

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Southington Board of Education

Appearing on behalf of the Parents: Attorney Bryan Meccariello
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Appearing on behalf of the Board: Attorney Julie Fay
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Appearing before: Attorney Brette H. Fitton, Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Did the Board err when it found that the behavior for which Student was to be disciplined was not a manifestation of his disability?

PROCEDURAL HISTORY:

Student and Parents requested an expedited due process hearing on May 2, 2013. While this decision makes reference to Attorney for the Parents and Parents' exhibits, it is acknowledged that Student is 18 years old and a party to this action. References to Parent exhibits, Parent witnesses and Attorney for the Parents is for purposes of consistency and clarity in the decision and intended to be inclusive of Student as a party. This hearing officer was appointed on May 6, 2013. A prehearing conference was held on May 13, 2013. During the prehearing conference hearing dates of May 29, 2013 and May 3, 2013 were set and the deadline for the mailing of the final decision and order was established as June 14, 2013. At the evidentiary hearing held on May 29, 2013 both parties submitted exhibits. Board's exhibits, B-1 through B-30, were entered as full exhibits. The Board objected to all of Parents' exhibits P-1 through P-31 on the basis that submission of same was violative of Regulations of Connecticut State Agencies (R.C.S.A. § 10-76h (e) (1) which provides each party with the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to the other party at least two business days prior to the commencement of the expedited hearing. It was agreed that Exhibits P-8, P-9, P-21, P-24, P-25, P-26, P-27, P-28, P-29, P-30 were duplicative of documents submitted by the Board, and as such, these documents were not entered as full exhibits in their own right. With the exception of Exhibit P-31, which Attorney for the Parent withdrew, Parents' remaining exhibits were marked for identification only. The Parties were informed that rulings on the admissibility of Parents' remaining exhibits would be made on a case by case basis upon Attorney for the Parents seeking to introduce them as full exhibits in the course of the hearing. Attorney for the Parents did not

seek to have any of Parents' remaining documents entered as full exhibits during the course of the hearing and as such they remained marked for identification only. Witnesses for the Parents were Mother and Father of the Student. The Board's witnesses were the Superintendent of the Board's school district, Assistant Principal of the Board high school, School Psychologist and Student's Regular Education classroom teacher.

SUMMARY:

The Student is an eighteen year old senior enrolled in the Board high school. He has received special education services since 2004 under the category of Other Health Impairment. Student has been diagnosed with attention deficit hyperactivity disorder (hereinafter "ADHD"). On April 10, 2013, the Student was found to be in possession of anabolic steroids while on school grounds and suspended Student for 10 school days. The high school convened a manifestation determination (hereinafter "MD") meeting on April 26, 2013 and it was determined that Student's conduct was not a manifestation of Student's disability. The Student's Parents filed an expedited hearing request on May 2, 2013 appealing the unanimous decision of the planning and placement team (hereinafter "PPT") at the PPT MD meeting that the conduct in question was not a manifestation of Student's disability.

STATEMENT OF JURISDICTION:

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

FINDINGS OF FACT:

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

1. Student is 18 years old and is in the twelfth grade in Board high school. [Exhibit B-7]
2. Student is diagnosed with ADHD, combined type [Testimony of School Psychologist] [Exhibit B-7] The Student is identified as eligible for special education and related services with the primary disability of Other Health Impairment. [Exhibit B-7]. Student has been identified as a special education student since 2004. [Testimony of Mother]
3. An annual PPT meeting was held on March 26, 2013. The following members of the PPT at the MD meeting participated in the March 26, 2013 PPT: Assistant Principal, Mother, Special Education Teacher/Case Manager and Guidance Counselor. On March 26, 2013, the PPT recommended that the current Individualized Educational Program (hereinafter "IEP") remained appropriate. In coming to that recommendation, the PPT relied on report cards, records and teacher reports. The IEP identifies concerns that Student's difficulty maintaining attention impacts academic progress in Social Studies, Reading, and Math. Additional general concerns were noted about Student's lack of focus and attention to tasks and details in the classroom. No

behavioral, social or emotional concerns were noted, nor were any goals or objectives developed to address behavioral or emotional issues. Student's annual goals and objectives were designed to help Student achieve in the academic/cognitive, employment, independent living, post-secondary education training and self-help areas. The Student's IEP specified 2.50 hours per week of special education instruction, and indicated that time outside of the regular education environment was required because Student's "...attentional difficulties impact his ability to succeed in the regular curriculum without special education supports." [Exhibit B-7]

4. On September 11, 2012, Student's Mother sent an email to the Student's Special Education Teacher indicating that both of Student's Parents supported discontinuing Student's support class. [Exhibit B-4] The decision to amend the Student's IEP dated April 2, 2012 by removing academic support special education hours was formalized in an Agreement to Change an IEP without Convening a PPT Meeting, which was signed by Student's special education teacher on September 12, 2013 and by Student's Mother on September 14, 2012. [Exhibit B-5]

5. On April 10, 2013, Assistant Principal at Board's high school was notified by school staff that there was an odor of marijuana emanating from a group of students who had signed in late to school. The Assistant Principal sent those students who had signed in late to school to the school nurse for an evaluation as to whether the students were fit to remain in school. Student was among those children who was late to school and had been sent to the nurse for evaluation. [Testimony of Assistant Principal] [Exhibit B-8]

6. After being evaluated by the nurse, the Assistant Principal asked Student if he would allow the Assistant Principal to inspect his book bag. Student provided his bag to the Assistant Principal for inspection. Assistant Principal proceeded to search Student's book bag, which he observed to be well organized. In one of the main compartments of the book bag, the Assistant Principal observed a folded white envelope which he removed and opened. Inside the white envelope, the Assistant Principal found two separate packages of pills. Student informed Assistant Principal that each package contained one hundred pills. [Testimony of Assistant Principal] [Exhibit B-8]

7. The Assistant Principal gave the packages of pills from Student's book bag to the school nurse who subsequently identified them as anabolic steroids. After learning from the nurse what the pills were, the Assistant Principal informed Student that Student was receiving a 10-day suspension. [Testimony of Assistant Principal] [Exhibit 9]

8. The April 10, 2013 incident was independently investigated by the School Resource Officer and Student was arrested by Southington Police Department on April 11, 2013 for possession of a controlled substance. [Exhibits B-8 and B-9]

9. On April 26, 2013 a PPT meeting was held so that the PPT could conduct a MD. Present at the MD PPT meeting were Student, Student's Mother and Father, Student's Special Education Teacher/Case Manager, Student's Regular Education Teacher, Student's Guidance Counselor, the Assistant Principal, and the School Psychologist. [Exhibit B-11] A Notice of Planning and Placement Team Meeting dated April 12, 2013 was issued for the April 26, 2013 MD PPT meeting by the Southington High School Special Education Department. [Exhibit B-10]

[Testimony of Assistant Principal]. Mother testified that she received this PPT Meeting Notice with the Procedural Safeguards pamphlet from school personnel at the April 26, 2013 meeting, and not before. The Parents and Student arrived on time for the MD PPT meeting. [Testimony of Mother]

10. Each person present at the MD PPT meeting was asked in turn whether or not they believed that the Student's conduct was caused by the Student's disability or had a direct and substantial relationship to the Student's disability. [Testimony of Mother, Father, and Assistant Principal]

11. When it appeared that Student did not understand the question regarding whether his conduct was a manifestation of his disability, the Assistant Principal explained the question in a few different ways until Student indicated he understood. [Testimony of Assistant Principal and Mother]

12. All those present at the MD PPT meeting stated that they did not believe Student's conduct was caused by Student's disability or had a direct and substantial relationship to it. [Testimony of Assistant Principal and Mother]

13. Each person present at the MD PPT meeting was then asked whether or not they believed that the Student's conduct was the direct result of the district's failure to implement the Student's IEP. [Testimony of Mother, Father, and Assistant Principal.]

14. All those present at the MD PPT meeting stated that they did not believe the Student's conduct was the result of a failure to implement the Student's IEP. [Testimony of Mother, Father, Assistant Principal.]

15. A Manifestation Determination Worksheet was completed during the MD meeting on April 26, 2013. [Exhibit B-11] Parents signed the MD worksheet at the beginning of the meeting and did not review the document at any point during the meeting while the document was being filled out or after it was completed. [Testimony of Mother] The Manifestation Worksheet indicates that the following information was considered in conducting the Manifestation Determination; Teacher Observations of the Student, Relevant Information Supplied by Parents, Evaluations and/or Diagnostic Results, Student's IEP and Placement, and Relevant Information Supplied by School Staff. [Exhibit B-11]

16. On April 30, 2013, Superintendent hand-delivered a letter to Parents which contained a notice of a hearing on the proposed expulsion of Student. [Exhibit B-14]

17. On May 2, 2013, Parents and Student filed a request for an expedited hearing challenging the MD. [Exhibit B-18]

18. On May 9, 2013, the Board sent a notice to Parents regarding the scheduling of a resolution meeting to take place on May 17, 2013. [Exhibit B-21] This meeting took place, but no resolution was reached. [Testimony of Mother]

19. Mother stated Student's ADHD was demonstrated in the following behaviors: getting off task easily, being distractable, lack of focus, and impulsivity. Mother reports these behaviors were seen at home. Mother stated her belief was that Student's ADHD caused Student to be forgetful, disorganized, impulsive, and to have short term memory issues which were the cause of Student's conduct on April 10, 2013. [Testimony of Mother]

20. Student was able to purchase the steroids through the mail without a credit card by obtaining a moneygram. Upon obtaining the steroids, Student at all times kept them in his backpack. Student took these steroids every day for a period of a few weeks until New Years Eve in 2012, when Student's behavior led to a confrontation with Parents and usage of steroids was disclosed. Parents had no knowledge of Student obtaining steroids prior to December 31, 2012. [Testimony of Mother]

21. In preparation for the MD meeting, the Assistant Principal spoke with Student's teachers and Student's Special Education Teacher/Case Manager and checked Student's grades. The Assistant Principal also discussed April 10, 2013 incident with some but not all of MD PPT members prior to MD meeting. [Testimony of Assistant Principal]

22. In preparation for the MD meeting, the School Psychologist met with the Student's Special Education Teacher/Case Manager, reviewed Student's current IEP, reviewed Student's special education file, course of study, grades and triennial achievement. In reviewing Student's school records the School Psychologist did not note any misconduct beyond that expected of the average high school student. [Testimony of School Psychologist]

23. The Student's Special Education Teacher/Case Manager described Student's disability at the outset of the MD PPT meeting. [Testimony of Assistant Principal] The MD Meeting was stopped at intervals to check and see if anyone had questions. [Testimony of School Psychologist and Assistant Principal]

24. Student was able to articulate how ADHD affects him at MD meeting and described himself as having trouble maintaining focus and being distracted. Impact of ADHD on Student is mild. [Testimony of School Psychologist]

25. By all accounts the PPT MD meeting was brief and took somewhere between 15 to 30 minutes to complete. Beyond a polling of the members there was no argument and no discussion. [Testimony of Mother, Father, Assistant Principal and Regular Education Teacher]

26. The Assistant Principal was unequivocal in his stated belief that there can be no connection between ADHD and being in possession of controlled substances on school grounds. [Testimony of Assistant Principal]

27. The Regular Education Teacher and the School Psychologist related concerns during the due process hearing that the amount of pills in Student's possession might be an indication that Student could be selling the controlled substance. [Testimony of Regular Education Teacher and School Psychologist]

CONCLUSIONS OF LAW AND DISCUSSION:

The Student has been identified as eligible for and received special education and related services under the category of Other Health Impairment since 2004 and thus is afforded the relevant protections under the Individuals with Disabilities Education Improvement Act, (hereinafter "IDEA").

Upon discovering Student to be in the possession of a controlled substance in school, the Board suspended the Student for 10 days which it had the authority to do regardless of Student's status as an identified special education student. 34 CFR § 300.530 (b). A student's disciplinary removal from school for more than 10 consecutive school days is considered a change of educational placement. 34 CFR § 300.536 (a) (1). Thus, when Board's suspension of Student was to extend beyond the initial 10 day suspension issued on April 10, 2013, and expulsion was considered, a change of educational placement was contemplated and the requirement for a manifestation determination meeting was triggered. 34 CFR § 536 (a) (1).

A manifestation determination must be made within 10 school days of any decision to change the placement of a child with a disability because of a violation of the code of student conduct. 34 CFR § 300.530 (e) (1). The manifestation determination meeting was held on April 26, 2013 which was within 10 school days of the Student's initial suspension and within 10 days of the proposed change in placement, which took place on April 30, 2013. Thus, the meeting was held in a timely manner.

As an expedited hearing request, the scope of this decision is limited. R.S.C.A. § 10-76-10. The sole matter to be decided is whether or not the Board erred when it determined that the Student's behavior was not a manifestation of the child's disability. The IDEA requires that, prior to a change of placement of a child with a disability due to a violation of school rules, a manifestation determination is made. 20 U.S.C. § 1415.

The procedure for a manifestation determination requires 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 LEA's failure to implement the IEP." 34 CFR § 300.530 (e).

Students and Parent do not claim that the Board failed to implement Student's IEP, and as such, only the claim that the conduct in question was caused by or had a direct and substantial relationship to Student's disability is addressed herein. In analyzing the relationship between a student's conduct and disability for purposes of a manifestation determination, the student's disability must be found to significantly impair the child's behavioral controls. *Doe v. Maher*, 793 F.2d. 1470, 1480, fn. 8 (9th Cir. 1986) ed. sub nom. *Honig v. Doe*, 484 U.S. 305 (1988). An attenuated relationship between disability and conduct does not provide a sufficient basis for a finding that conduct is a manifestation of a Student's disability. *Id.*

While evidence was presented that Student's disability impacted his academic learning in such a way as to require specialized instruction and accommodations, the supports needed by Student to address his ADHD were limited in nature and generally implemented within the regular education classroom. Indeed, Student's progress was such that Student's special

education support class was deemed unnecessary by Student's Parents and had been eliminated at Parents' request at the beginning of the 2012-2013 academic year.

General statements describing the Student as being disorganized, impulsive, forgetful and inattentive do not establish that required linkage between the deed and the disability. In order to obtain the controlled substance, Student had to find a source for the steroids online, identify a way to pay for the steroids which would be accepted by the distributor, obtain the money to purchase the steroids and convert the money to the form of payment accepted by the distributor. Student then found a way to arrange to receive the steroids without the knowledge of his Parents. Student took the steroids daily over a period of time and then stopped when he had a negative reaction to the steroids which led to the discovery of his use by his Parents. Student's actions in obtaining and consuming the steroids demonstrated planning and forethought, the opposite of impulsivity.

No evidence was presented that any other behaviors associated with Student's ADHD, such as forgetfulness or inattentiveness, significantly impacted Student's behavioral controls in such a way as to cause the Student to put steroids in his backpack and fail to remove them over a four-month period. On the contrary, Student's behavior was not identified as a concern in Student's March 26, 2013 IEP and Student's disciplinary history prior to the April 10, 2013 incident involved relatively minor infractions typical of the average high school student, such as cutting class.

Various procedural defects were alleged by Parent during the due process hearing, including a failure to provide Parents with adequate written notice in advance of the MD meeting, a failure to provide Parents with a procedural safeguards notice before the MD meeting, and insufficient review of Student's records and behavior at the MD meeting.

The Mother testified credibly that she was handed the Notice of the PPT Meeting document and the procedural safeguards at the meeting and not before. The Assistant Principal testified credibly that he had explained the nature and purpose of the MD meeting directly to the Parent in advance of the meeting. Parents and Student were aware of the time and place of the meeting, as evidenced by their timely arrival and participation in the meeting. The purpose of the meeting was explained again to the Parents and Student at the beginning of the MD meeting. When it appeared Student did not understand a question, it was explained in alternative ways until there was an understanding of the question. All members of the PPT were asked if they had any questions at various stages during the MD meeting. While the Board failed to provide a timely written notice, the Parents and Student were made aware of the purpose of the meeting and were not denied a meaningful opportunity to participate in the meeting as a result of this failure.

The Board is required to provide the parents with procedural safeguards notice on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability. 34 CFR § 300.530 (h). The PPT team at the MD meeting did not make a decision to remove the student, rather the PPT decided that the Student's conduct was not a manifestation of his disability, making it possible for the Board to make a disciplinary decision regarding a change in educational placement pursuant to its authority under 34 CFR § 300.530 (c). The Board was required to give the procedural safeguards notice when a decision was made to continue Student's suspension over 10 days or to expel the Student, whichever occurred first. As the MD occurred within the initial 10 day suspension, the provision of the Procedural Safeguards notice at the MD meeting was timely.

It is clear that the majority of the school staff PPT members prepared for the MD meeting by reviewing Student's records, special education file, grades, and current courses. School staff also had conversations with each other in advance of the MD PPT meeting regarding the Student and Student's conduct. It is also clear that the PPT members did not engage in a review of records or documents during the MD meeting, nor did the team engage in much discussion about the Student's disability or their conclusions. What is unclear is whether the Team members failed to enter into a lengthy discussion or review documents, because all of the PPT members agreed early on in the meeting that the Student's conduct was not a result of the Student's disability or for some other reason. Had there been a dispute among any of the MD PPT members, the Team might have felt compelled to engage in a more detailed discussion of the nature of Student's disability and the relative merits of each member's position. There was, at a minimum, a statement identifying Student's disability and Student was offered the opportunity to describe his disabling condition prior to PPT members being asked to answer whether they thought the conduct was caused by Student's disability or a failure of Board to implement the IEP. The PPT members also were asked at intervals throughout the MD meeting whether or not they had questions about what was taking place. While preparation by PPT members in advance of an MD meeting is not addressed in the Code of Federal Regulations, it is clear that a review of relevant information in the Student's file during the actual MD meeting in the presence of the parents is contemplated. 34 CFR § 300.530 (e). While the evidence shows that the MD meeting was deficient by not conducting a more searching, in-depth review, the Board was able to demonstrate by a preponderance of the evidence during the due process hearing that the conclusions reached by the PPT meeting at the MD meeting were correct. R.C.S.A. § 10-76h-14.

The Assistant Principal's statement at the hearing that there can be no connection between ADHD and the possession of a controlled substance on school grounds did raise a concern that the Assistant Principal did not engage in an evaluation specific to the Student, but rather applied a bright line test to Student's conduct. The concern about a predetermination of the outcome would have been greater had Assistant Principal not engaged in any preparation for the PPT MD meeting. The evidence showed, however, that the Assistant Principal had participated in the Student's most recent annual PPT meeting and that he took additional steps to familiarize himself with Student and Student's file prior to the MD meeting by conferring with the appropriate school staff and reviewing relevant documentation.

Evidence was also presented that there was concern among some of the staff members of the MD PPT that the quantity of steroids in Student's possession might indicate that Student was selling a controlled substance, not just possessing them. While individual staff members may have had concerns about the amount of steroids Student had in his possession, the question put to the PPT and decided at the MD meeting was whether the possession of a controlled substance on school grounds was caused by his disability. It was not demonstrated that any staff member based their opinion that the Student's possession of a controlled substance was not a manifestation of his disability on a belief that Student could possibly have been engaged in selling them as well.

Based on all of the evidence presented, it cannot be found that the Board erred when it determined that the Student's conduct was not a manifestation of his disability.

Note Regarding Findings of Fact and Conclusions of Law

This Final Decision and Orders sets forth this Hearing Officer's findings of fact and conclusions of law. This hearing officer reviewed and considered all of the evidence presented in this matter. Specific references to certain evidence here are not meant to exclude other evidence. 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).

FINAL DECISION AND ORDER:

The Board did not err when it found that the behavior for which Student was to be disciplined was not a manifestation of his disability.