

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

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

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

Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUE

1. Was the Student's behavior on December 15, 2009 a manifestation of his disability?

PROCEDURAL HISTORY

The Parents' attorney filed this expedited hearing request on January 13, 2010. Hearing Officer (hereinafter HO) Exhibit 1. This Hearing Officer was assigned to the case on January 14, 2010. A prehearing conference was held on January 25, 2010, at which time a hearing date of February 5, 2010 was selected at the mutual convenience of the parties. The mailing date for the final decision was set at March 4, 2010.

Both parties filed witness lists. The Parents did not file any exhibits. The Board filed Exhibits B-1 through B-11. The hearing convened on February 5, 2010. The Board's exhibits were entered into the record as full exhibits. Both parties waived opening statements. The Parents presented testimony from the Mother and Deborah Osinoff, L.C.S.W. The Parents rested their case. The Board presented testimony from David Walko, high school housemaster, Frank Piraneo, school psychologist, Kathleen Saggese, special education teacher, and William Herzog, guidance counselor. The Board rested its case. The parties were asked to file post-hearing briefs by February 15, 2010, which they did.

SUMMARY

The Student is a sixteen-year-old tenth grade student in the public high school. He has received special education services since second grade under the category of Other Health Impairment, attention deficit hyperactivity disorder (ADHD), inattentive type. The most recent evaluations of the Student were done in 2007. On January 6, 2010 a manifestation review planning and placement team (PPT) meeting was convened to determine whether the Student's conduct on December 15 involving

his arrest for possession of marijuana with intent to sell and possession of marijuana was a manifestation of his disability. The PPT determined that it was not and that no changes were needed in his IEP, including his participation in the school-wide behavior/discipline plan. The Parents disagreed. They claimed that the PPT did not consider that his ADHD caused impulsivity, which resulted in the conduct in December. The Board argues that the manifestation determination was conducted properly and that the results are clearly supported by the Student's records and history at the school.

The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record.

FINDINGS OF FACT

1. The Student is currently a sixteen-year-old tenth grade student (DOB 12/11/93) in the public high school and has been enrolled in the public schools since kindergarten. Testimony of Mother.
2. The Student received his first school psychological evaluation in the second grade. He was referred because teachers had noted "slow academic progress, weak fine motor skills, short attention span, impulsivity and low tolerance for frustration." Exhibit B-11 at 1.
3. "Behavior rating scales by teachers were significant for an attention deficit disorder, inattentive type." Classroom observations and testing setting supported that diagnosis. The PPT concluded that the Student "qualified for special education services under the category of Other Health Impairment due to ADHD symptoms and their effect on his learning." Id.
4. The Student's most recent school psychological evaluation was conducted by Sue Stoga, school psychologist, in May 2007, while the Student was a seventh grade middle school student. Id.
5. Ms. Stoga used a variety of evaluative measures including testing, classroom observation and review of records. The Student's test results showed that his intellectual functioning was in the average range overall (Full Scale IQ 97) and is ranked at the 42nd percentile nationally. There was "little difference among indexes and relatively little scatter among subtests." Id. at 2.
6. "Behavior rating scales completed by [the Student]'s teachers are in the clinically significant range for Attention Deficit Hyperactivity Disorder – Inattentive type." Id. at 3. In her summary, Ms. Stoga noted that the "most significant concern" is the Student's weakness in his ability to sustain his attention and sustain his effort to bring tasks to completion." Id. at 4.
7. There has not been any other diagnosis of the Student's disability, either in school or outside of school. Testimony of Mother and Deborah Osinoff.
8. The Student's individualized education program (IEP) of May 14, 2007 for the Student's eighth grade year had three goals to address difficulties in writing, reading and reviewing his work and revising it as necessary. Exhibit B-8 at 6-8. He received 12 hours and 15 minutes per week of special education in the general education classroom. Id. at 11.
9. The April 8, 2008 IEP for the Student's ninth grade year had three goals to address writing, reading and math. Exhibit B-7 at 6-10. He received 5 hours and 13 minutes of special education in

the resource room. The IEP also provided for “extensive and ongoing consultation with mainstream teachers to monitor progress and compliance with modifications.” Id. at 13.

10. The May 11, 2009 IEP for the Student’s tenth grade year has four goals to address writing and reading skills, transition to post-secondary education/future careers and attention. Exhibit B-6 at 7-12. He receives 4 hours and 31 minutes of special education in the resource room. This IEP also provides for “extensive and ongoing consultation with mainstream teachers to monitor progress and compliance with modifications.” Id. at 18.

11. The PPT team added the attention goal to address the Student’s difficulty focusing in class and need to develop his own strategies for refocusing. Id. at 3; and Testimony of Kathleen Saggese. This goal has three objectives: “With increasing frequency in his mainstream classes [the Student] will:” (1) “Identify impulsive behaviors and potential consequences in real and/or simulated situations;” (2) “Increase rate of self-controlled and refocusing behaviors;” and (3) “Self-monitor rate of refocusing behaviors.” Id. at 12.

12. The Student showed satisfactory progress in all the goals and objectives according to reports in June and November 2009. Exhibit B-5 at 7-12; and Testimony of Ms. Saggese.

13. On December 16, 2009, the local police department sent a letter to the Superintendent of the Board as required by Conn. Gen. Stats., Section 10-233H advising him that the Student was arrested on December 15, 2009 and charged with Possession of Marijuana With Intent To Sell (Felony) and Possession of Marijuana (Class A Misdemeanor). The description of the incident that led to the arrest was: “[The Student] was observed to participate in a drug transaction with another student at a gasoline station during school hours. He had 10 grams of marijuana on him after he was stopped by the Narcotics Section. [The Student] admitted to selling marijuana for profit.” Exhibit B-1.

14. David Walko, housemaster at the high school, notified the Parents on December 18, 2009 that the Student was placed on a ten-day out-of-school suspension because of “drug sale/intent to sell/distribution” beginning on December 21, 2009. Exhibit B-2.

15. After the arrest, the Parents decided that the Student’s propensity to act without thinking had reached a point that independent professional counseling was in order and they engaged the services of Licensed Clinical Social Worker Deborah Osinoff. Testimony of Mother.

16. Ms. Osinoff has been in private practice, handling mostly teenagers and young adults, for approximately 15 years, and worked in the social work field for years before starting her own practice. Testimony of Ms. Osinoff.

17. Ms. Osinoff first met with the Student and the Parents together on January 4, 2010 and subsequently has met with the Student individually on approximately five more occasions. Her diagnosis was ADHD. Id.

18. Based on those meetings, Ms. Osinoff’s opinion is that, as part of his ADHD, the Student has a real problem with “impulsivity” in the sense that he acts without thinking through the consequences of his actions. Id.

19. Because the Student's conduct involving drugs occurred during the day time at a gas station near the high school, she concluded that based on her training and experience, a non-impulsive student engaged in such activity would not do so in an open location but, rather, would try to be discreet so as not to be caught in the act. Id.

20. A PPT meeting was scheduled and held on January 6, 2010 to conduct a manifestation determination. The meeting was chaired by Mr. Walko. The Parents, Student, Regular Education Teacher MaryBeth Smith, Ms. Saggese, Frank Piraneo and William Herzog were in attendance. Exhibit B-5. The Parents were advised of procedural safeguards and the purpose of the meeting. Ms. Smith reported on the Student's progress in English class and Ms. Saggese reported on his progress in the other mainstream classes. Mr. Walko described the misconduct and the information considered in a manifestation determination. Mr. Piraneo reviewed the 2007 evaluation. The school-based PPT did not "feel the misconduct in question was in direct and substantial relationship to [the Student's] disability." Id. at 2. Ms. Saggese reviewed the current IEP and the PPT concluded that the "misconduct in question is not a direct result of the district's failure to implement the IEP." Id. The Parents disagreed because they believed the misconduct was a manifestation of his disability. Id.

21. The Parents believe that the manifestation PPT was flawed because it was so brief (15-20 minutes), the evaluation was too old, their input was not taken into account and the impulsivity aspect of the Student's disability was overlooked. Testimony of Mother.

22. The PPT did consider teacher observations of the Student, information supplied by the Parents, the most recent evaluations and diagnostic results, the Student's IEP and placement and information supplied by school staff. Exhibit B-3.

23. The Student's disability has never led to any school disciplinary issues of a significant nature. Testimony of Mr. Walko, Mr. Herzog, and Mother.

24. Any issue of a minor disciplinary nature is related to the Student's inability to stay focused or maintain his attention to class work, such as fidgeting, daydreaming or texting in class. Testimony of Ms. Saggese.

25. The IEP reflects that no modifications were required for the Student's participation in a school-wide behavior/discipline plan, nor was there any Functional Assessment and Behavior Support Plan. There were no related services or counseling in the IEP. Exhibit B-6 at 18.

26. The Parents did not request that the school provide any counseling and, until the Student's arrest did not provide any private counseling for him. Testimony of Mother.

CONCLUSIONS OF LAW

1. This hearing is convened pursuant to Section 1415(k)(3) of the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400, et seq. (“IDEA”) and Conn. Gen. Stats. Sec. 10-76h.

2. Pursuant to 34 CFR Section 300.530(e)(1):

. . . the LEA, the parent, and relevant members of the IEP team . . . must 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 LEA’s failure to implement the IEP.

In making this determination, the PPT team must find that the subject behavior of the student was a manifestation of his or her disability if either condition is met. 34 C.F.R. Section 300.530(e)(2).

3. The Parents do not dispute that the Board was implementing the Student’s IEP. Therefore, the condition in Section 300.530(e)(1)(ii) is not met.

4. The record does not support the Parents’ claim that the Student’s conduct was “caused by, or had a direct and substantial relationship to” his disability. Assuming the Parents are correct that impulsivity is a feature of the Student’s ADHD, there is no nexus between impulsivity and selling marijuana. At most, the Student’s impulsivity may have caused him to sell marijuana in a manner likely to lead to his arrest, but it doesn’t support a conclusion that selling marijuana or possessing marijuana with intent to sell is caused by or related in a direct and substantial way to his ADHD. See e.g., Fitzgerald v. Fairfax County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008); In re: Student with a Disability, 51 IDELR 231 (SEA VA 2008); and Lancaster Elementary Sch. Dist., 49 IDELR 53 (SEA CA 2007). Therefore, the condition in Section 300.530(e)(1)(i) is not met.

FINAL DECISION AND ORDER

The Student’s conduct on December 15, 2009 was not a manifestation of his disability.