

April 2, 2018

Final Decision and Order 18-0252

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Connecticut Technical High School System

Appearing on behalf of the Student:	Parent, <i>pro se</i>
Appearing on behalf of the Board	Fred Dorsey, Esq. Kainen, Escalera & McHale, P.C. 21 Oak Street, Suite 601 Hartford, CT 06106
Appearing before:	Melinda A. Powell, Esq.

FINAL DECISION AND ORDER

ISSUE:

1. Was the Student's behavior a manifestation of the Student's disability?

PROCEDURAL HISTORY:

The Student initiated this expedited special education due process matter on December 19, 2017. The Hearing Officer was appointed on December 19, 2017. A Prehearing Conference was convened on December 21, 2017. The issue for the hearing was identified by the Hearing Officer and no objections were raised by the parties. The initial mailing date was set to February 14, 2018.

Hearings were held on January 9, 12, and 29, February 8, and March 15. The mailing date was extended for good cause, *in part*, to allow the Parent's expert witness to conclude testimony and allow for cross-examination. The Hearing Officer found that the extension did not harm the Student, due to the availability of an alternate, interim placement offered by the Board, and the overarching requirement of ensuring a fair hearing procedure to both parties. The evidentiary portion of the hearing was completed on March 15, 2018. The Board and Parent submitted closing statements via email on March 16, 2018.

Parent exhibits 1-34, 40, 42, 46, 47, 48, 49 were admitted into the record, in full. Parent exhibits 36, 37, 38, 41, 43, 44, 45, 50, 53 and 54 were excluded by the Hearing Officer. Board exhibits 1-29 were admitted into the record in full. The due process complaint was entered into the record as HO-1, and a demonstrative exhibit which showed the anatomy of the brain was also entered as HO-2. The Parent later submitted P-35, the same exhibit as HO-2, and was also received for demonstrative purposes only.

The following witnesses were called by the Parent: the Student, the Student's Parent, the school psychologist, the Special Education Consultant, the school social worker, the

Assistant Principal, the Department Head, and Dr. Robert Reynolds, the Parent's expert witness. The Board called no witnesses.

All motions and objections not previously ruled upon, if any, are hereby denied and/ or overruled. To the extent there was conflicting testimony, the Hearing Officer finds the testimony of the witnesses cited herein more credible than witness testimony not relied upon.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F. Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985).

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.* and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student is eligible for special education under the category of OHI/ADD/ADHD. (P-5)
2. The Student is a sixteen year old, tenth-grade student at Vinal Technical High School. (P-5)
3. In September 2016, the Student was diagnosed with ADHD, Depression and Anxiety. (P-1)
4. In November 2016, the school psychologist completed a psychoeducational assessment, when the Student was in ninth grade at Vinal Tech, to determine strengths, weaknesses and eligibility. (P-1). Areas assessed included cognitive, attention/behavior, social/ emotional and executive functioning skills. A review of prior records revealed primary concerns in the area of maintaining attention, observed by the Parent, and learning problems, identified by teachers. (Id.). During testing, the Student was noted as quiet, but fidgety, and had observable difficulties concentrating. (Id.) Full scale cognitive ability on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) was found to be in the average range, as were the results on most of the testing. Id. Weaknesses were found in math and cognitive processing speed. (Id.)

5. The school psychologist also administered the Behavior Assessment System for Children (BASC-3), which is used to evaluate the behavior of children and young adults. It measures numerous aspects of behavior and personality including adaptive and clinical dimensions. (Id.) The Student reported clinically significant scores on attitude to school, atypicality, and attention problems. (Id.) The Parent reported the Student was in the average range on scales of hyperactivity, aggression, conduct problems, anxiety, depression, somatization, atypicality and withdrawal. (Id.) Overall, the ratings indicated index scores in the average range. (Id.). Adaptive skills were also noted in the average range. (Id.) Executive function was noted in the at-risk range. (Id.) Impulsivity was not a clinically significant issue identified through the evaluation. (School Psychologist Testimony)
6. Three teachers also completed the rating scales. (Id.) Areas of concern were attention problems and learning problems. Hyperactivity was rated differently by each teacher, from average to clinically significant. (Id.)
7. The Behavior Rating Inventory of Executive Function (BRIEF-SR) was also administered, which measures eight aspects of executive functioning, including inhibition, planning/ organization, and task completion. (Id.) The Student noted issues on the inhibition scale by agreeing with statements such as: “I have trouble sitting still.”, “I act too wild or out of control.” and “I don’t think of consequences before acting.” However, on the parent scale, it was noted that emotional control and inhibition were average. (Id.) Likewise, teachers rated inhibition in the average range. High elevations were in the organization, planning, working memory and task initiation. (Id.)
8. A student observation in the classroom was performed on December 12, 2016. No behavioral issues were noted. (B-4)
9. Consent was given by the Parent on January 4, 2017 for special education services. (B-8). The initial IEP was developed at that time.
10. An interview of the Student and Parent was completed by the school social worker on January 4, 2017. (B-6) The Parent did not express any concerns regarding impulsivity at that time. (Id.) Rather, concerns were expressed regarding poor attention span, inability to organize thoughts, difficulty with task initiation, lack of focus and short-term memory. (Id.) No recommendations were made to address any problems with impulsive behavior. (Id.)
11. On October 18, 2017, the Student was seen in a follow-up appointment with his doctor. Diagnoses included ADHD, Depression, Anxiety, Learning Disorder and Executive Functioning Disorder. (P-3) The doctor requested that the Student receive: support for completing all work, specialized math instruction, specialized instruction in Electrical Shop, especially in math, extended time and a quiet setting for testing, help with scaffolding of long term projects and papers, neuropsychological testing, and direct instruction in writing. (Id.) No issues were identified regarding behavior among the recommendations by the Student’s doctor. (Id.)

12. A planning and placement team (PPT) meeting was held on November 2, 2017 for a program review. (P-5) Common concerns included off-task behaviors, which led to classwork not being completed. Teachers also noted that while support is offered, the Student generally refused assistance in most classes. The Student had just begun to accept help in math. A Functional Behavior Assessment (FBA) was planned to specifically target time to initiate a task, prompts to begin and continue work, task avoidance or off-task behavior and work completion. (P-5) Present levels of performance were recorded in the IEP. Specific weaknesses were identified in task initiation, organization and work completion, requiring specialized instruction. (Id.) The Student was achieving passing grades in all classes, but required reminders and support. The Student's performance in academic/ cognitive areas were age appropriate. (Id.) In the Behavioral/ Social/ Emotional area, teachers noted struggles with organization and self-advocacy. (Id.)

13. Eight days later, on November 10, 2017, the Student attended an initial consultation with Dr. Reynolds, a private psychologist. (Reynolds Testimony) Presenting problems were that the Student had some significant problems in school with paying attention, staying focused, his attitude towards school was deteriorating, he was having particular trouble in math, and the Student and family were frustrated. (Reynolds Test.) He reviewed the psychoeducational report at that time. The main issue that became apparent to Dr. Reynolds was in the area of executive function, which was highlighted by many people, including the Student, Parent, and teachers. Dr. Reynolds interpreted the report to mean that executive functions were significantly underdeveloped, most notably in task initiation, task follow-through, time management, organization, and impulsivity/hyperactivity.

14. Dr. Reynolds performed an EEG test on the Student on November 14, 2017. (P-9, Reynolds Test.) Dr. Reynolds testified that the Student's test showed increased activity in certain areas of the brain. (Reynolds Test.) However, an EEG is not a diagnostic tool used for determining a child's diagnosis; rather, Dr. Reynolds uses it to guide treatment. (Id.)

15. On November 15, 2017, the Parent emailed the math teacher. (P-14) She reported that the Student reported he was doing well in math class and his teacher knew how to teach him so he could learn. This was the first time the Student had raved about his learning in school. (Id.)

16. On November 27, 2017, the Student received a session of treatment at Dr. Reynolds's clinic. (P-16) Ongoing symptoms/ concerns were noted to be homework battles, attentional/ focus difficulties, periods of "spacing out", underdeveloped executive functions and below average performance in writing and math. (Id.) No behavioral issues related to impulsivity or ADHD were noted. (Id.)

17. Prior to November 28, 2017, the Student was in math class and went to the classroom sink and saw a cup with a straw in it. He put a numbing cream on the straw of the cup, unbeknownst to the teacher. (Student Test.) He received the cream from his orthodontist. (Student Test.) On November 28, 2017, at approximately 7:30 a.m., the

math teacher drank from the cup and felt her lips and tongue go numb. (Asst. Principal Test.)(P-17)

18. Two days later, the Student asked the teacher if her mouth had gone numb the other day, and admitted to putting the cream on the straw. (Student Test., P-17, P-20, P-21). The teacher reported the incident to the administration. (Asst. Principal Test.) During the investigation by school administrators, the Student stated that another Student also had a tube of the gel, but initially refused to identify the Student. (Asst. Principal Test.) The Student also initially insisted that the gel was liquid Novocaine. (Id.)
19. The Student received a 10 day out of school (OSS) suspension, and was recommended for expulsion. (B-23)
20. A manifestation determination PPT meeting was held on December 13, 2017. The Student's IEP records were reviewed prior to the meeting by the Department Head. (Department Head Testimony). The PPT considered two questions: (1) did the behavior have a direct and substantial relationship to the Student's disability?; and (2) was the IEP implemented? (B-21, Department Head Test.) The PPT decided that the behavior was not a manifestation of the Student's disability. (Id.) The IEP had been implemented properly. (Id.)
21. None of the school members of the PPT had observed a pattern of misbehavior prior to the incident. (Department Head Testimony, Educational Consultant Testimony, Asst. Principal Testimony) School records are consistent with these witnesses' testimony. (B-3, B-17, B-23). There were scant behavioral issues in the prior twelve months. (Id.)(P-40)(P-24)
22. The Student was aware of the effects of the numbing agent because he received it from the orthodontist to alleviate pain or irritation caused by dental braces. (P-18) The Student and Student's friends would also use it during lunch periods on various occasions because the numbing effect was funny. (Student Test.)
23. Dr. Reynolds is the founder of the Reynolds Clinic, located in Middletown, which provides a full range of educational assistance including diagnosis, treatment and consultation for students experiencing behavioral difficulties. (P-7; Reynolds Test.) He specializes in alternative therapies. (Id.)
24. Dr. Reynolds opined that the Student's behavior on prior occasions in the cafeteria was primarily due to low self-esteem and a desire to fit in with his peers. (Id.) Also, the Student's refusal to identify another student who also had a tube of the gel was not ADHD related. (Id.) However, Dr. Reynolds concluded that the incident in math class was related to the Student's ADHD. (Id.)
25. Dr. Reynolds testified that in drawing a line between normal teenage behavior, which may be impulsive at times, and impulsive behavior caused by ADHD, is the degree to which the behavior impacts the student. (Id.) He could not opine on where the line is drawn, but stated that past prior behaviors would be important to the analysis.

However, during testimony, he could not provide any examples of past behavior which would establish such a pattern. (Id.)

26. It is normal to have some inattention, unfocused motor activity and impulsivity, but for people with ADHD, these behaviors are more severe, occur more often and interfere with or reduce the quality of how they function socially, at school or in a job. (B-25)

CONCLUSIONS OF LAW

1. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. A student receiving special education services may be suspended or expelled from school as provided by federal law. If a special education student violates a code of student conduct, the local educational agency may remove the student from his/her educational placement to an appropriate interim alternate educational setting, another setting, or suspension for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.) (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).) A local educational agency is required to provide services during periods of removal to a child with a disability who has been removed from his/her current placement for 10 days or less in the school year, if it provides services to a child without disabilities, who is similarly removed. (34 C.F.R. § 300.530(d)(3).) If a special education student violates a code of conduct and the local educational agency changes the educational placement of the student for more than 10 days, the local educational agency must meet the requirements of section 1414(k).
2. 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. § 1415(k)(1)(E); 34 CFR § 300.530(e)(1)-(2))
3. Parents and local educational agencies may request an expedited due process hearing of claims based upon a disciplinary change of educational placement under section 1415(k). An expedited hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed, and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2)).
4. On direct testimony, Dr. Reynolds opined that the Student's behavior in using the numbing cream with friends in the cafeteria on prior occasions was due to "low self-esteem" and a desire to fit in with his peers. The Student's behavior in math class involving the teacher was exactly the same as the prior incidents with peers.

- Nonetheless, Dr. Reynolds attributes the incident, which is under review in this matter, as an impulsive act consistent with ADHD.
5. Behavior caused by low self-esteem which has resulted from a disability is legally insufficient to support a finding that the behavior is a manifestation of a student's disability. This reason was rejected by Congress when it reauthorized the IDEA in 2004, and circumscribed the manifestation determination to behaviors which are directly linked to the student's disability. "[T]he Act recognizes that a child with a disability may display 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. The intent of Congress in developing section 615(k)(1)(E) was that, in determining that a child's conduct was a manifestation of his or her disability, it must be determined that "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability.'" 71 Fed. Reg. 46720 (Aug. 14, 2006), *citing*, Note 237–245 of the Conf. Rpt., p. 225).
 6. A frequent pattern of prior similar behavior is necessary to draw the conclusion that this Student's disability is the substantial cause of the conduct for which this Student is being disciplined. Dr. Reynolds was unable to identify any prior behaviors by this Student which would support his opinion that the straw incident was an event in a pattern of ADHD induced impulsive behaviors initiated by *this* Student. The prior, same behaviors were attributed to low self-esteem instead. Therefore, the Hearing Officer finds that Dr. Reynolds's testimony was conclusory, unsupported by any predicate underlying facts needed to reach that conclusion. *Student v. Southington Board of Education*, 113 LRP 42841 (SEA Conn 2013) ("General statements describing the Student as being disorganized, impulsive, forgetful and inattentive do not establish that required linkage between the deed and the disability."). Furthermore, because an EEG is not a diagnostic tool used for determining a child's diagnosis the results of the testing presented by the Student's expert was not probative of answering the question of what was the substantial cause of the behavior. Thus, Dr. Reynolds's opinion is an insufficient basis to overturn the PPT's manifestation decision. Rather, the weight of the evidence including documentary evidence by the Student's medical providers, including Dr. Reynolds's records, school records and psychoeducational evaluation, and testimony by school witnesses lead the Hearing Officer to conclude that the Student's behavior was not a manifestation of his disability.
 7. The Parent also argued that Dr. Reynolds was not allowed to present his findings to the PPT at the manifestation review meeting. Assuming, *arguendo*, that the PPT stifled or failed to fully consider Dr. Reynolds' presentation of the test results, such an error was harmless.
 8. The Parent failed to meet the burden of proof necessary for the Hearing Officer to reverse the decision of the PPT. Simply put, the weight of the evidence shows that lack of impulse control was not a significant symptom of the Student's disability as of December 13, 2017, when the manifestation determination was made.

ORDER:

1. The Student's behavior was not a manifestation of the Student's disability.
2. The decision of the PPT at the manifestation determination meeting is affirmed.