

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Appearing on behalf of the Parents: Anne Louise Blanchard, Esq.
Children at Risk and
Litigation Task Force Director
P.O. Box 258
Willimantic, CT 06226

Appearing on behalf of the Board of Education: Susan C. Freedman, Esq.
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Appearing before: Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

- I. Whether the Local Educational Agency (LEA) properly determined, the behavior which resulted in discipline was not a manifestation of the child's disability?
- II. Whether the child was entitled to return to the educational placement he attended prior to removal to the interim alternative educational setting during the pendency of the due process proceeding?
- III. Whether the interim alternative educational setting was appropriate?

PROCEDURAL HISTORY

On November 22, 2004 the parent/child filed for a due process action to dispute the manifestation determination, they did not request an expedited hearing. The State Department of Education assigned the matter for an expedited hearing. On November 29, 2004, the attorney for the child stated the matter was not an expedited matter and attorneys for both parties suggested they may seek an advisory opinion in the matter. Both attorneys declined scheduling a hearing on December 6, 2004. At the prehearing conference the attorney for the child stated she would be requesting a Stay Put, it was agreed the motion would be argued on the first day of hearing. The LEA filed a motion in Opposition to Stay Put. The first day of hearing convened December 22, 2004. The

LEA and parent agreed the child would participate in homebound tutoring as a condition of delaying the expulsion hearing. At the conclusion of the hearing the parties were informed the decision would be delayed due to plans for the upcoming holidays. On January 17, 2005 a written order placing the child in the interim alternative educational placement was made pursuant to 20 U.S.C. § 1415(k)(2) at that time the parties were notified it was necessary to order a transcript prior to issuing a final written decision in the matter which would be issued seven days after the receipt of the transcript.

SUMMARY

The parent/child appeals a manifestation determination pursuant 20 U.S.C. § 1415(k)(6) and the school personnel decision to place the child in an interim alternative educational setting pursuant to 20 U.S.C. § 1415(k)(1)(A)(ii)(I).

FINDINGS OF FACT:

1. There is no dispute the student is identified as disabled with a primary disability of emotional disturbance 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-9)
2. A Psychological Evaluation by Harvey Glass, Ph.D. was conducted in January 2004 to assess dangerousness and make recommendations for an appropriate program. The evaluation reports the following: The child presents as one who is cooperative, mild mannered with a full scale I.Q. in the average range. Social comprehension and situational reasoning capacity is in the average range suggesting the child should have the capacity to sort-out interpersonal reasoning situations. The evaluator specifically states, the child is able to understand safety rules but is quite limited in his understanding or appreciation of the impact and consequences of his behavior even when he is calm and away from a critical incident. The child's disability provides him with less ability to control his behavior but he is rational and without thought disorder or a paranoid agenda. The child's Individualized Education Program (IEP) incorporates most if not all of the evaluator's recommendations. The recommendations were made to address major areas of concern, peer relations, impulse control, school attendance, performance, motivation and counseling both in the school and in the community. (Exhibit B-8)
3. The child has a history of difficult peer relations and physical and verbal aggression which caused problems in another high school. The problems resulted in suspension and ultimately transfer to his present placement at the LEA's school. (Exhibit B-7 pp. 5,7,26, B-8)
4. The child's transfer occurred in March 2004. The IEP incorporated Dr Glass' recommendations, provided for counseling and a Behavior Intervention Plan (BIP). The child was instructed on strategies to diffuse conflict situations, provided with several individuals to contact to support him in processing difficult situations such as

a social worker, guidance counselor and assistant principal. In addition to behavior/psychological goals the child has a number of academic goals, to address class attendance, homework completion, and career objectives. He was instructed on the consequences of negative behaviors, provided with the Student Handbook, and participated in counseling and life skills instruction. (Exhibit B-7, B-20)

5. At the time the student transitioned into the LEA's High School, the IEP team reviewed the previous year's IEPs, evaluations and Dr. Glass' psychological report and Dr. Weidner's evaluation, from the most recent triennial evaluation. The child's former, special education teacher and Dr. Weidner attended the meeting convened to develop an IEP for the child. The team developed a program which they believed to be in the least restrictive environment for the child. Given the child's history of making serious verbal threats of physical harm, the team could have provided the child with a very restrictive program. The child returned to school with a paraprofessional shadow to monitor behavior during unsupervised periods. The IEP contained positive coping strategies and time with the assistant principal to provide the child with a clear understanding of the school rules and the staff's expectations of the child. The behavior processing sheets, Exhibit B-22, illustrate how the child implements corrective strategies. The Behavior Intervention Plan (BIP) was implemented on an informal basis because the child demonstrated he internalized the strategies. The team considered the child's average cognitive ability and satisfactory academic performance. (Testimony, Special Education Coordinator, Exhibit B-9 B-22)
6. The school social worker participated in behavior interventions. The child could come to her when he found it necessary to leave a room or situation to avoid escalating behaviors. The social worker, also, provided the counseling component of the child's IEP. (Testimony, School Social Worker)
7. In May 2004, the child had a six day suspension for an incident involving risk of injury to another student. A document titled, Conditions for Successful Return, required the child meet with parent, assistant principal and counseling staff. The child's outside therapist was to meet with his school social worker, his BIP was reviewed. The child's unstructured time was subject to restrictions, which would be lifted as his behavior improved. The document includes a written statement which clearly explains any instance of threatening or violent behavior would result in administrative or police action as the case required. (Exhibit B-13 p.2)
8. On October 12, 2004, grade 11, the IEP team met to revise the student's IEP, to provide for less intensive programming because the child's record showed improvement in all of the areas the IEP addressed. Teacher reports about the child were very good. The child's behavior had improved, with improvements in class participation, attentiveness, homework and desire to succeed. The IEP was modified to reflect the child's present level of performance on the social/emotional/behavioral assessment, which notes improved peer relations, a good start to the year with few if any incidents of interpersonal difficulties. His behavior intervention plan became

informal and states the strategies he should implement, which would permit him to remove himself from a difficult, situation should it occur in an unstructured place. The behavior intervention plan clearly outlines consequences for the child, it specifically states he will be written up as any other student and the appropriate disciplinary action will be taken. (Exhibit B-10 pp. 3, 16)

9. In October, there was an incident report which states while riding the school bus the child's girlfriend was involved in an inappropriate verbal exchange with the student who the child later attacked. The assistant principal intervened and the child and the other two students were warned to stop. The child was provided with a strategy to contact the assistant principal if problems continued. Fourteen days later the attack occurred with the same student, which resulted in suspension and the disciplinary action which is at issue in the due process action. (Testimony, Assistant Principal, Exhibit B-11)
10. The child was disciplined on November 4, 2004, for hitting another student with a stick, from behind. The stick was a dowel rod obtained from a janitor's closet. The details of the report are contained in the record. The assistant principal testified he has a history of working with the child on his behaviors. It was reasonable to expect the child would come to him with any ongoing disputes he had with the student he attacked. The child had demonstrated his willingness to utilize his social worker in the guidance department, and his special education teacher/case manager. Even though the BIP, Exhibit B-9 p.18, implemented when the child entered the LEA high school was discontinued due to the child's success with his behaviors, all the resources remained available to the child on an informal basis. The child had very few behavior/discipline issues at the LEA school. They are summarized on the chart at Exhibit B-13. (Testimony, Child, Assistant Principal Exhibits, B-9, B-11, B-12, B-13, B-21)
11. The assistant principal testified the BIP and the continued use of BIP strategies after the October 12, 2004 IEP meeting were designed to assist the child, known in the past to make poor choices, to learn ways to make better choices concerning his conduct. The student was not one subject to a BIP designed for a student who was unable to control his behavior. The witness expressed concerns that this particular incident was not an impulsive act, not in the heat of the moment. The stick was thoughtfully obtained, concealed and used to hit the student from behind without warning. (Testimony, Assistant Principal)
12. The child received a copy of the Student Handbook and the signature page contains the parent's signature. The Student Handbook identifies behaviors and consequences and defines "deadly weapon" as a weapon whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon or metal knuckles. "Dangerous instrument" means any instrument, article or substance which, under the circumstances in which it is used is attempted or threatened to be used, is capable of causing death or serious physical injury. (Exhibit B-19)

13. The pupil personnel director was familiar with the student and testified the child had problems with behavior control but the problems were inconsistent. The child has demonstrated his ability to control problem behaviors. At the IEP /Manifestation Determination on 11/12/05, an additional goal was added to the IEP to address the social/behavioral issues arising out of the November 4, 2004, attack. The goal was designed to prevent a reoccurrence. (Exhibit B-14 p.11, Testimony, Pupil Personnel Director)
14. The Functional Behavior Assessment conducted 11/10/04 reflects the collaborative effort of the school team through interview, observation, review of records, teacher's reports and discipline records. The child's evaluation prepared by Dr. Glass was reviewed. (Exhibit B-8, B-14, pp.21-22, Testimony, Pupil Personnel Director, Social Worker)
15. On 11/12/04 the IEP team met to conduct a Manifestation Determination. A Functional Behavioral Assessment dated 11/10/04 was presented. The team determined the behavior was not a Manifestation of the child's disability. The team found the child demonstrated his ability to control misconduct of this nature in the past. He appropriately utilized school personnel for intervention with this type of circumstance and while his disability indicated he had difficulty with this type of problem in the past he made progress in utilizing his behavior strategies to avoid disciplinary interventions. Dr Harvey Glass' evaluation (Exhibit B- 8) provides recommendations to permit the child, in light of his disability to have sufficient control of his behavior and understand the consequences of his actions. (Exhibit B-14 pp 14-22)
16. Program modifications provide for structured transitions, to reduce the chance of problems occurring during time moving from the cafeteria, free periods and changes of class. (Exhibit B-10 p. 13, Testimony, Pupil Personnel Director)
17. The LEA suspended the student from school for violation of the Board's Student Disciplinary Policy. Both parties agree an expulsion hearing was delayed at the request of the child's attorney. The agreement to delay the expulsion was conditioned on the child accepting homebound tutoring in the interim. (Exhibit B-15, B-16, B-20, Transcript, p.12)
18. The attorney for the child disputes the school team characterization of the stick as a weapon. School staff testified the student would be able to continue his classes with all of his special education supports and services in the ACES program and still be able graduate on time. The IEP has been revised to include goals and objectives and modifications to meet the child's social/psychological and counseling needs. The child's IEP was adequately and thoughtfully prepared to provide for the child's needs. He is offered a placement at ACES. The ACES program will permit the child to participate in the general curriculum although in a different setting. The goals added as a result of the Functional Behavioral Assessment are designed to address

recurrence of the behavior. (Testimony Assistant Principal, Pupil Personnel Director, School Social Worker)

CONCLUSIONS OF LAW

1. There is no dispute 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 his 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. The State Department of Education arranged for an expedited hearing in the matter. The date of the required decision was discussed at a prehearing conference and the child's attorney chose not to have the matter heard on an expedited basis. Both attorneys discussed the possibility of seeking an advisory opinion and declined to proceed to hearing on December 6, 2004.
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 public agency (school IEP team) has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with 20 U.S.C. § 1415(k)(4)(C). The hearing officer is subject to the identical standards required of the IEP team in making their 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 his ability to understand the impact and consequences of the behavior subject to disciplinary action; or impact the child's ability to control his behavior.

Applying these standards to the Hearing Officer review of the IEP team manifestation determination consideration of the relevant exhibits and testimony provided in the record follows: (1) The evaluations are Dr. Weidner's Psycho-Educational Assessment dated 2/8/03, Exhibit B-4, conducted as part of a triennial review and Dr. Glass' evaluation conducted in January of 2004 (Exhibit B-8 pp.10-14) prepared to guide school personnel in formulating an IEP for transition to the LEA's high school. The evaluation was conducted specifically to assess dangerousness and appropriate placement for the child following suspension for threatening verbal behavior at the school the child previously attended.

Dr Glass' evaluation identifies a mild mannered child with a history of distressed angry behaviors over a period of years. The child has an average I.Q. and average ability for social comprehension and situational reasoning. The evaluator notes he is vulnerable in social conflict situations. The evaluator states the child is able to follow safety rules; notes his limitations in understanding the impact and consequences of his behavior; and notes the child has less control over his emotions and impulses than the average person does, but he is rational and without thought disorder or paranoid agenda. The psychologist believes the child's ability to withstand conflict can improve as his emotional health improves and he shows significant psychological maturation. Dr. Glass' recommendations were implemented in the child's IEP upon placement at the LEA's school. There are recommendations for, change in the child's educational setting, psychotherapy outside the school setting, life skills instruction and crisis intervention.

Dr Glass' finding that the child is limited in his ability to understand the impact of and consequences of his behavior is the most troubling aspect of the psychological evaluations. The school team, however, engaged a number of strategies to make clear the behaviors and conduct that are expected and the consequences that would follow violation of the rules. Strategies include, staff members shadowing the child during the time he was introduced to the school, consultation with the assistant principal, counseling, and life skills curriculum. The child's entire school record demonstrates his assimilation of the program and improved appreciation of the consequences of his conduct. The record and testimony document his progress in all aspects of his conduct and his social and academic school experience. The conclusion required by 20 U.S.C. § 1415 (k)(4)(C)(ii)(II) is that supports and strategies provided to the child improved his ability to process consequences therefore the child's disability did not so impair his ability to understand the impact and consequences his actions or his ability to control his behavior.

4. The parent/child had the opportunity to present information which effects the child's behavior at the manifestation determination as required by 20 U.S.C. § 1415(k)(4)(C)(I), and on other occasions. Such information could have been presented at the manifestation IEP but preferably earlier. An evaluation prepared by Dr. Glass , Exhibit B-8, states there is little information [about home factors] on which to base a conclusion that outside factors [beyond the school setting] interfere with the child's success in school or ability to control his behavior. The parent had direct involvement in the evaluation commissioned to assess the child's status following a school suspension and could have provided relevant information if she wished. Dr. Glass cites indicators from previous testing which indicate outside/factors impact the child's conduct. Dr. Weidner's evaluation Exhibit B-4 places the child in the high risk range on a number of psychological measures. The family has not been forth coming with critical information that could have assisted the school team to be alert or plan for emotional changes affecting the child when he started medication. There was no testimony or evidence presented at the hearing by an expert or otherwise, asserting that medication impaired the child in anyway.

5. The testimony and record provide information obtained by way of observation as required by the statute. There are progress reports based, in part, on observation; paraprofessional shadowing, reports of the child's conduct in meetings with the school, social worker and assistant principal. The child testified at the hearing and was sincere, well spoken and credible. His testimony of the event, while somewhat different from the compilations in the assistant principal and police reports (B-11, B-21) is not necessarily inconsistent with those reports. The child claims he initially got the stick believing the student with his several friends standing nearby might attack him when he had to pass them, to move to other areas of the building. The child's testimony that he overheard another inflammatory statement from the student he attacked prompted him to hit the kid, is also credible. The child is credible in his assessment that the incident was a continuation of a previous dispute between the student who was attacked and the child's girlfriend. (Testimony, Child)
6. Approximately three weeks prior to November 4, 2004, the attack, the assistant principal warned the child, his girlfriend and the student who was attacked not to engage in inappropriate arguments. (Testimony, Assistant Principal)
7. The child's IEP and placement were carefully drafted and modified to meet the child's individualized needs. The staff was exemplary in providing a program in the least restrictive environment. The educational services, supplementary services and behavior intervention services were consistent with the child's IEP. The child exhibited progress in all aspects of his academic and social goals. The pupil personnel director and the social worker both testified they knew the child as a middle school student and observed growth, maturity and improved ability to handle conflict since that time. In October, the program was modified to reflect the success the child was experiencing. After the IEP modification the staff maintained an appropriate amount of observation, guidance and support. No inference is drawn that the change in program somehow made the child more vulnerable to engage in the conduct which resulted in suspension. The behavior which resulted in suspension/expulsion was way beyond the scope anyone would expect from the child given the extent of the disability. No amount of supplementary aids and services or additional behavior strategies would have been appropriate given the manifestation of the child's disability. The school team acted appropriately to address the initial conflict between the attacked student and the child and had reason to believe the child would come to the assistant principal if the problem continued. (Testimony, Assistant Principal, Pupil Personnel Director, Social Worker)
8. The attorney for the child argues the behavior at issue is the exact kind of behavior identified in the IEP therefore it is a manifestation of the child's disability. (Tr. p.7) 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 plan to restrict all students with a emotional disturbance identification to stringent programs because of any behaviors that could be explained in hindsight as behaviors that could occur as the result of their identified disability. Behavior is just

a part of the child's IEP which addresses, high absenteeism, problems completing work, risk of academic failure, difficulties with attitude and study habits in class.

9. At the hearing the parties stated the parent/child agreed to accept homebound instruction as a condition of delaying the expulsion hearing. The hearing officer had no knowledge whether the child's placement at the time of the hearing continued by agreement of the parties or as a change of placement made under 20 U.S.C. § 1415(k)(1)(A)(ii)(I). 20 U.S.C. § 1415(k)(1)(A)(ii) provides for the placement in an interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for no more than 45 days if the child carries a weapon to or at school, or on the school premises. The parties disagree whether the stick (Exhibit B-29) is a weapon within the meaning of 20 U.S.C. § 1415(k)(1)(A)(ii)(I). The attorney for the child argues the stick is not a weapon within the meaning of the statute. The term "weapon" as defined at 20 U.S.C. § 1415(k)(10)(D) has the meaning given the term "dangerous weapon" under the paragraph (2) of the first subsection (g) of section 930 of title 18, which states "dangerous weapon" means a device, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

The school removal/suspension/expulsion policy, Exhibit B-19 pp.1-2, defines "deadly weapon" as any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles. The term "dangerous instrument" is defined as any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury, and includes a motor vehicle, and a dog that has been commanded to attack.

It is expected parties in opposition to one another would dispute the objects which are intended to be defined by the statute as weapons. The attorneys were asked to present any case law which defined such a stick as a weapon, none were presented. The stick, however, does not meet the school handbook definition of weapon, in fact many objects found on the school premises, a board from the wood-shop or even a heavy book when used improperly can cause serious bodily harm or death. The items commonly found on school property are not intended to be defined as weapons and not likely to be what congress intended when it drafted the statute.

20 U.S.C. § 1415(k)(6)(A)(i) provides, a parent can appeal any decision regarding placement. The child's attorney filed a request to invoke Stay Put dated November 30, 2004. The LEA opposed the request on December 7, 2004. 20 U.S.C. § 1415(k)(7) provides the child shall remain in the interim alternative educational setting pending the decision of the hearing officer 20 U.S.C. § 1415(k)(6)(b)(ii), states when reviewing the decision under (1)(A)(ii) to place the child in the interim alternative educational setting the hearing officer shall apply the standards set out in paragraph (2). 20 U.S.C. § 1415(k)(2) provides a hearing officer may order a change in placement to an interim alternative educational setting for 45 days if the hearing

officer determines (A) that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or others; (B) considers the appropriateness of the child's current placement; (C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services and that the interim alternative educational setting meets the requirements of paragraph 3(B) which provides any interim alternative educational setting in which the child is placed shall (i) be selected so as to enable the child to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP and then permit the child to meet the goals set out in the IEP and include services and modifications designed to address the behavior described in (1) so that it does not recur.

10. The LEA met their burden to demonstrate by substantial evidence that maintaining the child's placement is substantially likely to result in injury to the child or others. The testimony at the hearing was sufficient for an the hearing officer to issue a written order on January 17, 2005 to place the child in an interim alternative educational setting pending the final written decision in the matter. The parties were notified it was necessary to order a transcript of the hearing which was received, prior to issuing a full written decision in the matter.
11. The LEA has made reasonable efforts to minimize the risk of harm in the current placement. They demonstrated, despite careful planning ongoing monitoring of the student, his behaviors can escalate very rapidly, the testimony of the assistant principal is that to place a shadow on the child, who is a large 18 year old, as they have done in the past, may not be a sufficient deterrent should he decide to go after someone. At the time the child attacked the other student, whether or not the behavior was provoked by the other student, the child did not show his anger by stomping down the hall erratically, rather he quietly obtained the stick from a janitor's closet, hid it from sight and simply attacked the other student without warning. The problem occurred in a hallway full of other students as they passed to their classes; it is possible it may be difficult to protect the child from retribution should he return to classes in the high school.
12. School staff testified the student would be able to continue his classes with all of his special education supports and services in the ACES program and still be able graduate on time. The IEP has been revised to include goals and objectives and modifications to meet the child's social/psychological and counseling needs. The child's IEP is adequately and thoughtfully prepared to provide for the child's needs. He is offered a placement at ACES. The ACES program will permit the child to participate in the general curriculum although in a different setting. The goals added as the result of the Functional Behavioral Assessment are designed to address recurrence of the behavior. The interim alternative placement meets the requirements of subsection 20 U.S.C. § 1415(k)(3)(B).

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.
2. The school team demonstrated the proposed interim alternative educational setting is appropriate and meets the statutory requirements.