

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Norwalk Board of Education

Appearing on behalf of the Parent:

Piper Paul, Esq.
Piper Paul Law
500 Post Road East, #239
Westport, CT 06888

Appearing on behalf of the District:

Michelle Laubin, Esq.
Berchem Moses PC
75 Broad Street
Milford, CT 06460

Appearing before:

Patrick L. Kennedy, Esq.
Hearing Officer

FINAL DECISION AND ORDER
(Expedited portion)

ISSUES:

1. Was the incident for which the expulsion hearing was convened a manifestation of the disability of the Student?
2. Did the District follow applicable federal and state legal requirements in arriving at its manifestation determination?

SUMMARY AND PROCEDURAL HISTORY:

Case 22-0416 was commenced by the Parents by request received by the District on May 3, 2022. The due process request contained both expedited and non-expedited claims. A prehearing conference was held on May 9, 2022. At the prehearing conference, based on *Letter to Snyder* issued by OSEP (12/13/15), the hearing was bifurcated between issues 1 and 2 (those involving disciplinary matters which must be heard on an expedited basis) and the non-expedited issues. Based on the date of receipt, it was determined that hearing of the case was required to be completed by June 1, 2022 and that the decision date was June 15, 2022. Hearing dates were set for May 16, 2022 and May 25, 2022.

Subsequent to the prehearing conference, the attorney for the Parents sent an email exercising the statutory right of the Parents to open the hearing to the public.

Hearings were held on the scheduled dates. The following witnesses testified on behalf of the Parents: Mother and Tim Morris. The following witnesses testified on behalf of the District: Edward Singleton, Alyssa Martino, Joseph Mangiardo and Nicole Waibel.

Hearing Officer HO-1 was entered as a full exhibit.

Parent exhibits P-1 through P-4, P-6 through P-16, P 18 through P-20, P-22 through P-25, P-27 through P-29, P-34, P-36, P-37, P-40, P-50, P-53, P-56. P-58 and P-60 through P-63 were admitted as full exhibits.

District exhibits B-1 through B-54 were admitted as full exhibits.

All motions and objections not previously ruled upon, if any, are hereby overruled.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law set forth herein, which reference certain exhibits and witness testimony, and 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); *Bonnie Ann F. v. Calallen Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

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. The Student, whose date of birth is September 16, 2008, is an eighth-grade student at Roton Middle School who resides with his Parents within the District. (B-32.)
2. The Student is enrolled in the Success program which operates at Roton Middle School and which is a self-contained special educational program for students with emotional and behavioral disabilities. (Testimony of Singleton, 5/25/22.)

3. The Student is identified as eligible for special education and related services under a primary category of other health impairment—attention deficit disorder/attention deficit hyperactivity disorder (OHI—ADD/ADHD). (Testimony of Waibel, 5/25/22.)
4. The Student has been evaluated numerous times over his years in special education, both by school evaluators in the Norwalk Public Schools, as well as by private evaluators requested by the parents and funded by the Board. Dr. Stacey Rosenkrantz Aronson evaluated the Student in 1st grade and indicated that the Student qualified for diagnoses of Attention Deficit Hyperactivity Disorder, Combined Presentation, Disruptive Mood Dysregulation Disorder, and Generalized Anxiety Disorder. (P-22.)
5. Dr. Aronson noted that the Student also had a thyroid disorder and that thyroid dysfunction is associated with attentional difficulty. She further noted that although the Student was taking medication for ADHD, it did not appear to be effective at controlling his symptoms at that time, and she recommended that the Parents obtain additional medical support for the Student. (P-22.)
6. When the Student was in the 4th grade at Kendall Elementary School, the Parents obtained an independent educational evaluation of the Student by clinical psychologist Dr. Roseann Capanna-Hodge, who provided diagnoses of Specific Learning Disorder with Impairment in Reading – Dyslexia, Specific Learning Disorder with Impairment in Math, and Attention Deficit Hyperactivity Disorder, Combined Type. (B-2.)
7. An evaluation by school psychologist Dr. Robert Johnson was also conducted in 2018, showing average cognitive functioning (WISC-V full scale IQ 103, verbal comprehension 111, visual spatial index 97, fluid reasoning 103, working memory 94). (B-4.)
8. Despite Dr. Capanna-Hodge's concerns that the Student was exhibiting signs of learning disabilities, Dr. Johnson's administration of the Feifer Assessment of Reading (FAR) indicated that the Student's phonological index was 97, fluency index 93, mixed index 95, demonstrating that the Student was not exhibiting signs of dyslexia. (B-4.)
9. Academic achievement testing conducted by Elaine Durbano, special education teacher, the same year showed standard scores in the average range in all areas, demonstrating that the Student's basic academic skills in math, reading, and writing were all developing in the average range. (B-6.)
10. Behavior rating scales, however, did validate clinically significant concerns for the Student in the areas of aggression, somatization, learning problems, leadership, and adaptive skills. (B-4.)

11. A functional behavior assessment (FBA) conducted by Board Certified Behavior Analyst (BCBA) Martina Pepin in 2017 indicated the Student was exhibiting maladaptive behaviors in school, including noncompliance and off task behavior. (B-3.)
12. The FBA determined that the behaviors were most likely to present when the Student was presented with a work demand, as well as when he was denied access to preferred activities or told to wait. (B-3.)
13. The services provided to the Student in the program included the services of a behavior intervention plan (BIP) overseen by the BCBA and the goals targeted included the ability to accept when given a “no” answer, to reduce disruptive behaviors, including laughing and making noise inappropriately. (B-9, B-10.)
14. The Student continued his placement in the SUCCESS program for students with emotional and behavioral disabilities at Roton Middle School for 6th, 7th, and 8th grades. His services included self-contained academic classes and a class-wide behavior management program. In 6th grade, the Student worked on goals including the abilities to maintain respectful behavior, use an appropriate tone of voice, keep to himself in the general education setting, comply with teacher directions, stay in his designated area, complete classwork, ignore distractions, express anger appropriately and accept criticism. (B-12.)
15. In the 7th grade, the Student’s goals included increasing his ability to manage negative emotions in the school setting and tolerating distressing or non-preferred events and activities. (B-16.)
16. In the fall of 2020, when students were permitted to return to school in person following the pandemic school closures of the spring of 2020, the Parents chose to maintain the Student on remote instruction for a period of time. The Student struggled with remote instruction because he was not able to receive the same types of intervention and redirection while on remote instruction that he had been able to receive during in-person instruction. Once the Student was able to return to in-person instruction in the spring of 2021, his behavior markedly improved, and he was able to progress on his goals and objectives much more effectively. (B-21; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
17. In September of 2020, at the conclusion of class, the Student said “I like bombing schools, g”. (P-10.)
18. The school contacted the Parents and had the school psychologist work with the Student to avoid such inappropriate displays of “dark humor” but did not take disciplinary action. (P-10.)
19. Although no manifestation determination PPT was held as no disciplinary action was proposed, the Principal considered the incident to be consistent with the

- Student's disability of ADHD as it was a completely impulsive remark.
(Testimony of Singleton, 5/25/22.)
20. In January of 2021, the Student was reevaluated to redetermine his eligibility for special education services while he was still on remote instruction due to parental concerns about exposure to COVID-19. For this reason, the triennial evaluation plan was modified to include a review of records and completion of behavior rating scales. (B-21, B-22, B-23; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
 21. Academic data collected in the form of AimsWeb testing showed that the Student's academic performance was not as strong as previously demonstrated, and the Student was requiring extensive prompting to complete work required of him. (B-21; Testimony of Waibel, 5/25/22.)
 22. Behavior rating scales also completed during this time showed that the Student was exhibiting clinically significant concerns in the areas of school problems and attention problems. (B-23; Testimony of Martino, 5/25/22.)
 23. Attention deficit disorder rating scales completed by the Parent showed clinically significant symptoms in activation, focus, memory and total symptoms. (B-23; Testimony of Martino, 5/25/22.)
 24. Ms. Waibel, special education teacher, endorsed several behavioral symptoms including failure to complete assigned work, susceptibility to distraction, failure to pay attention to teachers, lack of a positive attitude toward school tasks and inappropriate behaviors including lying, cheating and stealing. (B-23; Testimony, of Waibel, 5/25/16.)
 25. Recommendations at that time included preferential seating, chunking of instructions, nonverbal signals to return to task, using a behavior reinforcement system and providing clear instructions. (B-23.)
 26. Ms. Martino's review of records also included a review of the salient findings of previous evaluations of the Student, including those by Drs. Aronson, Johnson, and Capanna-Hodge. (B-23; Testimony of Martino, 5/25/22.)
 27. When the PPT conducted the Student's triennial reevaluation in January 2021, the PPT agreed that the Student would continue to qualify as eligible for services under the OHI/ADD-ADHD designation. (B-22; Testimony of Martino, 5/25/22.)
 28. The Student was able to return to school for in-person instruction during the spring of 2021, and make rapid progress in that setting. At the end of his 7th grade year, in preparation for 8th grade, the PPT reconvened and recommended that the Student begin attending general education academic classes, beginning with

- English Language Arts (ELA) for the fall of his 8th grade year. (B-25; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
29. The Student was also not recommended for Extended School Year (ESY) services for the summer of 2021 and he attended a general education summer program. (B-25; Testimony of Martino, 5/25/22.)
 30. When the Student returned to school in the fall of 2021, his maturity levels were noticeably increased and he mastered all of his goals and objectives. (B-26, B-27; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
 31. School psychologist Alyssa Martino noted that the Student was demonstrating “strong ability to accept accountability for his actions” as well as “strong leadership skills” and was observed “helping others with accountability”. (B-27; Testimony of Martino, 5/25/22.)
 32. In November of 2021, the Student was accused by another student of providing her with a drugged cookie. (Testimony of Mother, 5/16/22; Testimony of Singleton, 5/25/22.)
 33. The school investigated the accusation, found it completely baseless and exonerated the Student in short order. (Testimony of Singleton, 5/25/22.)
 34. On December 5, 2021, the school principal was contacted by a parent to report that a student had posted a threat to the school on Snapchat. (B-28.)
 35. The message was posted in an unofficial Roton Middle School Snapchat group. (B-28.)
 36. The post contained a picture of a rifle in what appeared to be a living room setting. (B-28.)
 37. The message posted with the picture was “keep playing with me bro fr bouta shoot this bitch up”. (B-28, B-43.)
 38. The Norwalk Police Department identified the Student as author of the post and visited the house. (B-28.)
 39. The police conducted a search of the house and found no weapons. (Testimony of Mother, 5/16/22.)
 40. At approximately 6:30 am on December 6, 2021, the school principal called the home and talked with the Mother. (Testimony of Singleton, 5/25/22.)
 41. The principal talked to the Mother in English. (Testimony of Singleton, 5/25/22.)

42. Although the principal spoke Spanish, all discussions between the principal and the Parents were in English. (Testimony of Singleton, 5/25/22.)
43. The principal told the Mother that they needed to have the Student brought to the school offices that morning and she agreed to do so. (Testimony of Singleton, 5/25/22.)
44. The Parents brought the Student into school. (Testimony of Mother, 5/16/22.)
45. A translator was provided for the Parents at that meeting. (Testimony of Mother, 5/16/22.)
46. The Student met with Alyssa Martino, the school psychologist, who conducted a threat assessment. (Testimony of Martino, 5/25/22.)
47. At some point, the Mother had to leave for work but the Father stayed. (Testimony of Mother, 5/16/22.)
48. In the interview, the Student said that he posted the image as a joke, that he did not have access to weapons, that he was trying to liven up the group because it had gotten boring and that a similar image had been posted by another student previously. (B-30.)
49. Ms. Martino concluded that the Student was not a threat to himself or others. (Testimony of Martino, 5/25/22.)
50. After the threat assessment was concluded, the Principal called the Mother to obtain access to the Student to provide him with his due process rights. (Testimony of Singleton, 5/25/22.)
51. The Mother told the Principal that she was at work and said that he should call the Father. (Testimony of Singleton, 5/25/22.)
52. Thereafter, the principal called the house and spoke to the Father. (Testimony of Singleton, 5/25/22; B-28.)
53. The Father and the Student then came to Town Hall to meet with the Principal again. (Testimony of Singleton, 5/25/22.)
54. The Principal spoke to the Student and the Father, confirmed once again that the Student had issued the threat and issued a ten-day suspension. (Testimony of Singleton, 5/25/22; B-28; B-29.)
55. The Principal also informed the Student and the Father that a manifestation determination PPT would need to be held and that there was a likelihood of a recommendation of expulsion. (Testimony of Singleton, 5/25/22.)

56. The school's Parent Coordinator and Translator, Andy Polanco, contacted the Mother to set up the manifestation determination. (Testimony of Waibel, 5/25/22.)
57. The Mother was informed of the five-day notice period for PPTs and waived it because she wanted to address the issue quickly. (Testimony of Mother, 5/16/22.)
58. On December 7, 2021, the school issued a notice of a planning and placement team meeting (PPT) for December 8, 2021 for a manifestation determination. (B-31.)
59. The Parents received the notice as an attachment to an email sent by Nicole Waibel written in both Spanish and English, which email also attached a copy of the procedural safeguards. (B-45; Testimony of Waibel, 5/25/22.)
60. The Parents also received a copy of the PPT notice in Spanish. (P-19.)
61. The PPT was attended by Edward Singleton, Principal; Mother; Student; Jason Zakhar, Student's Regular Education Teacher; Nicole Waibel, Special Education Teacher; Alyssa Martino, School Psychologist and Andy Polanco, Interpreter. (B-32.)
62. The PPT was also attended by Father; Joseph Mongiardo, Board Certified Behavior Analyst (BCBA) and Licia McKnight, Administrator, who were erroneously left out of the PPT report. (Testimony of Waibel, 5/25/22.)
63. The Parents were provided with a translator for the meeting. (B-32.)
64. The Translator, Andy Polanco, is a native Spanish speaker who has years of experience providing translations of PPTs for the District and one in New York where he was previously employed. (Testimony of Singleton, 5/25/22.)
65. The Parents waived another copy of the procedural safeguards. (B-32.)
66. The Parents had received numerous copies of the procedural safeguards in Spanish for many years. (Testimony of Mother, 5/16/22.)
67. The Parents were aware that they could hire an attorney or advocate for the meeting as they had previously utilized the services of an advocate. (B-2; B-7; P-4; p-22.)
68. At the meeting, the Principal presented the details of the incident. (Testimony of Singleton, 5/25/22.)

69. Ms. Martino provided the results of her threat assessment from handwritten notes as it had not yet been typed up. (Testimony of Martino, 5/25/22.)
70. The team then reviewed the manifestation worksheet. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22; B-20.)
71. The PPT team agreed that the Student's posting on Snapchat was not a manifestation of his disability. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22; B-32.)
72. The reason for the determination was that the activity was not impulsive—as it involved a lengthy process of surfing the web to obtain the image, selecting the image, coming up with a caption, discussing the caption with a friend, downloading the image and posting the image with the caption to the Snapchat group—and that the Student did consider the consequences as he believed that it would result in the rest of his Snapchat group finding the posting to be humorous. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Mangiafico, 5/25/22; Testimony of Waibel, 5/25/22; B-32.)
73. It was also concluded that there was no issue of failure to implement the IEP. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
74. The Parents and Student were in agreement with the determination that the incident was not a manifestation of the Student's disability. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22; B-32.)
75. At no point did the Parents claim any difficulty in understanding the proceedings. (Testimony of Singleton, 5/25/22; Testimony of Martino, 5/25/22; Testimony of Waibel, 5/25/22.)
76. At the conclusion of the manifestation determination, the principal advised the Parents that the school was planning to proceed with an expulsion hearing. (Testimony of Singleton, 5/25/22.)
77. It was only at that point—after the PPT had concluded—that the Mother protested as she believed that the disciplinary consequences would only be a suspension. (Testimony of Mother, 5/16/22.)
78. The Parents presented a witness, Tim Morris, who testified that the incident was a manifestation of the Student's disability¹. (Testimony of Morris, 5/16/22.)

¹ Although Mr. Morris gave testimony that was clearly presented as expert opinion, the Parents denied that he was an expert when his credentials came into question at the next hearing. After denying that Mr. Morris was an expert, the Parents then claimed that his testimony as a fact witness was based on his work

79. The reason for Morris' conclusion was that he considered the act to be an impulsive one for which the Student gave no thought to the consequences. (Testimony of Morris, 5/16/22.)
80. Mr. Morris is employed as a school counselor as well as a counselor in a private practice working with youth. (Testimony of Morris, 5/16/22.)
81. Mr. Morris has a certification from a private organization as a counselor in the area of substance abuse but not a state license.² (Testimony of Morris, 5/16/22.)
82. Mr. Morris' highest level of education is an Associates Degree from Housatonic Community College. (Testimony of Morris, 5/16/22.)
83. Mr. Singleton has Bachelors and Masters Degrees in Special Education from the University of Connecticut (UConn) as well as additional education in the areas of education and Spanish and was a special education teacher prior to becoming a principal. (B-54.)
84. Ms. Martino has a Bachelors Degree in Psychology from UConn and a Masters and Sixth-Year Diploma from Southern Connecticut State University (SCSU) as well as numerous research papers and presentations. (B-52.)
85. Mr. Mongiardo has an Associates Degree from Nassau Community College, a Bachelors Degree from State University of New York (SUNY)-Westbury and a Masters Degree from Manhattanville College as well as several licenses and certifications. (B-53.)
86. Ms. Waibel has a Bachelors Degree from SCSU in the areas of elementary education and special education as well as state certifications in those areas. (B-46.)

CONCLUSIONS OF LAW AND DISCUSSION:

1. Was the incident for which the expulsion hearing was convened a manifestation of the disability of the Student?

Both sides focused on the impulsivity of the Student's action in the testimony that they actually presented although both briefs were ambiguous on the extent that it was a determinative consideration. (Parents' brief appears to cast the argument in purely procedural terms without arguing that the evidence compels a conclusion that the

with "hundreds and hundreds and hundreds of school children", an obvious non-sequitur. (Argument of Parent Attorney, 5/25/22.)

² While it was suggested by the District that Mr. Morris intentionally gave false or misleading testimony concerning his credentials, the undersigned believes that, not being an experienced expert witness, he merely used the terms "license" and "certificate" interchangeably.

Student's actions were a result of his ADHD.)

In fact, premeditation and actions which require multiple steps are strong indicators that an action is not a manifestation of ADHD. Sequoia Union High School District, 17 LRP 11723 (PA SEA 2017); Poway Unified School District, 55 IDELR 152 (CA SEA 2010); Farrin v. Maine School Administrative District No. 59, 35 IDELR 189 (D. Maine 2001).

Both sides presented presumptively testimony in support of their positions which focused on whether the Student's actions were impulsive in nature. However, the Parent's expert, whose qualifications are in the area of substance abuse counseling, is not competent to give an opinion on ADHD. (Finding of Fact #81.) Further, to the extent that Parent's expert is at all qualified to render an opinion in this area, the qualifications of the witnesses for the District are far superior and entitled to much greater weight. (Findings of Fact 81-86.)

In any case, the actual nature of what occurred is much more consistent with the opinion of the District's witnesses than that of the Parent's. The Student thought that it would be humorous to post the threat on Snapchat and so took a multi-step approach which involved looking for an image on the internet, selecting the image, discussing a caption with a friend, downloading the image and posting the image and caption to Snapchat. (Finding of Fact #72.) The Student did not post the image without thinking of the consequences but rather misjudged the consequences, i.e. he believed the action would be one that made people laugh rather than one that got him in trouble. (Finding of Fact #72.)

Finally, it should be observed that the Parents and Student themselves believed that the Student's actions were not a manifestation of his disability when the PPT was held. (Finding of Fact #74.)

Therefore, the undersigned finds that the Student's behavior was not a manifestation of his disability.

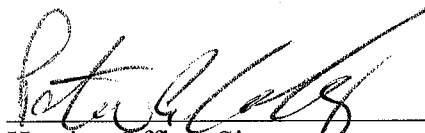
2. Did the District follow applicable federal and state legal requirements in arriving at its manifestation determination?

42 USC §1415(k)(1)(E)(i) provides that the PPT "shall review all relevant information in the student's file, including the IEP, any teacher observations and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability or (2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."

Both sides cite Bristol Township School District v. Z.B., 67 IDELR (E.D. PA. 2016) in support of their respective positions. That decision, however, supports the steps that the PPT took in reaching its manifestation determination. In the ZB case, the PPT did

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

Patrick L. Kennedy

Hearing Officer Name in Print