

STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION

Student v. Stafford Board of Education

Appearing on behalf of the Parents: The Parents appeared *pro se*.

Appearing on behalf of the Board: Attorney Peter A. Janus  
Siegel, O'Connor & O'Donnell, & Beck P.C.  
150 Trumbull Street  
Hartford, CT 06103

Appearing before: Attorney Mary Elizabeth Oppenheim  
Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Whether the conclusions of the manifestation determination were appropriate.
2. Whether the behavior that has resulted in the pending disciplinary action [expulsion] was caused by, or had a direct and substantial relationship to, the Student's disability; or if the conduct in question was the direct result of the Board's failure to implement the IEP.<sup>1</sup>

**SUMMARY:**

Disciplinary proceedings are pending for the ninth grade Student for allegedly trading drug paraphernalia at the Board high school. As the Student had been eligible for special education at the time of the incident, a manifestation determination meeting convened. The Board determined that the conduct which resulted in the pending disciplinary actions were not a manifestation of the Student's disability. The Parents requested this hearing to challenge the manifestation determination.

**PROCEDURAL HISTORY:**

The Parents requested this hearing on November 2, 2006. The hearing convened on November 17 and 30. This decision is issued within 10 school days of the final hearing date in accordance with Section 6159(k)(1)(F) of IDEA 2004.

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<sup>1</sup> On the first day of the hearing, both parties confirmed on the record that the issues for this hearing were as set forth in this decision.

The Parents' witnesses were the Jerome Lahman, M.D, Jamie Donnelly, the Board school psychologist and the Mother.<sup>2</sup>

The Board's witnesses were Barbara Macauley, Board director of pupil services; Robert Campbell, Board high school assistant principal; Kellie Chenevert, Board special education facilitator; Jamie Donnelly, Board school psychologist; Elisabeth Hamburg, Board special education teacher; Stanley Huber, Board regular education teacher; Marshall Gladstone, neuropsychologist; and James C. Black, M.D., psychiatrist.

To the extent that the procedural history, summary and findings of fact actually represent discussion/conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

### **FINDINGS OF FACT:**

1. The Student is currently 15 years old and in ninth grade at the Board high school.
2. An expulsion hearing is pending for the Student as a result of an incident that occurred in October 2006. That hearing has been recessed until this decision is issued. [Exhibit B-3]
3. The Student has been eligible for special education and related services since he was in fifth grade during the 2002-2003 school year. At that time the student was found eligible as an Other Health Impaired [OHI] student. [Exhibit B-67]<sup>3</sup>
4. The Student was first diagnosed with ADHD in August 1998. He continues to be diagnosed with ADD, Oppositional Defiant Disorder and Intermittent Explosive Disorder. [Testimony Dr. Lahman, Exhibits P-1, P-2]
5. While this action challenges the manifestation determination, in light of the testimony in this hearing, it is important to briefly address the Student's lack of progress in his Individualized Education Program [IEP] over the course of many years.<sup>4</sup>
6. The Student did not achieve appropriate progress on his goal in the 2003-2004 school year, making unsatisfactory progress on goal one, as explained on the

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<sup>2</sup> The Parents are divorced and both were present at this hearing. The Parents are commended about the manner in which they cooperated on behalf of the Student during these proceedings.

<sup>3</sup> The Board submitted exhibits in this hearing without an index, and without numbering the individual pages of an exhibit. The Board is cautioned that in the future, it should provide exhibits in the appropriate manner.

<sup>4</sup> The law was changed under IDEA 2004 so that manifestation determinations need not determine whether the IEP is appropriate. The Parents are not precluded, however, from requesting a due process hearing to challenge the appropriateness of the Student's program.

- progress reporting key on his homework completion goal, his only measurable goal for that school year. [Exhibit B-49]
7. During the Student's 2004-2005 school year, he made what was designated as "improving/inconsistent" as well as unsatisfactory progress in the homework completion goal. It was reported that the Student made some satisfactory progress in his behavioral goals to make appropriate decisions with regards to academic performance, and in his written expression goals. [Exhibit B-20]
  8. During the 2005-2006 school year, when the Student was in 8<sup>th</sup> grade, on all six objectives in his first goal, to develop successful learning and organizational strategies in order to achieve success in his classes, the Student received "O" in all six marking periods, for all seven objectives. The Progress Reporting Key merely designates "O" as "in progress." The progress reported was not S, for satisfactory progress, nor M, mastered. In his math goal, the Student did make satisfactory progress. [Exhibit B-14]
  9. The third goal for the Student in the 2005-2006 school years was addressing social/behavior and self-help skills. The Student's objectives included: "Decrease oppositional and avoidant behaviors by ident. areas of frustration in counseling;" and "develop coping strategies in counseling." The Student was marked as achieving "O" for all objectives in Goal 3, for all six marking periods. [Exhibit B-14]
  10. In May 2006, the Planning and Placement Team [PPT] convened and developed a program for the Student for his ninth grade year. The Student's goals and objectives for the 2006-2007 school year included:
    - a. Measurable Annual Goal 1: Demonstrate an improvement in organization, study skills and learning strategies necessary to progress toward achieving the learning standards, which included objectives to "better advocate for himself when necessary" and improve in the "mechanics of written language."
    - b. Measurable Annual Goal 2: Student will acquire the skills to successfully transition to a two-year or four-year college/university.
    - c. Measurable Annual Goal 3: Demonstrate an improvement in self-awareness and self-concept.
      - i. Objective 1: "Demonstrate the ability to identify his feelings of frustration when they occur."
      - ii. Objective 2: "Demonstrate the ability to identify and discuss anxiety related to academic competitive situations."
      - iii. Objective 3: [none]
      - iv. Objective 4: "Demonstrate the ability to verbalize how a person's self-concept affects his behavior."

- v. Objective 5: “Demonstrate the ability to identify his own problematic behaviors based on his perception of self and to identify substitute socially acceptable behaviors.”
  - vi. Objective 6: “Demonstrate the ability to identify his feelings and discuss how his feelings influence his behavior.” [Exhibit B-16]
11. In October 2006, the Student was involved in a disciplinary incident in which a homemade device, allegedly for use as drug paraphernalia, was found in the possession of another student who apparently reported that he received this device from the Student, after he offered the Student \$5 for it. There was no allegation that the Student was in possession of, or using substances, and no physical evidence of the device as either a photograph, or the device itself [which has since been destroyed] was presented at the hearing. The assistant principal testified that the Student never said that the device was one to use for marijuana, but that somehow “pot was identified as what would be used [in the device] during [his] investigation.” [Testimony Mr. Campbell, Exhibit B-1]
  12. The Board recessed the Student’s expulsion hearing, pending the determination of this hearing. [Exhibit B-3]
  13. The Mother, relevant members of the IEP team, and the Student met on October 18, 2006 for the manifestation determination. The Board members of the team concluded that the Student’s behavior that resulted in the pending disciplinary action was not a manifestation of his disability. While the Board attempted to claim at this hearing that the Parents agreed with this determination, it is found that there was no such agreement. [Exhibit B-6]
  14. The Prior Written Notice page of the document summarizing the Manifestation Determination noted that documents [evaluation procedure, assessment records or reports] that served as a basis for the action proposed included progress reports cards of 10/18/06, teacher reports of 10/18/06 and the discipline attendance [sic] of 10/18/06. [Exhibit B-6]
  15. The inquiry of the members of the team at the manifestation determination was whether the misconduct was related to the child’s disability. No review of the IEP goals and objectives were completed. Rather, the team had a cursory discussion of what services hours were provided to the Student. No specifics of his IEP were discussed, even though the Student has behavioral objectives in his IEP. [Testimony Ms. Donnelly, Ms. Macauley, Ms. Chenevert, Ms. Hamburg, Mr. Huber]
  16. The Parents brought this hearing request to challenge this manifestation determination.

**DISCUSSION/CONCLUSIONS OF LAW:**

The Individuals with Disabilities Education Improvement Act of 2004 [IDEA] provide for services to children with disabilities, from birth through age 21. The Student has been found eligible for special education services, and is afforded the protections of the Act and related regulations.

The IDEA provides that prior to the change of placement of a child with a disability, 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. Sec. 1415

If the Board, parent and the 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.*

If it is determined that the behavior was a manifestation of the child's disability, then the IEP team shall:

“(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in

subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.” 20 U.S.C. Sec. 1415

The Student’s pediatrician, who has provided medical services to the Student since birth, diagnosed the Student with ADD eight years ago. [Testimony Dr. Lahman] The pediatrician is found to be a credible and informative witness as to ADD and the impact on the Student’s daily life. In Dr. Lahman’s testimony, he demonstrated an accurate understanding of the incident, had a life-long understanding of the Student and his disability, and has made an assessment of the Student’s disability and the manner in which it manifests itself with the Student based on first hand knowledge, not merely a paper review as was done by the Board’s testifying neuropsychologist and psychiatrist. Dr. Lahman noted that children and adults with ADD have a tremendous amount of impulsivity, and tremendous difficulty making appropriate decisions, which influences decision making and daily life.

The impulsivity and poor decision-making evident in the Student’s behavior which resulted in the pending disciplinary action and the manifestation determination were a direct result of the Student’s disability. The direct and substantial relationship to the child’s disability was not such an “attenuated association” to the child’s disability, as was discussed in the comments of the new regulations for manifestation determinations. *Federal Register, Volume 71, No 156, 46720, August 14, 2006* Rather the Student’s

actions were the “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.” *Id.*<sup>5</sup>

The school psychologist, in her first months of her first year of employment as a school psychologist, led the discussion at the manifestation determination meeting as to whether the behavior was a manifestation of the Student’s disability.<sup>6</sup> While she conceded that impulsive decisions, a hallmark of ADD, can affect decision making, she opined that she didn’t believe that the Student had such impulsivity. According to the comments to the federal regulations, providing input to the changes to the regulations, a board’s determination of the whether the student’s conduct is a manifestation of the child’s disability should be *broad and flexible*, and should include such factors as the inter-related and individual challenges associated with many disabilities. *Id.* In this case the Board’s inquiry was not so broad and flexible. On the contrary, the inquiry was narrow, cursory and limited.

The Board director, Board school psychologist, and other board witnesses illogically concluded that because the Student has demonstrated remorse for the incident, that that somehow translates into a conclusion that this incident was not related to his disability. When confronted with suspension, expulsion, familial involvement, and a half day of on and off questioning about the incident by authority figures such as the assistant

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<sup>5</sup> Interestingly, in the Student’s IEP for the 2006-2007 school year, the cover page of the Planning and Placement Team [PPT] meeting indicates that the Student’s disability was “Other Health Impaired.” The box for OHI-ADD/ADHD was not marked. [Exhibit B-16] Without any explanation, the school based members of the PPT changed this designation at the time of the manifestation determination, to OHI-ADD/ADHD, perhaps in an attempt to limit the inquiry into the Student’s disability in the manifestation determination. [Exhibit B-6] More concerning is the fact that it appears that the Board members of the PPT team, or someone thereafter erased the check on the more expansive “other health impaired” primary disability and then selected OHI-ADD/ADHD.

<sup>6</sup> The teachers and staff working with the Student had minimal experience. The school psychologist was in her first months of experience as a school psychologist. The Student’s special education teacher was in her first year as a special education teacher, after having been employed one year as a regular education teacher.

principal, it would be surprising if the Student did not demonstrate remorse. As testified by Dr. Black, one of the Board witnesses, such a response is not uncommon. The Student apparently has remorse about the incident. That does not negate the fact that the Student's actions were directly and substantially related to his disability.

Board witnesses also repeatedly testified that the Student was merely unfocused or inattentive, not impulsive. When pressed, however, the regular education teacher noted that there was one day when the Student was completely out of control, loud, boisterous, didn't want to sit down and get to work, and acted out the entire class period. The regular education teacher was unable to calm the Student down for the whole time he was in the class. The testimony of the math teacher differed from the progress report that was part of the Student's records; this incident was not part of the documents reviewed by the neuropsychologist and the psychiatrist.

In another incident, the special education teacher gave the Student a detention for his uncontrollable behavior, in that the Student wouldn't do what he was directed to do. While the special education teacher proffered that the Student only exhibited inattentive behavior, her own testimony contradicted this. Furthermore, although a one line mention of an accommodation of "positive reinforcement" was part of the Student's IEP, the teacher did not give such reinforcement of this behavior, but rather served the Student with a detention.

Progress reports demonstrated that the Student was not fairing well academically at the time of the incident.<sup>7</sup> And, the special education teacher herself testified that she didn't give the Student any direct instruction, but worked on "binder organization."

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<sup>7</sup> As of October 6, 2006, the Student's grades were 65 in intr lit 9, 81 in wld cultur, 78 in ge alg I, 61 in health ed; 50 in gen phy sci and 73 in wood techni. [Exhibit B-12, *Abbreviations in the original*]



In explaining his lack of progress, the special education teacher said that it was “not uncommon for students to struggle.” This incident occurred near the beginning of the school year. In implementing the Student’s IEP, the special education teacher did not speak with any of his previous teachers from the middle school at the beginning of the Student’s ninth grade year, and doesn’t remember looking at any of the Student’s evaluations. She said she really didn’t focus on the Student’s file specifically at the beginning of the year as there were so many documents to review. This was the special education teacher’s first year teaching special education, having taught regular education one year prior to this. That was the extent of her experience in the field of education. This person, who was the person primarily responsible for the implementation of the Student’s IEP was implementing the program based on a cursory understanding of the Student’s background, and without giving him direct instruction except “binder organization.” The special education facilitator, who oversaw the Board staff including the Student’s special education teacher, did not appropriately oversee that the Student’s IEP was implemented, testifying at the hearing that “since the incident, I’ve done more research on his case.”

The Student’s IEP was not appropriately implemented, and in this manifestation determination meeting, that inquiry, i.e., whether the IEP was implemented, was not completed. Each Board witness testified that they did not go through specifics and did not consider the Student’s goals. There was no consideration of whether the IEP was implemented. At most, the inquiry was whether the Student was receiving the service hours designated in the IEP. Such brevity in the second part of the analysis of whether the conduct in question was the direct result of the Board’s failure to implement the IEP

is alarming. In this case the Student had particularized IEP objectives related to behavioral issues to deal with feelings of frustration, to identify and discuss anxiety related to academic competitive situations, to verbalize how self-concept affects his behavior, to identify his own problematic behaviors based on perception of self and substitute socially acceptable behaviors, and to demonstrate the ability to identify his feelings and discuss how his feelings influence his behavior. The Student's IEP also has historically included goals to address oppositional and avoidant behaviors, frustration and anxiety.

When members of the PPT include such behavioral issues in the goals and objectives, it is nonsensical for it now to attempt to foreclose such an inquiry, and claim such behavior is not associated with the Student's disability. These behavioral issues were not addressed in any manner in the manifestation determination. Furthermore, the record reflects that this goal and its objectives were not implemented for the Student. Most glaringly, the Board did not implement Goal 3 of the Student's IEP, which addressed feelings of frustration, anxiety in academic situations, self-concept affecting behavior and substituting socially acceptable behavior. The Student's conduct was a result of the Board's failure to implement the Student's IEP.

The manifestation determination meeting serves an important purpose. The Board members of that meeting seemed as though they were merely going through the motions in convening this meeting, rather than considering in good faith whether the behavior had relationship to the Student's disability and whether it related to the implementation of his IEP. The regular education teacher testified that he didn't feel that his opinion was part of the decision making process at the manifestation determination.

And, the inquiry was not appropriate, and never addressed the fact that the Student's disability manifested itself not merely as inattentiveness, but was multifaceted. By a simply reviewing of the goals and objectives in the IEP, the team would have been aware that the Student's behavioral issues identified in his IEP included more than merely being "unfocused," as the Board witnesses uniformly testified. Goal three of his IEP addressed these inter-related and individual challenges that this individual Student was experiencing, as a result of his disability. This is consistent with the Parent's testimony that the Student's behavior is variable, dependent on whether and when he takes his medication, and other factors.

The Board presented a neuropsychologist and a psychiatrist in their case. Neither one had ever met the Student, or was involved in any aspect of the Student's case prior to being requested to conduct a record review for this hearing. The neuropsychologist did not have an accurate understanding of the incident, nor of the Student's background. All his understanding was based on the records submitted by the Board.

Dr. Black, the psychiatrist, testified that he spent 1 ½ hours reviewing the documents, and opined that "the act of misconduct doesn't occur because of the modifications . . . that didn't happen or because he wasn't in the right class. . . I'm not an educator, so I'm speculating what the flaws would be." His testimony about impulsivity was contradictory, first stating that a period of 15 seconds would be the time frame of an impulsive active, and then stating that impulsivity would be the act of picking something up, but not placing it in your pocket. He also opined that, in terms of behavior, parents, rather than the Board, have more responsibility for the judgment of student. Dr. Black didn't know the Student, never met the Student, and reviewed only the documents

provided by the Board. His testimony was not persuasive, and was not helpful in determining the nature of the Student's disability.<sup>8</sup>

Unfortunately, this is the typical student who would fall through the cracks in his educational setting. The cracks were wide in this case. The Parents took the appropriate action to challenge the manifestation determination, to ensure that the Student does not further fall through the cracks.

The manifestation determination was flawed. The behavior had a direct and substantial relationship to the child's disability, and the conduct in question was the direct result of the Board's failure to implement the IEP. The Student was diagnosed with ADD and his other co-morbid disorders. His IEP addressed the multifaceted ways in which the Student's disability manifested itself, and it was not implemented.

In accordance with IDEA, the Board must now conduct a functional behavioral assessment [FBA] and implement a behavioral intervention plan for the Student. As the Board has demonstrated that it does not possess the appropriate expertise to conduct such an assessment, the Board shall provide for an outside consultant to conduct this FBA, which consultant shall be one that is mutually agreed upon by the Parents. The Student shall also be returned to his placement in accordance with his IEP. It is recommended that the Student's team immediately review its implementation of the Student's program as the Student is returned to his placement.<sup>9</sup>

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<sup>8</sup> Perhaps the Board should have committed more resources to the Student prior to this incident, instead of committing resources after the fact for the paper review conducted by the neuropsychologist and the psychiatrist in the attempt to bolster its case -- a review that was not even available for consideration by the members of the manifestation determination team.

<sup>9</sup> In addition, the Board is on notice that the Student's emotional issues may have exacerbated, as was pointed out by the neuropsychologist during testimony about his paper review. This may necessitate further evaluation of the Student and a revision of his IEP. As this was not an issue in this case, it is not

**FINAL DECISION AND ORDER:**

1. The conclusions of the manifestation determination were not appropriate.
2. The behavior that has resulted in the pending disciplinary action [pending expulsion hearing] was caused by or had a direct and substantial relationship to the Student's disability, and the conduct in question was the direct result of the Board's failure to implement the Student's IEP.
3. The Board shall conduct a functional behavioral assessment [FBA] and implement a behavioral intervention plan for the Student.
4. The Board shall provide for an outside consultant to conduct this FBA, which consultant shall be one that is mutually agreed upon by the Parents.
5. The Student shall also be returned to his placement in accordance with his IEP.

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part of the order of this hearing officer. But based on the testimony, the Board should now be aware of the failings of the Student's program, and the Board's lack of knowledge of the Student's educational needs.

