

CASE CLOSURE SUMMARY REPORT

SEP 14 2015

Dispute Resolution &
Administrative Services

County Public Schools

Mr. & Mrs.

School Division

Name of Parents

September 9, 2015

Name of Child

Date of Decision or Dismissal

John F. Cafferky, Esq.

James F. Hurd, Jr., Esq.

Counsel Representing LEA

Counsel Representing Parent/Child

Parents

County Public Schools

Party Initiating Hearing

Prevailing Party

Hearing Officer's Determination of Issue(s):

Did _____ commit a violation of school policy which was a manifestation of his disability?

Hearing Officer's Orders and Outcome of Hearing:

The hearing officer affirmed the results of the CPS Manifestation Determination Review. The case was dismissed by order.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

Frank G. Aschmann



Printed Name of Hearing Officer

Signature

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION
DUE PROCESS HEARING

In Re:

represented by
James F. Hurd, Jr., Esq.

County Public Schools represented by
John F. Cafferky, Esq.
Patricia Amberly Minson, Esq.

DECISION

This matter came to be heard upon the Request For A Due Process Hearing (complaint) filed by _____'s parents pursuant to the Individuals with Disabilities Education Act, 20 USC § 1400 et seq. (IDEA) and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81.

The Parents' complaint alleges _____ County Public Schools (CPS) erroneously found, in a Manifestation Determination Review (MDR), that _____ committed a violation of school policy which was not a manifestation of his disability. As the moving party the Parents assume the burden of proof in this matter. Schaffer v. Weast, 546 US 49 (2005). The standard of proof is upon a preponderance of the evidence. 8 VAC 20-81 O. 13.

Issue Presented

1. Did _____ commit a violation of school policy which was a manifestation of his disability?

Findings of Fact

(_____) is a sixteen year old _____ with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) who was attending _____ High School, a _____ County public school, at the time of the incident in question. In late 2007, _____ was diagnosed with ADHD, inattentive type, by _____ doctor. On January 22, 2008, _____ was found eligible for special education services pursuant to IDEA. An Individualized Educational Program (IEP) was developed and implemented for _____. In accord with IDEA, _____ has been consistently found eligible for special education services upon review. In accord with IDEA, _____ has had successive IEPs developed and implemented. Under _____'s IEP, implemented on November 19, 2014, _____ was placed in general education classes which were team taught. Team taught classes provide a lower pupil to teacher ratio than other classes which are not team taught. _____ has made progress in school, receiving grade promotions and achieving passing grades.

has been observed, at times, to be inattentive, fidgety and make inappropriate or distracting verbalizations. A letter from [redacted]'s doctor, dated May 19, 2015, identifies [redacted]'s current diagnosis as ADHD, combined type. [redacted] has been prescribed adderall to address attention deficit. [redacted]'s prescription is for daily use. [redacted]'s parents allow [redacted] to regulate [redacted] own medicine. [redacted] takes medicine when [redacted] feels [redacted] needs it, usually to assist [redacted] for important events. [redacted] states [redacted] misplaced [redacted] medicine and had not taken it for several days prior to the incident.

On April 28, 2015, [redacted] was involved in an incident at school. During [redacted]'s seventh period math class a student sitting next to [redacted] yelled out, "nigger, stop." The loud noise and use of a racial epithet drew the immediate attention of one of the teachers in the classroom. Apparently incensed by the student's words, the teacher began to discipline the student in the presence of the other students. [redacted] observed this and interjected, telling the teacher it was fault. [redacted] admitted to touching the other student on the leg under [redacted] desk. The student's verbal outburst was a direct reaction to [redacted]'s touch upon [redacted] person. CPS began an investigation into the incident.

Statements were taken from students and teachers present at the scene. School records were reviewed. [redacted] has seventeen disciplinary entries on a [redacted] High School Discipline Report, dated February 24, 2014. The report notes several incidents of physical contact with other students. [redacted] was advised that unwanted touching of other students is a violation of school policy, prior to April 28, 2015. During the administrative process, [redacted] made a written statement and gave testimony before CPS hearing officers. Additionally, [redacted] made contact with the student who yelled out and made statements via text message. The statements of [redacted] and other witnesses indicate that [redacted] did touch the student who yelled. Unwanted physical contact with another student is a violation of CPS policy. The statements and actions of the student who yelled demonstrate that the physical contact from [redacted] was unwanted. [redacted] also made statements to another classmate from [redacted] math class. [redacted] had engaged in a verbal exchange with this student prior to the incident with the student who yelled.

CPS concluded that [redacted] had committed an offense in violation of school policy. A MDR was conducted and CPS held that [redacted]'s actions were not a manifestation of disability. A second MDR was held with the same result. [redacted] was suspended for ten days and removed from [redacted] High School. [redacted]'s parents have objected to the discipline imposed by CPS and appealed the actions on every level of administrative review. CPS has maintained its position denying the appeals. [redacted]'s parents requested a due process hearing and this hearing officer has been appointed to conduct a de novo review of the MDR findings.

Application of Law

A manifestation determination is required under the Virginia Special Education Regulations when a student with a disability who has been found eligible under IDEA is disciplined by a removal. 8VAC20-81-160 D.1. An IEP team is convened to make the

determination if the conduct is a manifestation of the student's disability. 8VAC20-81-160 D.4. The IEP team shall determine the conduct to be a manifestation of the student's disability if the conduct was caused by or had a direct and substantial relationship to the student's disability. 8VAC20-81-160 D.4. Additionally, the IEP team shall determine the conduct to be a manifestation of the student's disability if the conduct is a direct result of the school's failure to implement the student's IEP. id.

presented evidence, through counsel, from doctor, that was impulsive and it was her opinion that the conduct was related to impulsivity. The doctor states that failure to take medication would result in returning to "baseline" condition. The doctor's opinion must be discounted in regard to causality because she fails to make any discussion or explanation of the statements made by and the other students during the investigation and administrative process. While is an impulsive person in the grand scheme of humanity, this tendency alone does not prove that acted impulsively on the specific occasion of the April 28th incident. The evidence that was not on medicine at the time of the incident falls to the same logic. Being on or off medicine in and of itself does not prove acted impulsively. Adderall is prescribed to improve focus and attentiveness. While it may well reduce impulsiveness to some degree, as noted by father's observations, the general state of impulsiveness does not directly address the specifics of actions at the time of the incident. 's counsel argues that only a doctor can make the determination of causality because ADHD is a medical condition and all others lack the expertise to render such an opinion. Thus, the doctor's opinion should be given superior weight over the CPS witnesses. This hearing officer does not find this to be a valid argument. Under the Virginia regulations an IEP team is specifically granted the authority to make a manifestation determination. The IEP team, by regulation, is composed of many members which are not licensed physicians. The IEP team is required to review and consider relevant information which included the doctor's opinion, however, the ultimate decision is rendered by the team as a whole. Thus the law governing a manifestation determination does not allow a single opinion, even from a qualified doctor, to supercede the findings of the IEP team.

CPS presented a substantial portion of the testimony to justify its actions in the administrative process. While it is natural to defend one's opinions, this testimony is not helpful in determining if 's actions were a manifestation of disability. It is expected that the witnesses would justify and rationalize their own actions. Thus the opinions of the CPS witnesses did not form a significant factor in this decision. This matter is one properly determined by the facts and not the opinions of those who have reviewed it previously.

Likewise, a substantial portion of the testimony from CPS was dedicated to prior offenses and the disciplinary record of . This material appears to have been given great weight by CPS personnel in formulating their opinions. While there are issues of liability for CPS to consider with a student who repeatedly makes unwanted physical contact with others it is not determinative of the ultimate issue as to whether 's actions on April 28, 2015, were a manifestation of his disability. It is a well established principal in the law that prior bad acts do not prove conformity therewith. Further, it was never demonstrated that these prior acts were not

impulsive and manifestations of disability. This is another reason why the opinions of the CPS witnesses were discounted in this decision.

's disciplinary record does have some relevance. It shows that had been given notice, prior to April 28, 2015, that the unwanted touching of other students was a violation of school policy. acknowledges that actions were wrong in testimony before the CPS hearing officers. states, "Well, yeah, it was inappropriate because I shouldn't have been touching him, my hands shouldn't have been on him..." 's statement demonstrates knew was violating policy. 's disciplinary record reveals that has received progressive discipline for violations of policy. Thus demonstrating a justification for the level of discipline for the violation, an issue contested by 's father.

's father presented evidence in the record that CPS should have done more to intervene if it perceived a disciplinary problem with . He notes that changes were made to 's IEP after the incident. This material could be interpreted as a challenge to the implementation of the 's IEP by CPS, which would fall under the second prong of the test for a manifestation determination. This hearing officer does not find any merit in the contention that 's actions were a direct result of CPS failing to implement the IEP. Changes to 's IEP after the incident are irrelevant. The IEP current at the time of the incident is the one which must be considered under this prong of the test. There is no evidence which suggests that the IEP in place on April 28, 2015, was not being implemented. That IEP essentially addresses the issue by providing that will control self and obey school rules. Additionally, evidence in the documents and testimony indicate that 's father did not want any form of behavior plan and considered 's actions to be childish and just horseplay. maintains this perception as well.

's own statements give the best indication of the nature of actions on April 28, 2015.

Before the CPS hearing officers, 's attorney asks, "... why did you grab him?" replies, "Honestly, I wasn't thinking about it. You know, I was just being a kid, I guess. I don't know. We were just horsing around."

is asked by the hearing officer, "...why did you decide to touch [sic] on the knee?" responds, "well we were just playing around, you know."

sent a text message to the student who yelled out. The text reads, "ughhh dude they're trying to get me in a lot of trouble and we were just playing." The other student replies, "you were just playing not me."

's statements are clear indications that decided to engage in play while at school. This demonstrates poor judgement in making a choice not an impulse which could not resist. This is further verified by another statement from . In response to the hearing officer's inquiries into the relationship between and the other student, states, "... at the time, I didn't think he was going to react that type of way, and now that I look on it, I completely did the wrong

choice.” By considering how the other student would react, demonstrates a consciousness of actions. Further, acknowledges that simply made the wrong choice, also indicating voluntariness in actions. Ironically, the reaction of the student who yelled out provides a direct contrast. His spontaneous comment appears to have been completely impulsive and uncontrolled. The teacher noted his shock as the disruption and words used were out of character for this student. ’s action was intentional, simply did not get the reaction was expecting.

’s failure to take adderall on the day of the incident has been considered but does not weigh heavily in this decision. As is noted in the literature provided by ’s attorney, it is counterintuitive that an amphetamine would assist focus and concentration but that is the effect it has for many people with ADHD. In ’s case the medication has a positive effect in this way but does not eliminate the symptoms, as observed by ’s father. was not using the medication daily as prescribed. was able to control behavior and participate in general education classes both with and without medication. spent considerable periods in school without incident. According to was not taking medication the day before the incident yet had no similar incidents in which impulse from his ADHD controlled behavior causing to touch others. At “baseline” maintained control. Thus the lack of medication on the day of the incident was not a significant factor even if had returned to “baseline” level of impulsivity.

This hearing officer finds that ’s actions were not caused by disability. While it can be argued that there is some level of impulse in ’s action, this hearing officer does not find that there was a direct and substantial relationship to ’s ADHD. ’s ability to control self the majority of the time conflicts with the notion that ADHD was a direct cause or even substantially related to the touching of another student. is a playful child who made a bad decision to engage in horseplay during school. made a conscious choice to touch another student for fun. made the “wrong choice” just as stated.

For the above stated reasons the Manifestation Determination Review conducted by County Public Schools in the matter of is affirmed.

ORDER

IT IS HEREBY ORDERED that this matter is dismissed.

Right of Appeal 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 state circuit court within 180 calendar days of the date of this decision.

9-9-15
Date


Frank G. Aschmann, Hearing Officer