors which can be symptoms of the child's illness are indeed symptoms the child is actually experiencing. The current year IEP simply reflects the child's diagnosis, that she takes medication and receives counseling outside of the school setting.

The child's program did not require a behavior plan or supplemental aids and services for the child to participate and progress in the general curriculum. The child was receiving resource room support prior to the incident for which she is being disciplined. The school staff was aware of the child's diagnosis. Even though the parent made the school team aware the child was receiving treatment, there was no request to evaluate what if any impact the child's illness had on her ability to control her behavior. The school record does show repeated attempts to control the child's behavior and the child's disciplinary record does not indicate action should have been taken. IDEA requires children be educated in the least restrictive environment. A program which placed behavioral constraints or limitation on the child simply because she had a mental health diagnosis would not have been appropriate. Therefore, the child's IEP is found to have been appropriate. The child's IEP and placement were modified to meet the child's individual needs. The child's IEP provides for a program in the least restrictive environment. The educational services and supplementary services are consistent with the child's IEP. The behavior which resulted in suspension is not sufficiently connected to the child's diagnosis, the therapist report fails to make that connection. The report simply describes behaviors a person with that diagnosis might demonstrate.

5. The parents argue the behavior at issue is the exact kind of behavior identified as those that can be exhibited by a person with the child's diagnosis, rendering the behavior a manifestation of the child's disability. The child did not appear to have had any difficulty controlling her behavior in the school setting, up until the time of the incident for which she is being disciplined. The child's entire school record, over the course of many years, consistently reports she is polite, well-behaved and hard working. The child's behavior record also supports a conclusion that the child is able to understand the consequences of her behavior. If the child is indeed experiencing

some lack of control of due to a change in her illness the therapist made no indication in their report.

6. The school is to provide a free and appropriate education for the child, in the least restrictive environment. It would be contrary to the entire notion of an individualized education program to restrict all students with an emotional disturbance identification to stringent programs because of any behaviors that could be demonstrated by any person with the same diagnosis.
7. School staff testified the student has not been expelled and would be able to receive specialized education and support to permit her to graduate on time. They have conducted the required Functional Behavior Assessment and provided the child with behavioral goals and objectives, should the behaviors continue to be a problem.

FINAL DECISION AND ORDER

1. The IEP team properly determined the behavior for which the child is disciplined is not a manifestation of his disability.