

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Greenwich Board of Education

Appearing on behalf of the Student: Parents, Pro Se

Appearing on behalf of the District: Attorney Abby Wadler
Assistant Town Attorney
Town of Greenwich
101 Field Point Road
Greenwich, CT 06830

Appearing before: Attorney Ann F. Bird, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

1. Was the Student's alleged misconduct a manifestation of his disability?
2. If not, should the Student be disciplined as proposed by the Board of Education (i.e., in the same manner as if he were not disabled)?

PROCEDURAL HISTORY

The Student's Request for an Expedited Impartial Special Education Hearing to challenge a manifestation determination of May 3, 2012 was received by the Board of Education on May 22, 2012 (Exhibit Hearing Officer 1). This Hearing Officer was assigned to the case on May 22, 2012. A prehearing conference was conducted on May 31, 2012 at which time a full evidentiary hearing was scheduled for June 13, 2012. The mailing date for the final decision was established to be July 6, 2012.

Both parties submitted witness lists and proposed exhibits. When the hearing was convened on June 13, 2012, the Student's Exhibits P1 through P8 and P10 through P14 were entered as full exhibits and the Board's Exhibits B1 through B15 were entered as full exhibits. The Student withdrew proposed Exhibit P9.

The parties each made an oral opening statement. The Student stipulated that he does not claim that the Student's IEP was not being implemented at the relevant time. In addition, the Student confirmed that he does not challenge the process by which the IEP Team conducted the manifestation determination on May 3, 2012.

The Student presented testimony from Dr. Burton R. Rubin as well as each of his parents. The Board then presented testimony from Special Education Administrator Rosemary Ampha, School Psychologist Dr. Jeffrey DeToso, House Administrator Richard Alessi,

Dean Lorraine Termini, and Teacher Dorothy Sirbano. The parties each waived oral and written argument.

This Final Decision and Order sets forth my findings of fact and conclusions of law. I reviewed and considered all of the evidence presented in this matter. Specific references to certain evidence here are not meant to exclude other evidence. Moreover, to the extent that the Summary, Procedural History and Findings of Fact actually represent Conclusions of Law, they should be considered as such, and vice versa. SAS Institute Inc. v S & H Computer Systems, Inc., 605 F. Supp. 816, 817 (M.D. Tenn. 1985).

SUMMARY

The Student is a seventeen year old senior at the public high school. He has received special education services since the fourth grade under the category of Other Health Impairment because he suffers from attention deficit hyperactivity disorder (ADHD). On March 30, 2012, the Student was involved in an automobile accident resulting from his and his friends' reckless driving on Interstate 95. As a result of the accident, the State Police discovered evidence that the Student was also engaged in selling drugs.

The public high school proposes to expel the Student for possession of drugs with intent to sell in accordance with state law mandate. A manifestation determination was conducted on May 3, 2012. The manifestation determination resulted in a conclusion that the misconduct was not a manifestation of the Student's disability because possession of drugs for sale was not an impulsive or spontaneous act. The Student's parents brought this appeal, claiming that the misconduct was a manifestation of the disability in that it involved impulsivity and/or was related to a diminished inner voice or craving for risky behavior related to the Student's ADHD.

FINDINGS OF FACT

1. The Student is a seventeen year old senior at Greenwich High School. He has been identified as a student in need of special education under the category of Other Health Impaired since December 2003, when he was in the fourth grade. (Testimony of Mother and Exhibit B13, p. 2).
2. The Student's disabling health impairment is Attention Deficit Hyperactivity Disorder. (Testimony of Mother) The Student's disability is exhibited in, among other things, significant attentional and response to inhibition difficulties, including impulsivity, divided attention and a propensity to make careless errors. (Exhibit B13, pp. 16-17).
3. Despite his disability, the Student is enrolled in college preparation courses and is expected to graduate with his peers and go on to a four year college or university. (B10).
4. Each of the Student's three objectives focuses on academic concerns, such as improving test taking and study skills, fulfilling activities for his transition to a four year

college, and choosing an internship. (Exhibit B10). His only special education service is resource room support for three 58 minute sessions per week. (Exhibit B10).

5. At the last annual review meeting in January 2012, the Student's IEP Team determined, among other things, that the Student's behavior does not impede his or other students' learning. As such, the Student does not have a Behavior Intervention Plan and is subject to the same schoolwide behavior/discipline plan applicable to the general student population. He receives no services or accommodations for behavioral or emotional difficulties. (Exhibit 10).

6. The Student had no involvement with the criminal justice system until the incident at issue. (Testimony of Mother). Moreover, he had no significant behavior infractions in high school until his Senior Year. (Testimony of Termini). He earned an excellent academic record, with mostly A's and B's, in his junior year of high school. (Exhibit B5).

7. The 2011-2012 School Year brought trouble for the Student on multiple fronts. His grades fell markedly (Exhibits B5 and B10), and he was disciplined for skipping class, leaving class and plagiarism, all before the incident at issue. (Exhibit B4). His attendance has been marked by frequent unexcused absences, and he has garnered a reputation for not completing his assignments. (Exhibits B7 and B10; Testimony of Sirbono).

8. At some point, the Student stopped taking medication prescribed for his ADHD because of unwanted side effects. (Testimony of Father). On March 15, 2012, his physician Dr. Rubin prescribed a new ADHD medication for him. (Exhibit P9).

9. Although the Student's academic progress and his behavior declined significantly this school year, there was no evidence that the nature or severity of his disability changed since his fourth grade year.

10. On about April 19, 2012, administrators at Greenwich High School learned that the Student was allegedly involved in a serious incident on March 30, 2012. According to a report from the Connecticut State Police, the Student engaged in a reckless car race with another driver on Interstate 95, weaved between cars and ultimately collided with an innocent motorist. (Exhibit B3).

11. When they arrived on the scene of the accident, authorities discovered evidence that the Student was also engaged in selling drugs. They discovered two baggies of white powder thought to be Ecstasy, "multiple" small plastic baggies containing marijuana, and a 100 gram weight probably used for weighing and packaging drugs in the passenger compartment of the Student's car. (Exhibit B3, p. 4). A second batch of "several" small plastic baggies containing marijuana and a glass jar containing marijuana buds were found in the trunk of the car. (Exhibit B3, p. 4).

12. The Student had approximately \$1,000.00 in cash on his person, mostly in small bills. (Exhibit B3, p. 5).

13. Before the authorities arrived at the scene, a passenger from another car retrieved a small scale and packages of different size plastic baggies from the Student's car. (Exhibit B3, p. 4). The Student later conceded that these items belonged to him. (Exhibit B3, p. 5).

14. In addition, the Student threw a bag filled with marijuana from his car immediately after the accident. (Exhibit B3, pp. 5-6).

15. The Student was arrested on six criminal charges associated with the incident: Reckless Driving, Following too Close, Possession of Drug Paraphernalia in a Drug Factory, Illegal Sale of a Controlled Substance, Sale of Illegal Drug and Drug Paraphernalia. (Exhibit B3, p. 6-7).

16. The Student was suspended from Greenwich High School for ten school days for alleged "drug possession with intent to sell." (Exhibit B2). In addition, the school administration proposes to pursue expulsion of the Student for the alleged drug possession with intent to sell, as required by state law. Connecticut General Statutes Section 10-233d(a)(2).

17. The Student's IEP Team, including the Student's parents, was convened on May 3, 2012 to make a manifestation determination concerning the incident. (Exhibit B1). The Team derived part of its understanding of the alleged misconduct from a written report of the incident by the State Police. (Testimony of Ampha). That report does not specify exactly how many small bags of marijuana were found or indicate when the Student acquired the marijuana, Ecstasy and the drug paraphernalia. (Exhibit B3). The IEP Team also heard a report from an administrator that the Student admitted to her that all of the drugs and drug paraphernalia belonged to him. (Testimony of Ampha and Termini).

18. The Student was invited to the manifestation determination meeting but did not attend. (Exhibit B1).

19. The IEP Team also reviewed and considered information about the Student's disability provided by, among others, School Psychologist Dr. DeToso, the Student's parents and the Student's physician, Dr. Burton Rubin, in the form of a letter. (Testimony of Ampha and DeToso). In his letter, Dr. Rubin expressed the opinion that the Student's disability and "documented impulse-control challenges" played a major role in the "automobile accident and drug possession incident." (Exhibit P8).

20. When Dr. Rubin testified during the hearing, he explained that his understanding of the "drug possession incident" was the Student's decision to be present in a car with drugs and friends on the day in question. Dr. Rubin conceded that his opinion would not hold if the Student engaged in "a chain of purposeful behaviors." (Testimony of Rubin).

21. School Psychologist Dr. DeToso, also spoke to the IEP Team and testified at the hearing. He indicated that individuals with ADHD, including the Student, have a propensity to act impulsively and to make quick, careless decisions without regard for the consequences. Dr. DeToso explained his view that the Student's misconduct in possessing drugs with the intent to sell, however, was not impulsive because it involved many distinct actions, each of which offered the Student an opportunity to make a different choice.

22. The IEP Team – excluding the Student's parents – determined that the Student's misconduct in possessing drugs with intent to sell was not a manifestation of the Student's disability because the underlying activities of obtaining a bulk quantity of drugs, weighing and packaging smaller amounts of the drugs in small plastic bags, and exchanging the small bags for money, likely involved a series of purposeful or deliberate acts, with many opportunities to make choices. As such, the IEP Team decided that the Student's misconduct in possessing drugs with the intent to sell could not be characterized as impulsive or as involving a quick, careless decision without regard for the consequences. (Exhibit B1).

23. The Student, like many individuals with ADHD, does have a propensity for impulsivity. He is more likely than others to act quickly without considering the consequences of his deed. (Testimony of Mother and DeToso).

24. The Student's behavior in this case – possession of drugs with the intent to sell – however, was not impulsive and did not involve a careless decision made without regard for the consequences. Instead, his misconduct involved a series of purposeful acts.

25. The Student points out that there was no evidence before either the IEP Team or this hearing officer that the Student's misconduct took place over a long period of time. He argues that in the absence of evidence that the misconduct took place over an extended period of time, the Student's behavior could be characterized as “impulsive” or “quick.”

26. While it is true that there was no specific evidence of the duration of the misconduct, it is reasonable to infer that the Student's activities took place over at least several hours, if not days. The presence of the scale, the jar with buds and at least two separate batches of “several” small baggies containing marijuana, as well as the large amount of cash in mostly small bills strongly suggest that the Student packaged and sold many small bags of marijuana. With each measurement, each package, and each sale, the Student made a decision to engage in misconduct. Even if the misconduct took place on a single day, it was neither impulsive nor an action quickly taken without regard for the consequences.

27. The Student also argued that individuals with ADHD tend to have a diminished “internal voice” to guide them away from misconduct, and that they crave the stimulation and thrill of risky behavior. Although the Student presented published articles that might

support this theory (Exhibits P2 through P7), the evidence did not demonstrate that the Student fits such a profile.

28. There was no evidence – outside of the incident at issue - to suggest that the Student has a history of misconduct involving a series of deliberate or purposeful actions. To the contrary, the misconduct referenced in the case, including the incident described by his mother - throwing glass on the playground – could well have involved sudden, impulsive acts. Significantly, the Student had no significant misconduct during his first three years of high school. (Testimony of Termini). He has a reputation for being a good worker and dedicated volunteer in the community. (Exhibits P10 through P14). Even his senior year misbehaviors could have been impulsive: cutting class, leaving class and plagiarism. Although he has been diagnosed with ADHD since 2003, there was no evidence of a history of deliberate, thrilling or risky behaviors other than the incident at issue. (See Exhibit B13).

29. Moreover, neither of the two very credible professionals who actually testified at the hearing - Dr. Rubin and Dr. DeToso – supported the theory that ADHD predisposes one to misconduct involving deliberate choices.

30. Finally, there was insufficient evidence to find a nexus to the Student's ADHD medication. Dr. Rubin's letter to the IEP Team stated that he prescribed a new ADHD medication for the Student on March 15, 2012, about two weeks before the incident. (Board Exhibit 8). The Student's father, by contrast, stated that the Student was not taking ADHD medication at the time of the incident, but is taking it now. Neither Dr. Rubin nor any other witness gave the opinion that the presence or absence of medication played a role in the Student's misconduct.

CONCLUSIONS OF LAW

1. In order for a local board of education to expel a student with a disability for a violation of the code of student conduct, the school, the student's parents and relevant members of the student's IEP team must review pertinent information and determine that: (1) the student's misconduct was not caused by, and did not have a direct and substantial relationship to, the student's disability, and (2) that the misconduct was not the direct result of the school's failure to implement the student's IEP. 20 U.S.C. Section 1415(k)(1)(E).

2. In this case, the Student does not claim that the misconduct was a direct result of the school's failure to implement the IEP, leaving only the first inquiry for consideration: whether the misconduct was caused by or had a direct and substantial relationship to, the disability.

3. A Student who disagrees with a manifestation determination may challenge the decision through an expedited impartial due process hearing. 20 U.S.C. Sections 1415(k)(3)(A) and 1415(k)(4)(B); 34 CFR 300.532; Regulations of Connecticut State Agencies, Section 10-76h-10.

4. The party who initiates an impartial special education due process hearing to challenge a manifestation determination has the burden to prove that the misconduct was a manifestation of the disability. Regulations of Connecticut State Agencies, Section 10-76h-14.

5. The Ninth Circuit Court of Appeals discussed the meaning of “conduct that is a manifestation of the child’s handicap” in Doe v. Maher, 793 F.2d 1470, 1480, fn. 8 (9th Cir. 1986) *affd. sub nom. Honig v. Doe*, 484 U.S. 305 (1988). As the court explained:

The district court usually used the term “conduct that is a manifestation of the child’s handicap” to describe the kind of student misconduct that has a “protected” status. . . . As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child’s handicap. Put another way, a handicapped child’s conduct is covered by this definition only if the handicap significantly impairs the child’s behavioral controls. . . . [I]t does not embrace conduct that bears only an attenuated relationship to the child’s handicap.

6. The evidence presented did not establish that the Student’s misconduct was impulsive or the product of a quickly made decision. Instead, the Student’s alleged misconduct in packaging and selling drugs involved a series of discrete decisions and purposeful acts that took place over the course of hours or days. See Farrin v. Maine School Administrative District No. 59, 165 F. Supp. 2d 37 (D. Me 2001) (Student did not demonstrate that “impulsivity” problem manifested itself in a decision to sell marijuana); Student and Greenwich Board of Education, Final Decision and Order in Case No. 10-0273 (Patricia M. Strong, Hearing Officer, March 4, 2012)(Greenwich High School Student’s ADHD was not manifested in his possession of marijuana with intent to sell); and Center Unified School District, 112 LRP 12038 (SEA CA 2012)(Student’s decision to smoke marijuana at school was not spontaneous when planned over many hours).

7. Accordingly, the Student failed to carry his burden to prove that his misconduct was a manifestation of his disability.

FINAL DECISION AND ORDER

The Student’s conduct on or about March 30, 2012 in possessing drugs with the intent to sell was not a manifestation of his disability. Accordingly, the Student may be disciplined in the same manner as if he were not disabled, as proposed by the Board of Education.