

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

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Appearing on behalf of the Board: Attorney Valerie E. Maze
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Appearing before: Attorney Patricia M. Strong
Hearing Officer

FINAL DECISION AND ORDER

ISSUE

1. Did the Board demonstrate that the student's behavior on January 6 was not a manifestation of his disability?

PROCEDURAL HISTORY

The Parents' attorney filed this expedited hearing request on January 26, 2005. Hearing Officer (hereinafter HO) Exhibit 1. A prehearing conference was held on February 4, at which time a hearing date on February 18 was selected at the mutual convenience of the parties. The Parents filed an exhibit list with one exhibit, identified as P-1, Opinion Letter of Anna Gomberg, M.D. Dr. Gomberg was not on the Parents' witness list. The Board objected to the filing of the exhibit until a ruling was made on the admissibility of the document. The Board also objected to the presentation of testimony by Deborah Osinoff, C.S.W. The Board claimed that the opinions of Dr. Gomberg and Ms. Osinoff were not offered at the manifestation review PPT meeting and, therefore, were not admissible at the due process hearing. The Board filed Exhibits B-1 through B-8, including B-3a and B-7a, which were entered as full exhibits at the hearing. After hearing argument regarding the admissibility of Exhibit P-1, the Hearing Officer ruled it would be marked for identification only because it was hearsay and the doctor was not available for cross-examination. The Parents' attorney later withdrew the exhibit without ever placing it in the record. Ms. Osinoff was permitted to testify over the Board's

objection. In addition to Ms. Osinoff, the Parents presented testimony from Jeffrey DeTeso, school psychologist, and the Mother. The Parents rested their case. The Board presented testimony from Mr. DeTeso and Stacey Gross, high school administrator. The Board rested its case. The Parties were asked to file post-hearing briefs by March 8, which they did. Since the decision deadline was March 12, which is a Saturday, the Hearing Officer stated that the mailing date would be the next business day, Monday, March 14.

SUMMARY

The Student is a sixteen-year-old eleventh grade student in the public high school. The Student was referred for a psycho-educational evaluation in September 2003, while in tenth grade. At that time he was a regular education student. In November 2003 he was classified as eligible for special education under the category of specific learning disability. The PPT documents from the eligibility determination were not in evidence. In November 2004 an annual review was conducted by the PPT. There were no changes made to the IEP for the November 2004-November 2005 period. On January 24, 2005 a manifestation review PPT meeting was convened to determine whether the Student's actions on January 6 possessing fireworks and creating a disturbance were a manifestation of his disability. The PPT determined they were not and the Student was eligible to continue receiving general education disciplinary actions. The Parents disagreed. They claimed that the IEP did not address all areas of need in particular his attention deficit hyperactivity disorder, which caused low self-esteem, vulnerability to peer pressure, poor decision-making and impulsivity. The PPT met on February 8, 2005 to modify the IEP. The only change was an additional block (58 minutes) of counseling. The two blocks of counseling were to be done by the social worker instead of the school psychologist. The team declined to add or change any goals and objectives. The PPT reaffirmed its January 24 manifestation determination. The burden of proof is on the Board to demonstrate that the Student's behavior was not a manifestation of his disability.

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 16 years old (DOB 7/30/88) and has been enrolled in Greenwich public schools since grade five. Exhibit B-3.
2. In September and October 2003 the Student (also referred to as R.) received several evaluations by school personnel after a referral by a PPT. Mr. DeTeso performed a psychological evaluation in September. Exhibit B-1; Testimony of Mr. DeTeso. An educational evaluation was performed in September and October by Michael Fass to determine academic achievement levels. Exhibit B-2. William J. Quinn, social worker, performed a social work assessment in October 2003. Exhibit B-3.

3. In the psychological evaluation, Mr. DeTeso described the reason for referral:

R[.] was referred to the Pupil Personnel Team (PPT) by the school for a psychoeducational evaluation. Reasons for referral include distractibility, hyperactivity, impulsivity, oppositional behavior, and poor reading and spelling skills. The purpose of this evaluation was to determine whether a learning disability, an emotional disturbance, or attentional issues could be contributing to R[.]’s school difficulties.

Mr. DeTeso administered the following measures: clinical/diagnostic interview with R.; clinical/diagnostic interview with Mother (Barkley ADHD structured interview); review of records; Wechsler Intelligence Scale for Children – Third Edition (WISC III) – age norms; Beery-Buktenica Developmental Test of Visual-Motor Integration (VMT); Behavior Assessment System for Children – Self Report (Adolescent – BASC-SRP; Behavior Assessment System for Children – Parent Rating Scales (Adolescent) – BASC-SRP; Brown AADD Scales (Adolescent); Conners’ Continuous Performance Test – II; Conners’ Parent Rating Scale – Revised (S); Conners’ Teacher Rating Scale – Revised (S); Wisconsin Card Sorting Test; Stroop Color and Word Test; The Thematic Apperception Test (TAT); Human Figure Drawings (HFD); and Sentence Completion. Exhibit B-1. Among the background information reported were several situations in which his behaviors had resulted in unfortunate circumstances, including police involvement. “Upon exploration of these, issues, R[.] described himself as impulsive and lacking forethought as to the possible consequences. In addition, R[.] has been suspended from school on different occasions for fighting and improper school conduct.” Id. Mr. DeTeso noted regarding the personality assessment, the TAT, HFD and Sentence Completion tests:

R[.]’s responses to the projectives indicate a young man who struggles with self-esteem issues and feelings of inadequacy. When he is confronted with situations where he feels misunderstood, vulnerable, or unable to solve problems independently, he reacts with frustration, anger, and eventually, oppositional/defiant behavior. In fact, oppositional behavior has been noted by his parents, teachers, and himself. . . . In social situations, projective themes suggest that R[.] seeks peer acceptance. This need, coupled with his poor self-esteem, underdeveloped social skills (BASC-PRS), peer pressure, and “fitting in” has resulted in what R[.] has referred to as his “poor decision making” and what {Mother} endorsed as Conduct Problems (BASC-PRS). While R[.] expressed embarrassment regarding these situations, his impulsive behaviors suggest poor problem-solving skills, defense mechanisms, and self-confidence.

Id. In his summary Mr. DeTeso concluded that:

His overall cognitive functioning falls within the Average range. . . . Visual-motor integration evaluation, as well as review of handwriting, also suggests poorly developed fine motor skills. Attentional testing indicated that R[.] presents with ADHD symptomatology, with particular concerns in the area of inattention. . . . Personality assessment suggests R[.] presents with diminished self-esteem, feelings of inadequacy, and oppositional/defiant behavior. Underdeveloped social skills, poor self-esteem, and ineffective problem-solving strategies/defense mechanisms appear to impact his interpersonal relations.

Id. At the hearing Mr. DeTeso claimed that R.'s disability was a specific learning disability in the area of writing, which had no impact on his conduct on January 6, 2005. This testimony is inconsistent with his psychological evaluation performed only 15 months prior to the conduct in question.

4. In October 2003 Mr. Fass administered the Wechsler Individual Achievement Test (WIAT- II). R. scored in the average range on only 2 of 10 subtests: reading comprehension and numerical operations. He scored in the low average range in 5 subtests: basic reading, pseudoword reading, reading composite, math reasoning and math composite. He scored in the low range on the remaining 3 subtests: spelling, written expression and writing composite. Exhibit B-2.

5. Mr. Quinn conducted a social work assessment in October 2003. He interviewed the Parents and the Student and reviewed records, presumably school records. The reason for the referral was described as: "R[.] was referred for evaluation by the PPT in order to understand those factors underlying his poor and deteriorating academic performance, as well as his inattentive and inappropriate behavior in the classroom." Exhibit B-3.

6. The IEP from November 2003 is not in the record. The May 12, 2004 PPT meeting document indicates that R.'s primary disability is a specific learning disability. The purpose of the meeting was an annual review. The start date of original service is listed as "10/28/04." Exhibit B-3a. Since the PPT occurred more than five months prior to that date, it is presumed that service began on 10/28/03 or thereabouts, which would be consistent with the evaluations referenced in paragraphs 2-6. There are no behavior issues mentioned under the Current Functioning/Present Level of Educational Performance pages. The "Pre Academic/Other Academic/Non Academic Areas" category lists as concerns/challenges/needs: "R[.] continues to forget to do things. He has had some difficulty remembering everything he has studied." The "Social/Emotional" area states as to concerns/challenges/needs: "Although R[.] wishes to succeed, he continues to present with ADHD issues in class and at home. These lead to poor organization, follow through, incomplete homework, and poor attention and vigilance in the classroom. As a result, R[.] can sometimes present with oppositional

behaviors when he perceives his teachers as singling him out when he has not completed his assignments.” The IEP has five goals, three academic, one transition/education and one social/emotional. The latter goal is: “Annual Goal #5 R[.] will continue to develop more appropriate self-help and self-advocacy skills regarding his academic performance as measured by mastery of the following objectives:”

Objective A: in a counseling session, R[.] will develop and practice more effective communication strategies when dealing with his teachers

Objective B: in a counseling session, R[.] will continue to develop more appropriate problem-solving strategies when he becomes frustrated

Objective C: in a counseling session, R[.] will continue to employ self-advocacy skills and seek out adults when he requires assistance and guidance

Objective D: in the academic setting, R[.] will seek out his teachers and ask for help, clarification, and will verbalize his frustrations appropriately

Id. The Program Summary indicates that R. was to receive one block (58 minutes) of counseling with the school psychologist. This was the equivalent of 34.8 minutes/week. His October 2004 Progress Report indicated satisfactory progress on all four objectives.

Id. Mr. DeTeso testified that he provided the counseling services to R. until the February 8, 2005 PPT meeting, when they were changed to the social worker.

7. On November 23, 2004 an annual review PPT meeting was conducted. The concerns/challenges/needs in the social/emotional area were the same as in the previous annual review. Goal #5 and the four objectives were also the same as before. Exhibits B-4 and B-8.

8. On or about January 6, 2005, R. was arrested and charged by the Greenwich Police Department with Possession of Fireworks and Conspiracy to Commit Disorderly Conduct. Exhibit B-7 at 9. In essence, it is alleged that he brought one package of firecrackers into Greenwich High School under a “conspiracy” with other students who eventually set off the package in a trash/recycling barrel in the student center. Testimony of Ms. Gross. Mr. DeTeso claimed to have more information about the Student and perhaps about the incident in question, but he claimed a statutory and common-law privilege of confidentiality. The statutory claim was overruled because he was not a state licensed psychologist, as required by the statute. Before a ruling was issued on the common-law privilege, the attorneys agreed not to question Mr. DeTeso on the matters he claimed were privileged. The Student did not testify because of the pending criminal case. As a result the facts on the incident were somewhat vague. Apparently the night before the incident some of the high school students, including R., exchanged e-mail messages and R. agreed to bring a package of firecrackers to school on January 6. He did not set them off. Other students set them off prior to the start of school, which had a late opening that day. There was some dispute over whether R. was involved in videotaping

the occurrence in the student center when the firecrackers were ignited in a recycling bin. There was no injury to anyone and no property damage to the school, except perhaps the recycling bin. Testimony of Ms. Gross. She testified as to the possible consequences that might have occurred in such an incident, such as damage to hearing, vision, possible physical injuries, fright, anxiety and panic of students and others in the student center, which has tables for 600-700 students and may have as many as 2000 students passing through it during certain times of the day, as well as property damage. She testified that she believed R. understood all those potential consequences when he brought the fireworks to school. On that same day, the school administration (hereinafter “the Board”) suspended R. for a period of ten (10) days, from January 6 to January 21, 2005. Id. and Exhibit B-7 at 10.

9. On January 24, 2005, a PPT meeting was convened for a manifestation determination. Those attending were Ms. Gross, the Parents, the Student, Debbie Baran, regular education teacher, Laura Boyd, special education teacher, Mr. DeTeso and Arianne Haley-Banez, school nurse. The school members of the team concluded that the behavior on January 6 possessing fireworks and creating a disturbance was not a manifestation of R.’s disability. The record indicates that the school team based its decision on the Cognitive evaluation of September 2003 (Exhibit B-1), Achievement test October 2003 (Exhibit B-2), report cards and review of records. They determined that R.’s current IEP and placement were appropriate and consistently implemented. They did not explain their reasoning. Exhibit B-5.

10. On January 26, 2005 the Parents filed this due process request to review the manifestation determination. Exhibit HO-1.

11. On February 8, 2005 a PPT meeting was held to review R.’s program according to the notice. Exhibit B-6, p. 1. The cover page of the PPT meeting document indicates two reasons for the meeting: review IEP/Program and manifestation determination. Id. at 3. The written prior notice contains the first reference to the Student’s ADHD disability. The school-based team used the meeting to “clarify” and “revisit” the manifestation determination. Id. at 4-5. They endeavored to explain how Goal #5 reflected all the issues brought up by the Mother and supported in Exhibit B-1. They also used the Student’s behavior since he returned from the suspension for the fireworks episode to indicate that since he had not repeated the behavior, it was evidence that the behavior was not a manifestation of his disability. “The team does not see evidence to add a specific peer pressure objective at this time. The team agreed that Ms. Polizzi [social worker] would encourage R[.] to address both teacher and peer relationships during their sessions.” One additional counseling block (58 minutes) was added to the Program Summary, for a total of two blocks, which is the equivalent of one hour and “9.5999” minutes/week. Id. at 7. The IEP goals and objectives were not changed.

12. Mr. DeTeso testified that the team believed that the IEP was appropriate because it addressed all curriculum areas and that the Student’s disability was a writing disability not a processing disorder that affected cognitive functioning. He also testified that the behavior of planning the night before to bring in fireworks to school negated the

impulsivity aspect, which is a feature of the Student's disability. He also stated that impulsive, poorly thought out decisions are R.'s "M.O." Mr. DeTeso, Ms. Gross and Laura Boyd met prior to the January 24 PPT meeting and agreed the behavior was not a manifestation of the Student's disability. The PPT meeting was less than 30 minutes. The Parents were provided with their procedural safeguards. The Parents' position was heard and the school-based team gave their decision. Testimony of Mr. DeTeso and Ms. Gross; and Exhibit B-5.

13. Ms. Osinoff testified that the "impulsiveness" that accompanies ADHD does not necessarily require a temporal connection between thought and action. Rather, she indicated that, in her professional opinion, the Student's "impulsivity" from his ADHD resulted in him being the type of child who does not "think things through", *i.e.*, he does not think about all of the consequences of his actions. Susceptibility to peer pressure, need to fit in and low self-esteem are features of his ADHD. Low self-esteem is also a feature of the learning disability. That and social immaturity go "hand-in-hand" and affect the ability to understand consequences of and to control behavior. His actions on January 6 were definitely affected by his disabilities.

14. The Mother testified that consequences do not mean anything to R. He doesn't think about them when he does things. She gave an example near in time (November and December 2004) to the fireworks incident. R. took the car without permission on three separate occasions even though he did not have a driver's license. On the third occasion he was stopped by the police and issued a \$250.00 ticket. He later got his driver's license in December. She is fearful whenever R. leaves the house. She does not know what he is going to do.

CONCLUSIONS OF LAW

1. This hearing is convened pursuant to section 1415(k)(6) of the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400, et seq. ("IDEA") and Conn. Gen. Stats. Sec. 10-76h. The IDEA sets forth the scope of review for the hearing officer in this expedited hearing:

In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C) [of §1415(k)].

20 U.S.C. §1415(k)(6)(B)(i).

2. The relevant statute concerning the PPT manifestation review is Title 20 U.S.C. Section 1415 of the IDEA, which provides in relevant part:

(k)(4)(C) Conduct of Review.—In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child’s disability only if the IEP Team—

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including--

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child’s IEP and placement; and

(ii) then determines that—

(I) in relationship to the behavior subject to disciplinary action, the child’s IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child’s IEP and placement;

(II) the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action.

3. If any of the factors set forth above is not met, the behavior may not support the IEP Team’s decision determining “no manifestation.” See Richland School District v. Thomas P., 32 IDELR 233 (W.D.Wis. 2000).

4. The Parties agree that the student qualifies for and is entitled to receive a free and appropriate public education (“FAPE”) with special education and related services under the provisions of state and federal laws. Connecticut General Statutes, Sections 10-76 et seq. and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401, et seq. The Parents contend that R. is a child with two disabilities: specific learning disability and other health impairment (ADHD). This is borne out by the psychological evaluation in September 2003 by Mr. DeTeso. The Board contends that the primary disability is specific learning disability and that other health impairment (ADHD) is a secondary disability. A “child with a disability” is defined under the federal law as “a child evaluated in accordance with Sec. 300.530-300.536 as having . . . an other health impairment, a specific learning disability . . . and who, by reason thereof, needs special education and related services.” 34 C.F.R. 300.7(a)(1). There is no distinction in IDEA or state law regarding primary versus secondary disabilities. It is not clear from the record how that determination was made, but in any event, the Board is required to

develop an IEP in all areas of need, including behavior. 34 C.F.R. Section 300.346(a)(2)(i).

5. The IDEA defines related services in 20 U.S.C. Section 1401 (22) as: “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes . . . psychological services, . . . [and] counseling services. . . .” See also 34 C.F.R. Section 300.24(a).

6. The Student clearly had related service needs related to both disabilities, which impacted his self-esteem, decision-making, impulsivity and vulnerability to peer pressure. These needs were not adequately addressed in Goal #5, which pertains only to relationships with teachers and not peers. The PPT’s finding that the Student’s IEP was appropriate on January 24 is not supported by the evidence. The IEP was changed to add an additional block of counseling only two weeks after the manifestation determination review. The information supporting the change was gathered prior to the student’s January 6 suspension. No additional goals or objectives were added to the IEP, therefore it is still deficient. While the amount of counseling time may be sufficient, there is nothing in the goals and objectives that addresses the needs outlined above.

7. The determination that the Student’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action is not supported by the record. The PPT’s definition of impulsivity to include only behavior that occurs immediately in a situation and not over time is too narrow. The better definition is found in Ms. Osinoff’s testimony. The “impulsiveness” that accompanies ADHD does not necessarily require a temporal connection between thought and action. Rather, the child’s “impulsivity” results from not “think[ing] things through”, *i.e.*, he does not think about all of the consequences of his actions.

8. The determination that the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action is based on the assumption that the child would repeat the behavior in question if he could not control it. Since the Student has returned to school on January 24 he hadn’t repeated the behavior in question. This is an insufficient basis on which to make the necessary conclusion.

FINAL DECISION AND ORDER

1. The Board has failed to establish that the Student’s conduct on January 6 was not a manifestation of his disabilities.
2. The PPT shall convene and modify the IEP in accordance with this decision.