

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

West Haven Board of Education v. Student

Appearing on behalf of the Parent:

Pro Se

Appearing on behalf of the Board:

Attorney Michelle C. Laubin
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, Ct 06460

Appearing before:

Justino Rosado, Esq., Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Is the maintenance of the Student's current placement substantially likely to result in injury to the child or to others? If so;
2. Should the Board change the Student's placement to a diagnostic placement, an appropriate interim alternative educational setting (IAES), for not more than 45 school days?

JURISDICTION:

At the request of the hearing officer the Board was requested to file a brief as to a hearing officer's jurisdiction in the matter, under 34 CFR 300.532, where the Student has not been identified as requiring special education and related services as stated in IDEA. The Parent was also allowed to file a brief objecting or supporting the jurisdiction. The Parent did not file any brief objecting or supporting the hearing officer's jurisdiction. The Board filed their brief (Hearing Officer's Exhibit¹ No. 3) in a timely manner.

The hearing officer agrees with the Board and finds that he does have jurisdiction in the matter.

This matter was heard as a contested case pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administration Procedure Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

SUMMARY:

The Student has not been identified as being entitled to receive a free and appropriate public education (FAPE) as defined in the Individuals with Disabilities Education Improvement Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a et seq.

¹ Hereafter Hearing Officer Exhibits will be noted as "H.O." followed by the number of the exhibit.

At a manifestation determination review it was found that the disciplinary behavior that had resulted in the disciplinary action was caused by and had a direct and substantial relationship to the Student's disability. The Board is of the opinion that maintaining the Student's current placement is substantially likely to result in injury to the child or to others and sought a 45 day diagnostic placement at an IAES. The Parents refused and the Board filed for an expedited hearing pursuant to IDEA regulations at 34 C.F.R. §300.532.

PROCEDURAL HISTORY:

An impartial hearing officer was appointed on April 4, 2014; a pre-hearing conference was held on April 9, 2014. A hearing date of April 29, 2014 was chosen by the parties. An additional hearing date was needed to conclude the testimony and April 30, 2014 was chosen by the parties. The Board presented Exhibits 1 thru 108 which were full exhibits of the hearing. The Parent presented Exhibits 1 thru 5 and they were accepted as full exhibits of the hearing. The Parents presented five witnesses and the Board presented five witnesses.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and Bonnie Ann F.v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

The Board did not have school from April 21 to April 25, 2014. The date for the mailing of the Final Decision and Order is May 14, 2014.

FINDINGS OF FACT:

1. At the November 16, 2010 PPT, the Student was exited from special education and related services as stated in IDEA. The Student had a medical diagnosis of Childhood Disintegrative Disorder; a 504 Plan under The Rehabilitation Act of 1973 was offered. At this time, the Student attended a Magnet School in a neighboring district as a Student whose nexus is West Haven. (Board ²Exhibit N0. 23)
2. The Students eligibility determination for a 504 Plan was held on March 22, 2011. At the eligibility determination it was reported that the Student had behavior issues on the school bus and a small bus was requested. The 504 team approved door to door transportation in a small bus. The Student was found 504 eligible with the disabilities of Childhood Disintegrative Disorder, ADHD, and Anxiety NOS/non-verbal disorder. (B-30)

² Hereafter Board Exhibits will be noted as "B." followed by the number of the exhibit.

3. The Parents withdrew the Student from the inter-district magnet school and enrolled him in a neighborhood school. (B-43 and B-44).
4. Bridges Community Support Services in Milford, CT provided services to the Student for poor social skills, sensory issues, difficulty managing feelings, auditory and visual hallucinations, poor processing skills and difficulty with transitions. (B-31)
5. In September 2011, the Board requested that the Parents' sign the consent forms for the evaluations requested at the May 5, 2011 PPT meeting for eligibility under IDEA. On September 15, 2011 the Parents informed the Board that they did not consent to the evaluations. (B-47)
6. In September 2012, the Parents referred the Student to Cornell-Scott Hill Health Center (CENTER) for emotional issues. It was noted that the Student had difficulties with social skills and attention seeking behaviors. The CENTER requested the Student's school record and information. The Board was provided with information that the Student was receiving counseling services. (B-104 and B-62, Testimony of Social Worker)
7. The Student's mental health counselor at the CENTER formulated a treatment plan based on a diagnosis of disruptive behavior, psychotic behavior, ADHD and autism. (Testimony of Mental Health Counselor)
8. At an evaluation performed at the CENTER, the evaluating psychiatrist ruled out psychotic disorder and ADHD. The Student presented as a student on the Autism Spectrum. (Testimony of Psychiatrist)
9. In further sessions it was noted that the Student still had issues with imaginary friends and aliens. The doctor prescribed a small dosage of Risperdal and shortly after the psychosis stopped and the medication did not have to be increased. (Testimony of Psychiatrist)
10. The last visit to the psychiatrist's office occurred on March 2, 2014. The Student did not demonstrate any psychosis. The psychiatrist would support an outside evaluation but did not know if a diagnostic placement was best. The doctor was made aware of the threat to the principal by the Student two days after it occurred. The psychiatrist was not consulted by anyone in regards to the Student's threat. (Testimony of Psychiatrist)
11. On January 13, 2012, the Student was suspended for one day for gesturing with a plastic toy knife at another Student. This incident occurred in the afternoon on the school bus. The school requested evaluations but the Parents refused to consent. (Testimony of Social Worker, B-53)
12. The first grade teacher was not concerned with the Student's behavior in her class. The student had two incidents where he touched another Student and the incident was taken care of in the class setting. When corrected he would stop. Most incidents involving the Student's behavior occurred in the cafeteria or on the bus. The Student was selected as

Student of the month. He did well in class and behaved. The teacher did not feel the Student was a danger in the class. (Testimony of First Grade Teacher)

13. The second grade teacher testified that the Student complied with instructions in the classroom. He was rewarded by being placed on the "bucket list" for acts of kindness. There was one incident in the classroom where the Student was in disagreement where a bin should be placed. The Student became upset and the teacher called the office. This behavior was out of the ordinary. There were two incidents in the classroom but there was no fear of danger. (Testimony of Second Grade Teacher)
14. The school social worker was not aware the student was in treatment or taking any medications. Clifford Beers Clinic made a request for Student's information but was not aware if services had been obtained from the clinic. A report had been generated by the clinic but not shared with the school. (Testimony of Social Worker, B-54)
15. In the third grade classroom, the Student was well behaved. The student was placed on the "bucket list" for acts of kindness. The Student was yelling in the classroom; the teacher took him to the hallway and asked him to calm down. The Student listened to the teacher and controlled himself. (Testimony of Third Grade Teacher, Parent's Exhibit³ No. 4, P-5)
16. In the third grade, the Student was suspended for one day. He pushed a staff member because he was not allowed to buy snacks. Snacks can only be purchased after the students have eaten their lunch. The Student had thrown away his lunch. The Parents requested a PPT meeting. They did not believe that the incident happened as stated. (Testimony of Social Worker)
17. In a group session, the school psychologist explains bus rules to the Student. The Student would state that he did not understand. The psychologist stated that the Student does not have cognitive issue and understanding rules is not an issue. The Student struggles with relationships with people that discipline him. The Student does not understand the meaning of swearing. (Testimony of School Psychologist)
18. On May 13, 2013, at the request of the parents, the CENTER sent a letter to the Board advising them that the Student's primary diagnosis is Asperger's Disorder. This change was based on previous treatment information received, information collected from the Parents and observations of Student's behaviors within therapy. It was noted in the letter that if the Board had any questions they could contact the treating psychiatrist. The Board was not provided with the evaluation process. (B-67, Testimony of Social Worker)
19. On October 30, 2013 the Student was suspended for one day for inappropriate language and behavior. (B-74)
20. The Student questions the rules and their consequences. He questioned his understanding of the rules and his ability to defend himself. The Student had difficulty keeping hands

³ Hereafter Parents Exhibits will be noted as "Pq." followed by the number of the exhibit.

and feet to himself. In the second grade, the Student responded appropriately to counseling services and during that year he did not receive any out of school suspensions. He only had one episode in the classroom where he was yelling at one of his peers. He had difficulty calming down but when called came willingly. (Testimony of Social Worker)

21. The Student's third grade progress report for the first marking period stated that he was adjusting well to the third grade and that occasionally he gets a little excited and calls out. He appears happy in school and is comfortable asking for help when he needs it. His second semester progress report stated that the Student is learning when he makes a mistake or does something wrong to accept the correction, apologize and move on. He is handling problems in a calmer manner. (B-76 and B-83)
22. The Student continued in a counseling group in the third grade and the social worker continued to work on anger management and peer skills. (Testimony of Social Worker)
23. On September 20, 2013, the Student was written up for swearing on the bus. On March 3, 2014, he was suspended from bus service for one day. On March 4, 5 and 7, 2014, the Student had incidents on the school bus. The Student's school transportation was changed to a small bus and no further bus behavior incidents were reported. Until the Student threatened the principal the social worker did not feel the Student was a threat. The Student does not like to go to the principal's office. (B-86 to B-90, Testimony of Social Worker)
24. On March 19, 2014, the Parent reported to the Mental Health Counselor at CENTER that the Student wanted to bring a bat to school to harm his principal. The Parent discussed it with the Student and the Parent checked his backpack to see if there was a bat. The Counselor discussed other alternative ways that the Student can express his feelings. On March 20, 2014, the Counselor sent an email to the school reporting the discussion with the Parent; she reported it to the school because it was a safety issue. The Counselor did not recall if the Parent found a bat in the backpack. The Student did not seem to be unraveled and the Parent had a safety protocol. The Student seems to understand school rules; the issue is not the rule but the setting. If the setting is not structured he has a difficult time. (Testimony of Mental Health Counselor, B-100 and B-107)
25. The Student has not been in for treatment since the March 19, 2014 incident. Counselor was not aware if the Student is being treated elsewhere. Counselor agreed that a psychiatric evaluation was proper but did not know if a therapeutic placement was appropriate. (Testimony of Mental Health Counselor)
26. On March 21, 2014 notice was sent to the Parents informing them that the Student was being suspended for 10 days, commencing on March 24, 2014 and ending April 4, 2014, for threatening the principal. A manifestation determination was scheduled for March 31, 2014 and a PPT was also scheduled for that date. (B-92, B-93 and B-94)

27. A 504 meeting was held on March 31, 2014 for the manifestation determination. The Parents had an advocate from the Office of Protection and Advocacy. The team reviewed the Student's history of prior incidents and diagnoses. Team members articulated the Student's lack of appropriate coping skills. The Student's teacher commented that she does not see these issues in her classroom. All team members agreed that the behavior was a manifestation of the Student's disabilities. The team agreed that the school did not fail to implement his 504 plan. The team questioned whether maintaining the current placement is substantially likely to result in injury to self or others. An alternative placement at an alternative district school was offered during the suspension. The Parents refused the alternative placement. (Testimony of Assistant Director of Pupil Services, B-99)
28. The Student's conduct was a manifestation of his disability (autism) and disruptive behavior. There is no issue of concern of the Student going after the principal; the concern is on the school bus. The school psychologist stated that, "the mother had found a bat in the backpack." A diagnostic placement would be appropriate in order to gather more information. A behavior plan was not presented because the psychologist did not know if a behavior plan would be useful and would have helped Student to understand the rules. (Testimony of School Psychologist)
29. After the manifestation determination meeting, the Board conducted a PPT. The team addressed the Student's eligibility under IDEA. The team recommended psychiatric and neuropsychological evaluations. The Parent agreed to the evaluations. The team would provide the Parent with names of evaluators for their consideration, but it is not a "mutually agreed upon" evaluator. If Parents are not in agreement with the evaluator they could request an independent educational evaluation after the Board's evaluations are completed. The team discussed a diagnostic placement for the Student. The Parent objected to a diagnostic placement. The team decided to allow the Student to remain in the alternative placement that had been provided to the Student during his suspension. (B-95, B-98 and Testimony from Testimony of Assistant Director of Pupil Services)
30. Alternative measures were presented: an alternative placement, cab to and from school and searching the Student's backpack. These would lessen risks but not ensure something would not happen. (Testimony of Social Worker)
31. The Student has not been in school since March 19, 2014. The board has offered transportation to an alternative placement but the Student has not attended school. The Board considered other measures before an outside placement. Other programs at the current alternative placement would not interfere with the Student's program. The assistant director of pupil services opined that a therapeutic day placement would be appropriate. The Board would provide transportation. The March 31, 2014 agreed upon psychiatric and neuropsychological evaluations have not been done because the Board has not been able to find available evaluators. (Testimony of Assistant Director of Pupil Services)

ARGUMENT AND CONCLUSIONS OF LAW:

1. The Student has not been found eligible for special education and related services as set forth in IDEA, 20 U.S.C. Sec. 1401, et seq., and is scheduled to undergo evaluations to determine his eligibility under IDEA. (Findings of Fact No. 29)
2. The IDEA provides that prior to the change of placement of a child with a disability due to violation of school rules, a manifestation determination must be completed. This provision provides that:
 - 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)If the LEA, the parents and the other members of the IEP team determine that either sub-clause is applicable for the child, the conduct is determined to be a manifestation of the student's disability. *Id.*
3. Although the term "manifestation determination" (MD) does not appear in the regulatory language of Section 504, OCR interprets Section 504 as requiring an MD review in connection with disciplinary actions that constitute a significant change in placement under 34 CFR 104.35. See *Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009) (OCR interprets the Section 504 regulation at 34 CFR 104.35 to require a manifestation determination prior to a suspension of more than 10 days). Because an expulsion (along with a long-term suspension) is considered a "significant change in placement" under the Section 504 regulations at 34 CFR 104.35, a district may not expel a student with a 504 plan without first conducting a manifestation determination and finding that the misconduct was not related to the student's disability. If the MD review team determines that the behavior is a manifestation of the student's disability, then it may not expel the student or take other disciplinary action that constitutes a change in placement. *S-I v. Turlington*, 552 IDELR 267 (5th Cir. 1981).
4. As a rule suspension and expulsion of students with disabilities have been treated the same way under both the IDEA and Section 504. OCR has stated that the same protections available to students classified as disabled under the IDEA are available to students classified as disabled under Section 504, with the exception of students who are disabled solely by virtue of alcoholism or drug addiction.
5. Students with identified disabilities cannot be expelled or suspended from school for more than 10 school days for misconduct that was a manifestation of the student's disability. *Honig v. Doe*, supra. OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

In addition, the FAPE requirement of Section 504 (34 CFR 104.33) includes appropriate procedures for discipline, designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met. *S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981).

6. The hearing officer's statutory authority pursuant to 20 U.S.C. § 1415(K)(3)(1)(B)(ii)(I) is further clarified at 34 C.F.R. § 300.532(b)(2)(i) in which the hearing officer may return a child to a placement if the hearing officer finds that the removal was a violation of 34 C.F.R. § 300.530 or that the child's behavior was a manifestation of the child's disability; or (ii) Order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
7. In this case, the 504 team found that the disciplinary behavior that has resulted in the disciplinary action was caused by and had a direct and substantial relationship to the Student's disability. The 504 team determined that the disciplinary behavior demonstrated by the Student was a manifestation of his disability and the disruptive behavior was characteristic of the Student's disability and requested evaluations.
8. The Board is requesting a 45 day IAES at a diagnostic placement for the Student. The Board contends that the Student's current placement is substantially likely to result in injury to the child or others. I disagree.

34 C.F.R.300.532 (a) requires that the current placement is "substantially likely to result in injury." "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938); see *Shipley v. Arkansas Blue Cross and Blue Shield*, 333 F.3d 898, 901 (8th Cir.2003). Substantial evidence, however, does not mean a preponderance of the evidence. *Leonard v. Southwestern Bell Corp. Disability Income Plan*, 341 F.3d 696, 701 (8th Cir. 2003).

The factual findings must be supported by some substantial level of evidence, which need not rise to the level of preponderance. The evidence must be substantial when the entire record is examined: contrary evidence may not simply be ignored on review and the evidence must be such that it would be possible for a reasonable fact-finder to reach the same conclusions that the administrative fact-finder did. If any of these conditions is not met, the administrative decision must be reversed. *Menendez-Donis v. Ashcroft*, 360 F.3d 915 (8th Circuit 2004).

The Student does have behavioral episodes but they are mainly in the cafeteria and on the school bus. They do not rise to the level requiring an IAES. These behavioral episodes occur in settings that are not structured. The Student needs structured settings (Finding of Fact No. 25). His behavior in the classroom is not problematic because the setting is structured and the teachers are able to control the environment. (Findings of Fact Nos. 12, 13, 15, 21 and 28)

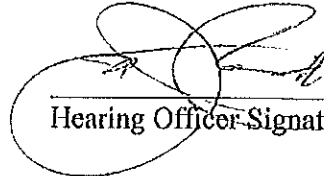
9. The Student's teachers all testified that in the classroom the Student was well behaved and when he misbehaved, he accepted the correction and listened to the teacher. Findings of Fact Nos. 12, 13 and 16) The school psychologist testified that her concern with the Student was on the school bus. (Finding of Fact No. 28). The psychiatrist and the Counselor from the Center, who have been treating the Student for more than a year, do not feel that a diagnostic placement would be best for the Student. (Findings of Fact Nos. 10 and 25) For these reasons and all the evidence presented, the Student shall be returned to his placement and not to an IAES.
10. I disagree with the school psychologist and am ordering a functional behavioral assessment (FBA). The Student, since kindergarten, has misbehaved on the school bus and cafeteria. After the issue with the toy knife an FBA should have been requested. Section 504 requires a district to accommodate the behavioral difficulties of a student with a disability by developing a BIP. *Morgan v. Chris L.*, 25 IDELR 227 (6th Cir. 1997) On September 20, 2013, the Student was written up for swearing on the bus. On March 3, 2014, he was suspended from bus service for one day. On March 4, 5 and 7, 2014, the Student had incidents on the school bus and no behavioral assessment was requested. The solution was changing the mode of transportation. (Finding of Fact No. 23) This is a band aid solution that does not resolve the problem.
11. To the extent a procedural claim raised by the Parent is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL DECISION AND ORDER:

1. Maintenance of the Student's current placement is not substantially likely to result in injury to the child or to others.
2. The Student shall not be placed in an IAES as requested by the Board but the Student shall be returned to his March 19, 2014 placement.
3. Within ten school days of the publishing of this decision, the Board shall perform a behavioral assessment of the Student and create a behavioral intervention plan.
4. If within 5 school days of the publishing of this decision, the Board still does not have evaluators to perform the psychiatric and neuropsychological evaluations agreed to at the PPT, the Board shall consult with the psychiatrist who treated the Student at the CENTER and request the names of two psychiatrists and two psychologists who can perform the evaluations. The Board shall choose the evaluators from those referred and expedite the evaluations.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).



Hearing Officer Signature

Justino Rosado
Hearing Officer Name in Print