

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Greenwich Board of Education

Appearing on behalf of the Parents: Attorney Lindy Urso, 29 Fifth St., Stamford, CT 06905

Appearing on behalf of the Board: Attorney Abby Wadler, Law Department, Town of Greenwich, 101 Field Point Rd., Greenwich, CT 06830

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the conclusions of the manifestation determination were appropriate.
2. Whether the behavior that has resulted in the pending disciplinary action [expulsion] was caused by, or had a direct and substantial relationship to, the Student's disability; or if the conduct in question was the direct result of the Board's failure to implement the IEP.

SUMMARY:

Disciplinary proceedings are pending for the tenth grade Student for alleged possession of marijuana with intent to sell at the Board high school. As the Student had been eligible for special education at the time of the incident, a manifestation determination meeting convened. The Board determined that the conduct which resulted in the pending disciplinary action was not a manifestation of the Student's disability. The Parents requested this hearing to challenge the manifestation determination.

PROCEDURAL HISTORY:

The Parents requested this hearing on April 11, 2008. The hearing convened on May 1, and the hearing continued to May 8 so that counsel for both parties had an opportunity to file briefs. This decision is issued within 10 school days of closing of the evidentiary hearing and receipt of briefs in accordance with 20 U.S.C. Sec. 1415.

The Parents' witnesses were the Father and Dr. George Chapar, the Student's treating psychologist.

The Board's witnesses were Frank Piraneo, Board school psychologist; Jean Espinoza, Board special education teacher; Norma Einhorn, Board social worker and David Walko, Board high school housemaster.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

FINDINGS OF FACT:

1. The Student is currently 16 years old and in tenth grade at the Board high school.
2. An expulsion hearing is pending for the Student as a result of an incident that occurred in March 2008. [Exhibit B-17]
3. The Student was first diagnosed with ADHD in 1999. [Testimony Father] The Student is currently diagnosed with ADHD and mild depression with concomitant anxiety. [Testimony Dr. Chapar]
4. In April 2007, the Student was evaluated for special education and related services. In the Board's psychological evaluation, it was noted that the Student's intellectual profile indicates that the Student's intellectual processing decreased significantly since the last measure in 2000, from a full scale IQ of 127 to a full scale IQ of 105. According to the evaluation report, the decline from 127 to 105 exceeded the expectation of a statistical decline from the WISC III to the WISC IV. It was noted however that the WISC IV was completed prior to the Student commencing his medication trial of Concerta. In the testing results, the school psychologist noted that the assessment of attentional capacities was "rather equivocal." He noted that the Father reported on the BASC-2 that the Student engages in disruptive, impulsive and uncontrolled behaviors at a level of clinical significance. On the CTRS-R, only two of the teachers found that the Student met the criteria for inattention and none observed hyperactive-impulsive type behavior. At least some of the rating scales were completed "post medication." The school psychologist concluded that attentional issues have a historic basis and continue to be in evidence, although noting that measures indicate disparity in both observability and degree among parent, student and teacher reports. According to the school psychologist, the attentional issues were "felt to be mild-moderate" and that evaluation data clearly indicated that the attentional issues do not fully explain the depth of educational problems the Student has experienced, and noted that emotional status indicators reflect an anxious, pessimistic youngster. [Exhibit B-9]
5. After the evaluation, the Student was found eligible for special education and related services in April 2007, under the disability category Other Health Impaired [OHI]. [Exhibit B-3] The Student was identified with the primary disability of OHI because the Student had a significant disorder of his attention with his "emotional overlay." [Testimony Ms. Einhorn]

6. At the eligibility determination PPT meeting, the Planning and Placement Team [PPT] developed a program for the Student with annual goals and objectives. The goals included: (1) [the Student] will begin to acquire organizational skills by April 2008; (2) [the Student] will continue to acquire organizational skills by April 2008; (3) [the Student] will begin to investigate post high school options by April 2008; and (4) [the Student] will work towards self awareness so as to improve his academic performance. Every objective relating to goal 4 referenced the mental health support that the Student would receive through his counseling sessions. According to the service grid, the Student was to receive 6 sessions/blocks per week of resource room assistance and 30 minutes of individual/group services from the social worker in the office/therapy room. [Exhibit B-3]
7. The Student's parents are divorced. The Father lives in Greenwich, the Mother resides in Stamford. The Father describes his responsibility for the Student as being the prime custodial parent and major caretaker. [Testimony Father]
8. The Student has been prescribed Concerta for a little more than a year, which has resulted in fewer anger outbursts, decreased irritability and better behavior. [Testimony Father]
9. Due to the Father's traveling schedule, the Student stays with his Mother in Stamford about 25 percent of the time. Often when the Student is in the care of the Mother, the Student does not take his prescribed medication. At the time of the disciplinary matter that is the subject of this hearing, the Student had been staying with his Mother since Monday; the incident occurred at the end of that week. [Testimony Father]
10. On March 28, 2008, the Student was involved in an incident at school in which he was in possession of a puzzle box that the Student didn't know how to open, and inside the box there were individually wrapped packets of marijuana. [Testimony Mr. Walko, Father, Dr. Chapar] The Student reported that he received the box as a present from friends. [Testimony Father, Dr. Chapar]
11. The PPT convened on the already scheduled annual review PPT meeting date on April 2, 2008, for the manifestation determination.¹ The Board members of the team concluded that the Student's behavior that resulted in the pending disciplinary action was not a manifestation of his disability. At the meeting, the Father indicated that it was difficult for him to see that the Student's actions were a calculated act. In explaining why he didn't object to the conclusions of the manifestation determination at the meeting, the Father said that he didn't know the routine and didn't know he had a voice at the meeting to oppose the school members' conclusions. He did indicate at the meeting that the actions could be related to the ADHD and the Student's anxiety. [Testimony Father, Exhibit B-1]

¹ The annual review was "already on the books," according to the Board housemaster, so the team conducted the manifestation determination at that time.

12. The Prior Written Notice page of the document summarizing the manifestation determination noted that documents that served as a basis for the action proposed included the report cards and review of records. [Exhibit B-1]²
13. The school members of the team concluded that the misconduct was not related to the Student's disability. The school members of the team who testified, however, were not clear what disability they were considering during the manifestation determination [i.e., ADHD-inattentive, ADHD-hyperactive, or any of the Student's other disabling conditions], nor had a sufficiently clear view of what the incident was that was the subject of the pending disciplinary action. [Testimony Mr. Walko, Ms. Einhorn, Ms. Espinoza, Mr. Piraneo]
14. The Parents brought this hearing request to challenge this manifestation determination.

DISCUSSION/CONCLUSIONS OF LAW:

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA] provides for services to children with disabilities, from birth through age 21. The Student has been found eligible for special education services, and is afforded the protections of the Act and related regulations.

The IDEA provides that prior to the change of placement of a child with a disability due to violation of school rules, a manifestation determination must be completed. This provision provides that:

“ . . . within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine -

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.” 20 U.S.C. Sec. 1415

If the Board, Parents and the members of the IEP team determine that either sub-clause is applicable for the child, the conduct is determined to be a manifestation of the Student's disability. *Id.*

² The date of the manifestation determination, including the year, was not correct on the PPT summary document. The meeting occurred on April 2, 2008, not April 3, 2007, as is written on the meeting summary. [Testimony Mr. Walko]

If it is determined that the behavior was a manifestation of the child's disability, then the IEP team shall:

- “(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);
- (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
- (iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.” 20 U.S.C. Sec. 1415

In certain circumstances, even when the conduct is a manifestation of a student's disability, the student can be placed in an interim alternative placement.

“(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA”. 34 CFR Sec. 300.530(g)

The Student has been diagnosed with ADHD since 1999, and is diagnosed with ADHD, mild depression and concomitant anxiety, according to his treating psychologist. His treating psychologist testified as to the Student's disability at the hearing. [Testimony Dr. Chapar] The psychologist is found to be an informative witness as to ADHD and the impact on the Student's daily life. Dr. Chapar testified that the Student certainly had impulsive symptoms of ADHD. He explained that teenagers are rarely seen as hyperactive in their ADHD, but are impulsive. The Student's disability manifested itself as being very impulsive, with the inability to think of consequences of bringing the puzzle box to school, and the lack of connection between the possibility of negative consequences and his actions. The impulsivity manifests itself as a failure of judgment, according to the treating psychologist. Because the Student was

staying with his Mother, and has been very inconsistent with taking his prescribed medication while in the care of his Mother, the Student would likely have more symptoms of his ADHD at that time, according to the treating psychologist. [Testimony Dr. Chapar] Dr. Chapar has demonstrated an understanding of the incident, and is treating the Student on an ongoing basis. His testimony was persuasive and helpful in understanding the Student's disability and the manner in which it manifests itself, with and without medication.³

Dr. Chapar's testimony was much more compelling than the school psychologist's testimony. The school psychologist agreed that acting without thinking is the hallmark of impulsivity, but said that the Student's actions were not related to his disability because "the manifestation is to determine whether the behavior was a direct relationship to his disability, and he is a young man with inattentive ADD, and that act doesn't fit that diagnosis." Mr. Piraneo said that his primary contribution to the team was to state that he didn't see any impulsivity in any of the evaluation reports; such a conclusion is erroneous as the words of his own evaluative report from April 2007 indicate that the conclusions regarding ADHD were equivocal. [Testimony Mr. Piraneo]⁴

The impulsivity and poor decision-making evident in the Student's behavior which resulted in the pending disciplinary action and the manifestation determination were a direct result of the Student's disability. The direct and substantial relationship to the child's disability was not such an "attenuated association" to the child's disability. *Federal Register, Volume 71, No 156, 46720, August 14, 2006* Rather the Student's actions were the "disruptive behaviors characteristic of the child's disability and the child should not be punished for behaviors that are a result of the child's disability." *Id.*

While the school psychologist conceded that impulsivity, a hallmark of ADHD, can affect decision making, he opined that he didn't believe that the Student had such impulsivity. Board witnesses also repeatedly testified that the Student was merely unfocused or inattentive, not impulsive.⁵ The record and the Board's evaluation of the Student do not support this conclusion. According to the comments to the federal regulations, providing input to the changes to the regulations, a board's determination of the whether the student's conduct is a manifestation of the child's disability should be *broad and flexible*, and should include such factors as the inter-related and individual challenges associated with many disabilities. *Id.* In this case the Board's inquiry was not so broad and flexible. On the contrary, the inquiry was narrow and rigid.

The Student's IEP was not appropriately implemented, and in this manifestation determination meeting, that inquiry, i.e., whether the IEP was implemented, was not appropriately completed. In fact, the social worker testified that the Student was seen on an as

³ While the treating psychologist was found persuasive in his testimony, he was somewhat inappropriate in his demeanor at the beginning of the testimony as he was speaking to the hearing officer as an adversary, and inquiring in a discourteous manner why he had not been properly introduced to the hearing officer. After a short break to give the psychologist an opportunity to speak with the Parents' counsel, the psychologist apologized for his behavior.

⁴ Mr. Piraneo testified at the hearing that he didn't see impulsivity in either report. That directly contradicts the evaluation that Mr. Piraneo himself had written. [Exhibit B-9]

⁵ Ms. Espinoza testified that she "was thinking that this was an impulsive act" and concluded that she had never seen impulsivity with the Student.

needed basis; his IEP, however, provides for weekly 30 minute counseling sessions. The testimony of the Board witnesses did not address whether the IEP's counseling goals were implemented. The failure to implement counseling goals certainly could directly result in conduct that is the subject of the pending disciplinary action. Such brevity in the second part of the analysis of whether the conduct in question was the direct result of the Board's failure to implement the IEP is not the appropriate inquiry that must be made in the manifestation determination.

In this case the Student had particularized IEP objectives related to working on issues with mental health support, and was to receive counseling from the social worker one session per week for 30 minutes. When members of the PPT include such behavioral issues in the goals and objectives, these behavioral goals must be addressed in the manifestation determination. They were not. Furthermore, the record reflects that this goal and its objectives were not appropriately implemented for the Student as it appears that he did not receive his counseling on a weekly basis. The Student's conduct was a direct result of the Board's failure to implement the Student's IEP.

The manifestation determination meeting serves an important purpose. It is not a rubber stamp of the disciplinary action taken by the Board. It must be a good faith inquiry into whether the behavior directly related to the Student's disability and whether it directly related to the failure to implement his IEP. The inquiry never appropriately addressed the question of the Student's disability; the Student's disability is more than mere inattentiveness, but is multifaceted. The Board's school psychologist was inappropriately dismissive of the Student's disabilities. The manifestation determination was flawed. The behavior had a direct and substantial relationship to the child's disability, and the conduct in question was the direct result of the Board's failure to implement the IEP.

In accordance with IDEA, the Board must now conduct a functional behavioral assessment [FBA] and implement a behavioral intervention plan for the Student. The Student shall also be returned to his placement in accordance with his IEP.⁶

FINAL DECISION AND ORDER:

1. The conclusions of the manifestation determination were not appropriate.
2. The behavior that has resulted in the pending disciplinary action [pending expulsion hearing] was caused by or had a direct and substantial relationship to the Student's

⁶ Nothing in the record indicates that the Board is seeking to invoke section g of the regulations, and place the Student in an interim alternative educational setting when a student "[k]nowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises . . ." This issue was not presented at the PPT meeting of April 2, 2008, nor addressed at this hearing. If the Board proceeds in this manner, it would necessitate a finding that the Student "knowingly" possessed the illegal drugs. The testimony at this hearing on the issue of whether the Student knew what was in the box was contradictory, although a conclusion could be drawn that because the Student gave a fictitious name of who gave him the box, he was aware that there might be contraband in the box. [Testimony Mr. Walko] Because neither party presented the interim alternative educational setting as an issue in this case, this is not addressed any further in this decision.

disability, and the conduct in question was the direct result of the Board's failure to implement the Student's IEP.

3. The Board shall conduct a functional behavioral assessment [FBA] and implement a behavioral intervention plan for the Student.
4. The Student shall also be returned to his placement in accordance with his IEP.