

VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

POST-HEARING REPORT and DECISION

Public Schools
School Division

Parents

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Child

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Hearing Officer

The Parent
Party Initiating Hearing

PURPOSE:

The Parent seeks to enroll her child in _____ School, instead of in _____ from which he has been expelled or in an alternative setting.

ISSUES:

1. Whether _____'s behaviors are a manifestation of his disability.
2. Whether the school has implemented his IEP.
3. Whether placement of _____ was appropriate under his current IEP and since the manifestation determination.
4. Whether _____ has been denied FAPE.

Preliminary Matters.

_____’s last placement was the alternative school _____ (_____), by virtue of the “stay-put” rule.

The hearing began on 9/29 and adjourned on 10/1/2008.

The Parties stipulated that all exhibits, bound in the large white notebook, are joint exhibits and they were admitted without objection. The Parties further agreed that most witnesses would be called to testify by the Parent, a few would be called by PS.

DECISION

Summary of the Case.

This case began with the filing with the _____ Public Schools (PS) of the Parent’s Complaint requesting a due process hearing for her son, _____, on August 6, 2008. The Parent, Mrs. _____, complained of two Manifestation Determination Reviews the first of which found that _____’s actions were a manifestation of his disability), implementation of his IEPs, his placement, expulsion, and procedural violations. The case is essentially centered on the

second MDR where his behavior on 4/30/08 was found not to be a manifestation of his disability. On 5/8/08, [redacted] was placed in [redacted] for 45 days as an interim alternative educational setting. On 8/11/08, he was expelled from PS. Upon expiration of the 45-day period by virtue of the "stay-put" rule (34 CFR Sec. 300.518 and 300.530(c), [redacted] has continued at [redacted] to date.

Findings of fact.

1. [redacted] is presently a [redacted]-year-old boy born 9/29/[redacted]. He was found to be a child with a disability and eligible for special education (SPED) services on 6/1/05. His disability category was emotional disturbance (ED). (Exhs 1-4) However, the Parent, Mrs. [redacted], refused to agree with the eligibility decision, and refused to consent to the initial IEP proposed. As a consequence, [redacted] received no SPED services in 2005.
2. Another IEP was drafted following an inconclusive MDR which the Parent attended, but the Parent refused to agree to the IEP. (Exh 6-9)
3. The Parent continued to decline to sign the proposed IEP and to cooperate with the PS to provide SPED services through 2005 and 2006. Mrs. [redacted] continued her refusals to cooperate, including withdrawing [redacted] from the psychiatric evaluation of 10/29/04. (Exhs 6-7)
4. On 5/10/07, [redacted] was suspended for the first semester of the 2007-2008 school year. He had taken a BB gun to school in May 2007. (Exh 10)
5. On 2/4/08 an IEP was designed and signed by the Parent, together with her consent to evaluation. [redacted] was classified as ED in this IEP. (Exh 11)
6. On 2/22/08, [redacted] was suspended for ten days, for biting, kicking and hitting a school staff member (Exh 12) An MDR was convened thereafter on 2/27/08. The Committee considered the Sodergren evaluation report of 2004, which also mentioned ADHD disability, as the latest evaluation then available to the Committee at the time (Exh 4). The Committee found that these behaviors were a manifestation of [redacted]'s disability which was then classified as ED. But that category was questionable at that time, based on the Parent's report that they had a new medical diagnosis of ADHD. (Exh 13)
7. The Eligibility Committee was reconvened for the express purpose of reexamining [redacted]'s category of ED on 3/4/08, in light of the new medical diagnosis reported by the Parent, and fulfilling the 3-year reevaluation requirement. (Exh 14) The medical diagnosis, made by Dr. [redacted], M.D. ([redacted]'s doctor), is noted on the prescription form by [redacted], a nurse practitioner, which is the last page of this exhibit. That document was delivered by the Parent to the school. The category was changed from ED to OHI – Other Health Impairment.
8. A new IEP was then prepared under date of 3/6/08 with the new category of OHI. (Exh 15) There was disagreement by the Parent as to whether the OHI category, shown on page 1 of

- the IEP, actually replaced the previous ED category shown on page 3 of this IEP. Mrs. [REDACTED], the witness, pointed out that OHI replaced the ED category but the ED *services* continued as before the change of category. (TR pp 577 –581; 617-622; 628 - 630)
9. On 4/30/08, [REDACTED] kicked the security officer, Mr. [REDACTED] in the groin. Mr. [REDACTED] at the time was holding [REDACTED] to prevent him from leaving the room before he was released for dismissal. (Tr pp. 582 – 584; 593-603)
 10. On 3-19-08, after the IEP of 3/6, the team attempted to review the functional behavioral assessment (FBA) and the behavior intervention plan (BIP), but they couldn't make contact with the Parent. (Exh 16; Tr pp. 623 - 625)
 11. [REDACTED]'s regular ed teacher, Mrs. [REDACTED], reported that he responded well to structure. She said that he needed more structure. (Tr pp 429 – 432)
 12. The Eligibility Team considered the change in [REDACTED]'s from ED to OHI would provide for more and better service to him. The ED services would not change, just the category and ED services fit within the OHI category. The change would not affect placing him at [REDACTED]. (Exh 14; Tr pp. 311 – 318)
 13. The attempted review of the functional behavioral assessment and the behavior intervention plan was thwarted by the inability of PS staff to make contact with Mrs. [REDACTED]. Telephone and various postal and delivery efforts got no response from the Parent.

Conclusions of Law.

Issue 1: Whether [REDACTED]'s behaviors are a manifestation of his disability.

[REDACTED]'s behaviors were a manifestation of his ED category, as the first MDR in February of 2008 committee found. The evidence showed that he often became frustrated, particularly in reading and writing class. He would either tune out, or occupy himself with some other activity such as art work which he enjoyed, or strike out in anger at his perceived inability or shortcomings. His teachers testified to his perfectionism as often behind his temper tantrums.

However, a few months after the first MDR, [REDACTED] was suspended again for his behaviors. On April 30, 2008 he was having trouble with his frustration and exhibited it in the usual manner of throwing things, tearing or cutting paper, and the like. Again, his behavior got to the point that his teacher had to call on Mr. [REDACTED], the security officer, to help quiet him down. So, [REDACTED] became calm while Mrs [REDACTED] counted the play money with him. Mrs. [REDACTED] told Mr. [REDACTED] to let [REDACTED] go as he appeared calm, and she and his special ed teacher, Mrs. [REDACTED], became busy with dismissing the other children from school. Mr. [REDACTED] was still holding [REDACTED]'s arms, facing him, when [REDACTED] suddenly kicked him in the groin.

The evidence shows that, upon convening a second MDR committee after [REDACTED] was suspended for 10 days, the committee decided that [REDACTED]'s kicking Mr. [REDACTED] was *not* a manifestation of his disability. [REDACTED] was placed in [REDACTED] as an interim educational placement for 45 days. He was

subsequently expelled from PS, but subject to the “stay-put” rule he remains in [redacted] and is receiving educational services. This act of kicking when [redacted] had quieted down and was not attracting the attention of the other adults in the room was clearly a premeditated act. It was not driven by any frustrations or his self-perceived shortcomings or any other thing that ordinarily would send [redacted] into the normal frenzies he exhibited at other less serious times.

The Parent complains that Mrs. [redacted], the psychoeducational specialist who prepared the report of her evaluation of [redacted] on 3/14/08 was not a member of the MDR committee that found [redacted]’s conduct of 4/30/08 to not be a manifestation of his disability, citing 34 CFR sec. 300.530(f). The complaint fails when the law is construed properly, as is set forth in *Fitzgerald, et al v. Fairfax County School Board*. Civil Action No. 1:07cv1117 (2008). There, the U. S. District Court for the Eastern District of Virginia, Alexandria Division found that the MDR committee is a subset of the IEP team, and the LEA has the absolute right to appoint school and LEA personnel to the IEP team and thus to the MDR committee. For the remainder of the MDR committee, as for the IEP team, the Parent has an equal right with the LEA to invite other “relevant” members to serve on the MDR committee. Thus Mrs. [redacted] could have invited Mrs. [redacted] to serve as a “relevant” member. (see 20 U.S.C. sec 1415(k))

Therefore, I find that [redacted]’s conduct clearly meets the definition of causing serious bodily harm to Mr. [redacted] while at school on school premises under 34 CFR sec. 300.530(g)(3). Furthermore, [redacted]’s act was not caused by or have a direct and substantial relationship to his disability; nor was it a direct result of the S’s failure to implement his IEP, as set forth in 34 CFR sec. 300.530(e)(i and ii).

Issue 2. Whether the S had implemented [redacted]’s IEP.

The evidence shows that S did implement his IEP in both the 2/4/08 IEP and the 3/6/08 IEP. The Parent signed both IEPs without question. The IEP team members paid as particular attention to [redacted] and the implementing of his IEPs as did his mother and grandmother. The Parent’s only apparent complaint about implementation of the IEPs is that the S never provided her with the progress reports on [redacted]. The evidence is to the contrary. S witnesses testified that progress reports are kept in [redacted]’s cumulative record, a complete copy of which The Parent received. Mrs. [redacted] was the only person who testified that she received no progress reports, and she produced no other evidence to support her statements.

Therefore, I find that both the IEPs were implemented.

Issue 3. Whether placement of [redacted] was appropriate under his current IEP of 3/6/08.

[redacted] was initially placed, under his first IEP, in [redacted] school in an inclusion general education class coupled with a self-contained special education classroom, both of which were in line with his IEP in his ED category. That same setup was continued under the current IEP in spite of the fact that a review of his eligibility resulted in the change in his category from ED to OHI (ADHD). The evidence shows there was no change in placement and a minimal adjustment to his goals and objectives. The testimony of the numerous professional educators that the new IEP with the change in his disability category forecast better service to him.

Therefore, I find that placement of [redacted] under the 3/6/08 IEP to be appropriate.

Unfortunately, the MDR of 5/7/08, and the connected proposed IEP were interrupted by [redacted]'s unfortunate act against Mr. [redacted] and dictated placing [redacted] in [redacted] for the 45-day period. I find also that his current placement in [redacted] is appropriate.

Issue 4. Whether [redacted] has been denied a FAPE by [redacted] S.

[redacted]'s situation was a difficult one, and presented many obstacles in the path of [redacted] S in their efforts to serve him. Nevertheless, the evidence is clear that his teachers and other professional educators never gave up on him. They have provided [redacted] with educational benefit through well-crafted IEPs.

The Parent claims that the MDR of 5/7/08 was wrongfully conducted and thereby denied the child a FAPE. The violation alleged was not including the evaluating psychologist (Mrs. [redacted]) on the MDR committee. But Mrs. Foster was not a member of the IEP team; but she could have been a member of the MDR committee. However, the committee had her 3/14/08 report available to them, which according to the testimony was sufficient for the MDR.

Moreover, the MDR committee meeting was to determine whether or not [redacted]'s assaulting Mr. [redacted] on 4/30/08 amounted to the special circumstance (34 300.530(g)(3) of inflicting serious injury on another person. The evidence is clear that his conduct therefore was *not* a manifestation of his disability. Thus, no FBA/BIP were necessary, according to 34 sec. 300.530(f)

That determination made it unnecessary for the IEP team to complete their work on either a functional behavioral assessment or a behavioral intervention plan. This is abundantly clear when it is recalled that the documented efforts of the IEP team to get the Parent to the meeting to complete the FBA/BIP work were related to the 2/27/08 MDR (which determined that [redacted]'s conduct on 2/22/08 was a manifestation of his disability) and the IEP of 3/6/08) and not 4/30/08 incident.

Therefore, I find that [redacted] has received and is receiving a FAPE.

I further find that [redacted] is a disabled child, that he needs special education and related services, and that the requirements of notice to the Parent have been satisfied.

ORDER

Accordingly, it is ordered that [redacted] remain in his current educational placement and that the [redacted] S continue to provide for his education and services, or assure provision of the same.


F. Mather Archer October 21, 2008
Hearing Officer

NOTICE

This decision is final and binding unless either party appeals in a Federal District Court within 90 calendar days of the date of this decision, or in a Virginia Circuit Court within 1 year Of the date of this decision.