

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT, bnf
PARENTS
Petitioner,**

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§
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v.

DOCKET NO. 163-SE-0205

**McKINNEY INDEPENDENT
SCHOOL DISTRICT,
Respondent**

DECISION OF THE HEARING OFFICER

Statement of the Case

This school discipline case is before me on agreed facts and cross-motions for summary judgment. Both sides waived hearing. They have stated there is no disagreement on material facts. The findings of facts below are from the pleadings and exhibits filed by both sides. Ms. Myrna Silver is the petitioner's attorney. Ms. Nona Matthews of Walsh, Anderson, Brown, Schulze & Aldridge, P.C., is the school district's attorney. The case was filed with the Texas Education Agency on February 9, 2005. The 45 day deadline is March 26, 2005. Having heard and considered the arguments of counsel, I will grant the petitioner's motion in part and deny the motion in part, and grant and deny the respondent's motion in part.

The petitioner, STUDENT ("STUDENT"), is a student who school authorities have not identified as eligible for special education and related services under IDEA. But he is deemed eligible for IDEA special education and related services under 20 U.S.C. §1415(k)(8), and 34 C.F.R. § 300.527, as a child with a suspected disability. His parents asked in writing that the District assess STUDENT's eligibility for special education and services under IDEA before STUDENT tried to set a fire in a school bathroom (the incident for which the District now seeks to expel STUDENT). On the one hand, the parents claim the District cannot discipline STUDENT without first completing an evaluation and manifestation determination as 34 CFR § 300.523 requires. On the other hand, the parents have consistently refused permission for school authorities to test STUDENT to identify the extent of his specific disabilities and find out if he is eligible for IDEA special education and services.

Over the parents' objections, the District held an expulsion hearing in which the School Board's Hearing Officer found STUDENT had tried to set the fire. The Hearing Officer ordered that STUDENT be expelled to the Collin County Juvenile Justice Alternative Education Program for 180 school days. The parents' attorney objected to the District holding the expulsion hearing prior to the manifestation determination. Whether holding the expulsion hearing prior to the manifestation determination is consistent with IDEA is one of the issues before me.

Several other issues are presented. Among them the parents have asked me to rule the expulsion hearing was premature and to order the school district to withdraw any copies of the hearing officer's expulsion order which he may have already distributed. I have no jurisdiction over this grievance. The local school authorities are solely responsible under §37.007(a)(2)(B), Texas Education Code, for the disciplinary hearing. Since the parents have requested a stay of the disciplinary hearing until after the manifestation determination-- and school authorities have granted the stay request -- it would not appear there is a violation of the IDEA. Any violation of FERPA that may have occurred through distribution of the expulsion order before the appeal to the school board is also outside my jurisdiction as a special education hearing officer.

Findings of Fact

1. The petitioner, STUDENT is a *** grade *** year old student who, before the events that are the subject of this due process hearing, attended *** School in the McKinney Independent School District. Student received benefits under §504 of the Rehabilitation Act of 1973 for several disabilities including dyslexia, attention deficit hyperactivity disorder, and central auditory processing disorder. School officials have classified STUDENT as a § 504 student since the *** grade. The District also tested STUDENT to see if he was eligible for special education services under IDEA in the *** grade but found him ineligible.

2. STUDENT had a series of disciplinary infractions in the fall 2004-2005 semester. After the school suspended STUDENT for ***-days for kicking in the door to a school bathroom stall, his mother requested by e-mail on November 30, 2004 that the school evaluate STUDENT to determine his eligibility for special education and related services under the IDEA. The school authorities scheduled the request for consideration at a meeting to be held December 9, 2004. But on December 3, 2004, before school authorities could hold that meeting, STUDENT set a fire in a school bathroom. This incident resulted in his arrest and another school suspension. On December 6, 2004, after the assistant principal told STUDENT's parents that he could not return to *** School that day because he was under suspension, his parents withdrew STUDENT from the school. The parents then had some evaluation tests run on STUDENT at their own expense and enrolled STUDENT in a private school.

3. The District sent written notice to the parents that it was trying to expel STUDENT dated December 13, 2004. *** School authorities scheduled both a manifestation determination assessment (which was originally to have taken place under §504) and an expulsion hearing for December 16 and 17, 2004. The District postponed these hearings until after the Christmas and New Year holidays at the request of STUDENT's attorney. They were then further postponed until January 13, 2005 for the expulsion hearing (again at STUDENT's attorney's request) and the parties were working on an agreed date for the manifestation determination meeting when Ms. Silver entered the case as a new attorney for STUDENT. Ms. Silver asserted a manifestation ARD should take

place under IDEA rather than §504 and that it should precede rather than follow the expulsion hearing.

4. The expulsion hearing took place on January 13, 2005, as agreed between the school district and STUDENT's previous attorney. The District's Hearing Officer found that STUDENT was guilty of attempted arson and ordered that he be expelled to the Collin County Juvenile Justice Alternative Education Program for 180 school days. The parents have appealed this ruling to the School Board and have requested that the appeal be stayed pending the manifestation determination. The School Board has granted the stay.

5. School authorities have attempted to schedule the manifestation determination on several occasions conditioned upon the parents signing a written consent form and making STUDENT available for a Full Individual Evaluation, but the parents have refused to sign the form and have not made STUDENT available for testing to determine the extent of his disabilities.

6. STUDENT still attends the private school but the District has indicated a willingness to allow him to return to his former classes under "stay put" until after the manifestation determination, the appeal from the expulsion order, and any related appeals.

Legal Analysis

According to the petition, the first issue presented is as follows:

Whether a Manifestation Determination ARD Committee meeting should be held for STUDENT pursuant to 34 C.F.R. § 300.527 rather than a Manifestation Determination under Section 504?

Although there was some early confusion among school authorities, both sides now agree that STUDENT is eligible for special education services under 34 C.F.R. §300.527. Therefore, the manifestation determination must take place under IDEA requirements.

34 C.F.R. §300.527 provides, in part,

§ 300.527 Protections for children not yet eligible for special education and related services.

(a) General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency . . . may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. An LEA must be deemed to have knowledge that a child is a child with a disability if --

(1) The parent of the child has expressed concern in writing . . . to personnel of the appropriate educational agency that the child is in need of special education and related services . . .

The e-mail request to school authorities asking that STUDENT be evaluated for special education eligibility was sent before the incident for which the school is seeking to expel STUDENT and he is thus clearly within the protection of 34 C.F.R. §300.527.

The second issue raised challenges the District's failure to conduct a manifestation determination meeting within ten days after deciding to try to expel STUDENT. See 34 C.F.R. § 300.519 (a) and §300.520 (b)(1)(i).

STUDENT's prior attorney agreed to postpone this ten day deadline. In fact, he introduced the postponement request after the school district offered dates satisfying IDEA requirements. It is clear that he waived the deadline at least temporarily.

Further, the District could not hold a manifestation determination ARD without first doing a Full Individual Evaluation to find out the extent of STUDENT's disabilities. 34 C.F.R. § 300.531. Before the District can perform the required evaluation, the parents must sign consent forms. 34 C.F.R. § 300.505(a)(1)(i). By refusing to sign the forms, STUDENT's parents have effectively prevented the manifest determination ARD from taking place. This is not a matter for which the school district can be held accountable. See, Doe v. Maher,¹ in which the U.S. 9th Circuit Court of Appeals held as follows:

"Defendants correctly observe that an IEP team is unequipped to evaluate the source of a handicapped student's misconduct until it has obtained the results of a comprehensive evaluation conducted in accordance with 34 C.F.R. § 104.35. . . . It would be pointless to require an IEP team to convene before the evaluation is at hand."

Other cases have also held that a parent cannot claim IDEA benefits for a child while refusing to consent to allow school authorities to test the child to see whether he or she qualifies for those benefits. See, Gregory K. v. Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing"). Accord, Dubois v. Connecticut State Bd. of Educ., 727 F.2d 44, 48, 555 IDELR 398 (2d Cir. 1984); Patricia P. v. Board of Educ., 203 F.3d 462, 468; 31 IDELR 211 (7th Cir. 2000); and Doe v. Eagle-Union Community Sch. Corp., 101 F. Supp. 2d 707, 718; 32 IDLR 117 (S.D. Ind. 2000).

See also, Robert O. bnf Teressa O. v. Dickinson Independent School District, TEA Docket No. 166-SE-298 (1998). That case, like this one, involved a school district

¹ 793 F2d 1470 (1986), affirmed as modified, sub nom. Honig v. Doe, 484 U.S. 305; 108 S. Ct. 592; 98 L. Ed. 2d 686 (1988).

trying to expel a student. The student had been referred but not yet identified as a student eligible for IDEA services when he committed the offense for which the District was trying to expel him. After giving written consent to evaluate the student for special education services, the student's guardian revoked the consent to conduct a psychological evaluation. The hearing officer overrode the lack of parental consent and ordered completion of the FIE and the development of an IEP.

I agree with the conclusions of the above cases. I hold STUDENT's parents must allow the school district to perform an FIE before the manifestation hearing so it can be decided if there is a linkage between STUDENT's disabilities and the fire he tried to start in the school bathroom.

The third issue which STUDENT's parents raise is whether IDEA requires that STUDENT's manifestation determination ARD committee meeting must precede his expulsion hearing. There is a comprehensive discussion of this issue by the U.S. District Court for Maine in Farrin v. Maine School Administrative District No. 59, 165 F. Supp. 2d 37, 50; 35 IDELR 189 (D. Maine 2001). The Farrin court decided IDEA does not require a manifestation determination ARD committee meeting to precede an expulsion hearing. The Cassville R-IV School District decision of the Missouri State Educational Agency, 37 IDELR 142 (2002), cites the Farrin decision as precedent and follows its holding on this issue. Based on Farrin and Cassville R-IV School District, I rule the school district did not violate IDEA by holding STUDENT's expulsion hearing before holding STUDENT's manifestation determination ARD.

Conclusions of Law

1. STUDENT is subject to the protections of IDEA through 20 U.S.C. §1415(k)(8) and 34 C.F.R. § 300.527.
2. STUDENT is entitled to a manifestation determination ARD to determine any linkage between his disabilities and his setting a fire in the school restroom. He may not be disciplined as a result of any behavior or misconduct which is a manifestation of or which arises out of his disabilities.
3. The ARD cannot proceed unless the parents give written consent or unless I override the lack of parental consent under 34 C.F.R. § 300.505(b). To expedite a prompt conclusion of this matter, I will override the lack of parental consent.
4. If the parents want STUDENT to participate in publicly funded special education, they must make him available for the Full Individual Evaluation.
5. There is no requirement that the ARD take place before the expulsion hearing. Therefore, the expulsion hearing was not untimely.
6. Since the expulsion has been stayed by the school district while it is on appeal to the school board, disciplinary action against STUDENT is not yet final and there has

been no violation of IDEA requirements that STUDENT not be disciplined until a manifestation determination ARD takes place to determine any linkage between his disabilities and his setting a fire in the school restroom. School officials are responsible for the expulsion hearing under §37.007(a)(2)(B), Texas Education Code. I have no jurisdiction over the proceedings.

Order.

1. Within ten days of receipt of this order, school authorities shall allow STUDENT readmission to his placement at *** School and to return to his classes and "stay put" there pending final resolution of all issues related to his setting a fire in the school bathroom and the manifestation determination.

2. On returning STUDENT to *** School, STUDENT's parents are ordered to immediately make STUDENT available to the District for a Full Individual Evaluation.

3. The District is ordered to do an expedited evaluation to determine if STUDENT meets requirements for special education and related services under the IDEA and the nature and extent of his disabilities.

4. Immediately upon completion of the Full Individual Evaluation, after complying with all applicable notice and other IDEA requirements, school authorities shall conduct a manifestation determination ARD to determine whether there is any linkage between his disabilities and his setting the fire in the bathroom.

5. The District is ordered not to expel STUDENT for any behavior or misconduct that is a manifestation of his disabilities or which arises out of his disabilities.

6. Each party shall pay its own costs in this proceeding.

IT IS SO ORDERED.

Entered at Austin, Texas, March 25, 2005.

Larry J. Craddock
Special Education Hearing Officer
State of Texas

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C AND R J.

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McKINNEY INDEPENDENT

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SCHOOL DISTRICT,

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SYNOPSIS

Issue No. 1: Whether a TEA hearings officer has jurisdiction to review school disciplinary hearings involving rule infractions allegedly committed by a child with a disability eligible for special education services under IDEA.

Held: For the School District. Chapter 37 of the Texas Education Code contains the Texas law related to hearings and appeals related to student discipline. It does not confer jurisdiction on TEA hearings officers to review that determination or set it aside. No other Texas or federal statute confers that jurisdiction on TEA hearings officers.

Citation: §37.007(a)(2)(B), Texas Education Code.

Issue No. 2: Whether STUDENT's manifestation determination should be conducted under §504 or under IDEA.

Held: For the Parents. STUDENT's parents requested in writing that he be evaluated for eligibility for special education and services under IDEA before STUDENT set a fire in the school bathroom which is the offense for which school authorities are attempting to expel him.

Citation: 34 C.F.R. § 300.527.

Issue No. 3: Whether the District erred in failing to conduct the manifestation determination ARD within ten days of giving notice the District wanted to expel STUDENT.

Held: For the School District. STUDENT's first attorney requested a continuance when the school district first set the manifestation determination ARD within ten days of the decision to try to expel STUDENT. Therefore there was a waiver. In addition STUDENT's parents have refused to give permission for an FIE and the parent must allow their child to be tested when claiming eligibility for services under IDEA.

Citation: 34 C.F.R. § 300.519 (a); §300.520 (b)(1)(i); 34 C.F.R. § 300.531; 34 C.F.R. § 300.505(a)(1)(i); Doe v. Maher, 793 F.2d 1470 (1986), affirmed as modified, sub nom. Honig v. Doe, 484 U.S. 305; 108 S. Ct. 592; 98 L. Ed. 2d 686 (1988); Gregory K. v. Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987); Dubois v. Connecticut State Bd. of Educ., 727 F.2d 44, 48, 555 IDELR 398 (2d Cir. 1984); Patricia P. v. Board of Educ., 203 F.3d 462, 468; 31 IDELR 211 (7th Cir. 2000); Doe v. Eagle-Union Community Sch. Corp., 101 F. Supp. 2d 707, 718; 32 IDELR 117 (S.D. Ind. 2000); Robert O. bnf Teresa O. v. Dickinson Independent School District, TEA Docket No. 166-SE-298 (1998).

Issue No. 4: Whether the District erred in holding the expulsion hearing before the manifestation determination ARD.

Held: For the School District. There is no requirement that the manifestation determination ARD be held before the expulsion hearing.

Citation: Farrin v. Maine School Administrative District No. 59, 165 F. Supp. 2d 37, 50; 35 IDELR 189 (D. Maine 2001); Cassville R-IV School District, 37 IDELR 142 (Missouri Education Agency 2002).