

BACKGROUND AND PROCEDURAL MATTERS:

1. The Parents' attorney requested this expedited hearing on March 29, 2001. A Hearing Officer was assigned to the case. She offered to recuse herself at the request of either party because she has a child who attends the Board's middle school. The Board's attorney requested that she disqualify herself. Thereafter, this Hearing Officer was assigned to the case on April 2, 2001. A prehearing conference was thereafter held on April 10, 2001. Two hearing dates were scheduled for April 17 and May 3, 2001.
2. Parties were given until April 16 to file exhibits and witness lists. Initially the Board filed its list of witnesses and no exhibits. The Parents filed their witness list and 15 exhibits. At the first day of the hearing on April 17, 2001, the Parents requested the opportunity to review the student's records, which they claimed were withheld. The Board denied receiving any request for the records, but at the request of the Hearing Officer agreed to make the records available for the Parents' attorney to examine during the lunch recess. The Hearing Officer marked the request for hearing as Hearing Officer Exhibit 1 and requested the Board to provide a copy of the student's Individual Education Program (IEP) which was in effect on March 7, which it then offered as Board Exhibit 1. Both parties later filed supplemental exhibits, two for the Board and eight for the Parents. The Parents' attorney filed a Final Index of Parents Exhibits at the May 3 hearing.
3. An additional date was added on April 26 in order for the parties to complete the hearing within the requisite 45 days. On April 18, the Parents' attorney sent a letter to the Hearing Officer in which he stated, among other things, that the Parents would assert that the Board failed to comply with the written notice requirements of 34 C.F.R. Section 300.503 and Regulations of Connecticut State Agencies Section 10-7[6]d-8.
4. On April 26, the parties were heard on the Board's objection to the addition of the Parents' procedural claim and the Board's claim that the Parent (mother) signed a waiver of written notice at the March 12 manifestation determination review PPT. That document was received as Parent Exhibit 20 and the issue was reserved for adjudication in the final decision.
5. The Parent (mother) was permitted, over the Board's objection, to offer testimony as to the circumstances surrounding her signing Parent Exhibit 20 for purposes of presenting the Parents' claim that there was no informed consent or waiver of written prior notice. The Board offered rebuttal testimony of this issue in its case on May 3.
6. The Parents' medical expert, Douglas Berv, M.D., was on vacation and not available on April 26, but the parties were accommodated by starting the hearing at 9:30 am on May 3 and allowing the remainder of the day for the Board's presentation of its case. All witnesses were heard and the parties were allowed oral closing argument on May 3, as well as the opportunity to file written briefs by May 11. Both parties filed written submissions. The parties have had a full and ample opportunity to present all their evidence, both written and oral testimony, as well as legal arguments.

7. In addition to 23 exhibits, the Parents presented oral testimony from the mother, the student and a psychiatrist, Dr. Berv. The Board presented three exhibits and oral testimony from several staff members, including the Interim Associate Principal, Robert Flanagan, Robert Schumann, the student's assigned guidance counselor, Cathy Austin, School Psychologist, and Andrea Regan, Special Education Teacher assigned to the student in the Board's high school resource room.

ISSUES:

1. Was the student's behavior on March 7 a manifestation of his disability?
2. Was the Board's failure to provide written prior notice of the manifestation determination review a violation of the Individuals with Disabilities in Education Act and/or state regulation?
3. Was the Parent's waiver of written notice adequate to cure any procedural violation?

FINDINGS OF FACT:

1. The student is currently 17 years of age. His current educational placement is at the regional Board's public high school as a junior. The student has been in the regional Board's district since grade 7. Prior to that, he attended elementary school in one of the towns in the regional school district.
2. The student was initially identified as eligible for special education services in 1992 while in grade two based on a diagnosed language-based learning disability and social and emotionally maladjusted. (Parent Exhibits 2 and 16 and Testimony of Mother)
3. In 1993, after being diagnosed with Attention Deficit Disorder (ADD) by a neurologist, the student began taking Ritalin. His aggressive behavior toward other students subsided and his grades improved dramatically. (Mother's testimony and Parent Exhibits 1, 16 and 22)
4. In grade five, the student was re-evaluated. He continued to qualify for special education services based on learning disabled and other health impaired (ADD with hyperactivity). In grade eight, the student had another triennial evaluation. The student's behavior was noted as still problematic at times. "The less structured the setting, the more [the student's] conduct problems increase, along with hyperactivity and inattention. With increased structure, [the student's] behavior is not significant." (Parent Exhibit 16, quoting page 3)
5. The student was in regular education classes for most of the time, receiving resource room support for one period in each cycle. His grades ranged from A's to C- in grade eight. He requested higher level classes, but was not recommended for them. (Parent Exhibit 17)
6. In grade 9 the student began attending the high school. The March 1999 PPT meeting recommended that the resource room support be increased to two periods per cycle. It was

noted that the student was not taking medication and his teachers reported discipline problems and distraction. His grades ranged from A to F. There was a decline from the beginning of the school year noted. (Parent Exhibit 18)

7. He was participating in high school sports. Id. at 7.
8. In grade 10, the student had four periods of resource room support per cycle. Ms. Regan reported that his teachers had concerns with behavior in class and distractibility. (Parent Exhibit 19)
9. In grade 11, the student started the year well, but in October 2000, the student stopped doing homework and began cutting classes. His grades went down and he received 10 disciplinary referrals between October 2000 and March 8, 2001, not including the incident in question. (Parent Exhibits 7 and 21 and Testimony of Mother, Student and Mr. Flanagan)
10. His mother noted problems in behavior at home. He went to his pediatrician in February 2001 for his annual check-up and was prescribed Concerta, a new medication containing a time-released drug similar to Ritalin. Parent Exhibit 1 at 18 and testimony of Dr. Berv and mother. The drug had an immediate negative effect on the student's behavior. He became angrier and more aggressive. (Testimony of Mother, Student and Dr. Berv)
11. On March 7, 2001, the student was late for his seventh period class because he had to go the office for a special pass as a result of tardiness to school. He waited until the last period of the day to obtain the pass, although he should have gotten it when he arrived at school. The student obtained the pass at approximately 1:35 PM and, according to the school rules, was allowed seven minutes to travel from the office to his class. On the way, the student became distracted, first by his girl friend, whom he walked to her class and then by several male friends who invited him to meet them in the bathroom for a smoke. The student left his girl friend at her class and, instead of proceeding to his science class, he went to the bathroom with his friends. He did not smoke a cigarette, but instead decided to "do a trick" with a butane lighter, allowing the gas to escape into his hand and then igniting the gas. He testified that he was "bored" and didn't know why he did this. He did not intend to start a fire, however, the flame ignited a wad of paper, which was stuffed into the frame of the bathroom stall door. The student thought he had put the fire out before he left the bathroom, but apparently it smoldered and caused the fire alarm to sound and the building was evacuated for approximately 20 minutes of the school day. The student confessed when questioned by Mr. Flanagan. (Testimony of the Student and Mr. Flanagan)
12. The student was suspended from school for 10 days beginning on March 9. Mr. Flanagan notified the parents by telephone call and a letter, which they received after the PPT. Parent Exhibit 9. On March 9, Ms. Austin telephoned the student's mother and requested that she attend a PPT meeting on March 12. (Testimony of Ms. Austin, Mr. Flanagan and Mother) The parties stipulated that there was no written prior notice of the PPT meeting. The parties diverged as to whether the mother was verbally informed in detail as to the nature and purpose of the PPT, which was a manifestation determination review.

13. The mother did not realize that the purpose of the PPT meeting on March 12 was to determine whether the student's behavior on March 7 was a manifestation of his disability and further and that if it was not, that he would be subject to further discipline, i.e., expulsion from school. The mother signed the waiver because she was asked to by the team, however, the waiver did not specify what issues were to be considered at the PPT. She did not realize that if she had refused to consent to the waiver of written notice, the PPT would not have taken place on March 12. Immediately after the PPT meeting, the mother called the student's physician and reported the situation. He told her to take the student off Concerta and re-prescribed Ritalin. (Testimony of Mother and Parent Exhibit 20)
14. The PPT concluded that the behavior on March 7 was not a manifestation of the disability (ADHD). The mother disagreed and further she tried to point out that the student's behavior had changed for the worse as a result of a medication change on or about February 20, 2001. (Testimony of Mother and Parent Exhibit 10)
15. The PPT minutes do not indicate whether the team determined that the student's current IEP was appropriate. The team members present at the March 12 PPT all testified at the hearing, except Melinda DiVicino, school psychologist. The school nurse was not present at the PPT, nor did she testify, although she is the main contact person between home and school. She regularly speaks with the mother and the student and provides the student with daily medications. (Parent Exhibit 10 and Testimony of Mother and Student)
16. Mr. Flanagan testified that the current IEP was discussed at the PPT meeting and found appropriate. He felt that the student's disciplinary referrals were minor and not indicative of a behavior problem. He did not think the medication change was significant because he saw no change in behavior at school. No one at the PPT meeting was knowledgeable about the effects of Ritalin or Concerta in the dosages taken by the student, with the possible exception of Ms. Austin, but she did not address the issue. (Testimony of Mr. Schumann)
17. The March 12 manifestation determination was the first one for Mr. Schumann. Ms. Regan had approximately one and one-half years of experience as a special education teacher. She was assigned to the resource room where the student spent four periods per cycle. She did not work one-to-one with him. He did not have a behavior plan. She did not see the disciplinary referrals as a behavior problem, but a "choice" by the student. She did not find the behavior of March 7 to be a manifestation of the disability because the student did not have a cognitive impairment.
18. The March 1, 2000 IEP, which the manifestation determination review found appropriate, had no goals related to behavior. (Board Exhibit 1)
19. On April 4, 2001, the annual review IEP was conducted. There were behavior goals added related to tardiness and decision making. (Parent Exhibit 14 at 6)
20. The student told the members of the March 12 PPT manifestation determination review that he "has difficulty controlling his behavior, especially toward the end of the day when I get

bored.” The team did not find this significant because there was no “pattern of negative behaviors in school.” (Parent Exhibit 10 at 3)

21. The student testified that he had developed the habit of leaving the classroom when he became very agitated and unable to sit still as a means of calming himself. He would ask teachers for permission to go to the bathroom, not because he needed to use the bathroom, but because they could not refuse the request and he could calm down by walking out of the classroom. He also began a pattern of being late to class and skipping the afternoon classes because he was especially distracted, unable to focus and restless at that time of the day. (Testimony of Student)
22. Dr. Berv is a qualified psychiatrist with experience in treating hundreds of patients with ADD. His opinion was that the behavior on March 7 was “a classic example of reckless risk taking impulsive behavior seen in ADHD.” Dr. Berv also opined that the March 7 incident would not have occurred if the student’s medication had not been changed and he had been on an appropriate medication. (Plaintiff Exhibit 22 at 6 and Testimony of Dr. Berv)

CONCLUSIONS OF LAW:

1. The relevant statute is Title 20 U.S.C. Section 1415 of the IDEA, which provides in relevant part:

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

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

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

(II) observations of the child; and

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

(ii) then determines that—

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

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

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

2. If any of the factors set forth above is not met, the behavior may not support the IEP Team's decision determining "no manifestation." See Richland School District v. Thomas P., 32 IDELR 233 (W.D.Wis. 2000)
3. The student's activities in spending excessive time in the bathroom and hallways at school interfered with his education because he missed assignments, instruction time and ultimately was suspended from school for 10 days as a result of the March 7 incident in the bathroom. Based on the information that was available to the team at the PPT meeting on March 12, 2001, there was reason to suspect that the student's behavior was harmful to himself, if not others, and that it warranted some modification in his IEP to address "positive behavioral interventions, strategies and supports to address that behavior." IDEA Section 1414(d)(3)(B)
4. The PPT's finding that the student's IEP was appropriate is not supported by the evidence, in particular in that the IEP was changed to add behavior goals only three weeks after the manifestation determination review. The information for the triennial evaluation and April 4 IEP was gathered prior to the student's March 9 suspension.
5. The PPT's finding that the medication change had nothing to do with the March 7 incident is not supported by the evidence.
6. The PPT's finding that there was no pattern of behavior problems prior to the March 7 incident is not supported by the evidence in that there were 10 prior disciplinary referrals arguably related to the student's disability.

FINAL DECISION AND ORDER:

The Hearing Officer finds in favor of the Parents. The Board should have advised the Parents about the requirements for manifestation determination review in writing before the March 12 PPT. The waiver was not valid to cure the lack of written notice because it did not advise the Parent of the issues to be considered at the PPT or their right to request a postponement for up to three days. Based on the facts found and the conclusions therefrom, the Board has not sustained its burden of proof that the March 1, 2000 IEP was appropriate and that the March 7, 2001 behavior was not a manifestation of his disability. The student's behavior should be addressed through the IEP process, not the expulsion process.