

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

August 12, 2005

05.065H--Parents v. Monmouth School Department

REPRESENTING THE FAMILY: Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. A hearing was held on July 13, 2005 and July 19, 2005 at the Burton Cross State Office Building, Augusta, Maine. Present for the entire proceeding were the parents and Debora B. Marshall, Director of Special Education for the Monmouth School Department ("District"). Testifying at the hearing were the following:

The parents

David Heckman	Monmouth Academy mathematics teacher
Keith Morang	Monmouth Academy special education teacher
Jane Spencer-Sears	consultant
Debora Marshall	Director of Special Education
Monica Strobel	Interim Director of Special Education
Frank Walsh	LCSW-counselor

I. PROCEDURAL BACKGROUND:

The parents requested this due process hearing on June 13, 2005. The case involves the student, their son, whose date of birth is xx/xx/xxxx. The student completed xx grade at Monmouth Academy in June 2005.

On June 27, 2005, the parties and their counsel attended a prehearing conference. Present were: the mother and father; Richard O'Meara, Esq., counsel for the family; Eric Herlan, Esq., counsel for the District; Monica Strobel, Interim Director of Special Education; Debora

Marshall, Director of Special Education; and Shari Broder, Esq., Hearing Officer. Documents and witness lists were exchanged in a timely manner.

At the hearing, which commenced on July 13, 2005, the parents submitted 16 exhibits comprising pages P-01 through P-71. The District submitted 36 documents, comprising pages S-1 through S-187. Written closing arguments were submitted on July 29, 2005, and the record closed at that time.

On August 10, 2005, the Hearing Officer received an E-mail from Attorney Herlan requesting that the Hearing Officer address an issue involving an evaluation done by Dr. Scheckart not directly related to the determination in this hearing. Counsel for the parents was unavailable to respond. As this decision was due out by August 12, 2005, and Dr. Scheckart's report would not affect this decision, the Hearing Officer cannot [sic] reopen the record, absent the consent of the parent's counsel to extend the decision deadline.

II. ISSUE:

The parties agree that there is only one issue in dispute: Whether the PET correctly concluded that the student's conduct for which he was suspended was not a manifestation of his disability.

III. FINDINGS OF FACT

1. The student is xx years old, and recently completed xx grade at Monmouth Academy, a public school serving Monmouth, Maine. He lives with his parents and sister in Monmouth. The father is a certified special education teacher with a master's degree in special education. Both parents are very involved, loving and supportive, and take an active role in the student's education.
2. As a young child, the student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), combined type. P.61. Educational testing revealed him to be a student of average intelligence. The use of medication was effective in helping the student focus at school. During elementary school, the student was identified as eligible for special education with the

exceptionality of Other Health Impairment (“OHI”) and received some direct instruction and modifications.

3. A psychoeducational evaluation done in the spring of 2000, when the student was in xx grade, concluded that he had impairments in behavioral fluency and memory processing that would require intervention for the student to progress in school. P.39.

4. The student’s Individualized Educational Program (IEP) for xx grade notes that the student “occasionally demonstrates poor impulse control in social settings and during unstructured class time.” P.16-17. During xx grade, the student’s IEP provided, in addition to some direct instruction, behavioral coaching, and counseling. P.16. His IEP stated that he had behaviors that impeded his learning, and it contained modifications and a behavior plan. P.17-27. Listed among his problem areas were, among many other things, “behavioral dysregulation . . . consequences not meaningful because low intrinsic motivation to tasks . . . possible depression.” P. 22. To assist the student with his behavior issues, the District formed a functional behavior team which included his parents and several staff members. P. 14.

5. Toward the end of xx grade, the student was reevaluated as part of his triennial review. Results of the testing showed that he likely had a Nonverbal Learning Disability (“NLD”).

6. On September 25, 2003, the Pupil Evaluation Team (PET) developed an IEP for the student’s xx grade year. S. 62. It noted that the student did satisfactorily in the regular classroom in all academic areas except math, but that he needed significant supports and modifications. S. 62. It further mentioned the student’s need for assistance with organizational skills, and that he was sometimes inattentive. S. 62. The student’s integrative processing disorder, and its effect on the student’s ability to understand and respond to social cues was also noted, as was his non-verbal language processing problem. S. 63. The PET then considered whether the student was

appropriately classified as OHI, and examined whether the student had a learning disability. After completion of a learning disability report, the PET reached consensus that the student should receive services as a student with a learning disability, “due to specific weaknesses in language retrieval and processing speed.” S.59.

7. On April 2, 2004, David Heckman, the technology teacher, discovered that the student had accessed pictures of nude women on the Internet from the computer lab. S.104. Consequently, the student was suspended from the computer lab for the remainder of the school year and was given five days of detention. S. 104. There were no changes in the student’s use of the computer lab when he began xx grade.

8. The student’s special education teacher, Keith Morang, saw big improvements in the student’s behavior during his xx year. He noted that the student had become more social and was easier to interact and get along with. Although the student had a few disciplinary issues, primarily with using inappropriate language, Mr. Morang did not view him as a rule breaker, or as a student who did not understand the rules. The parents liked Mr. Morang and were glad that the student was continuing to work with him.

9. On September 23, 2004, the student was suspended from school for three days for walking through the girls’ locker room at 3:45 p.m. S.102. Although he knew he was not supposed to do this, he could not get to the gym through the boys’ locker room, as it was locked.

10. On September 27, 2004, the PET held its annual review [sic] the student’s program. The minutes from that meeting focused on how the student was performing in his classes. S. 45-47. Although the minutes did not record any discussions about the student’s social work services, they note a determination to discontinue them. S. 46. The school social worker, Cathy Foyt, said there had not been any incidences in which she had to work with the student. Additionally, the

parents explained that the student's counseling outside of school appeared to be meeting his needs, so the PET removed school social work services from the student's program. His goals and objectives focused exclusively upon math. The IEP also mentioned, however, that the student required "opportunities to process social problems with the school social worker." S. 50.

11. The PET met again on October 20, 2004. S. 34-35. Although there was no specific mention in the minutes about whether the student had behaviors that impeded his learning, his IEP, reviewed by the PET, noted for the first time that he did not have such behaviors. S.38. Mr. Morang did not feel that the student had behaviors that impeded his learning any longer. Immediately after the meeting, Mr. Morang discussed the change with the mother, who acknowledged that the student was having fewer disciplinary problems. Mr. Morang asked whether the mother felt that the student should have alternative consequences and not follow the progressive discipline policy used for most students, and the mother said she did not wish to "go that route." As she generally felt confident that the District "knew what it was doing most of the time," she did not contest the decision to remove the behavioral components.

12. The student had a history of taking things that did not belong to him, although this occurred primarily at home, and the District was unaware of this. He had stolen money and other items from each of his family members, and was working with a therapist, Frank Walsh, on this and other behavioral issues on a regular basis. He understood the difference in the ramifications of stealing outside the home versus at school or from stores, and chose to steal from home because the consequences were less severe. S.176. When caught, he was usually lectured by his parents, and had to make restitution. On one occasion, the student stole \$40 from his mother. As he explained to Mr. Walsh, he knew it was wrong, and thought it through beforehand. Given that he was taking only a small part of a large sum of money, he thought his mother might not notice.

He also thought that if she did, he could reap the benefits before he got caught. On another occasion, he considered stealing money from his sister while she was in the shower, but decided not to risk it. S.169.

13. In March 2005, the student was caught attempting to leave a bowling alley with one of the bowling alley's balls. S.100. He explained to Mr. Morang that he had seen the bowling ball there before, and wanted it. He understood it was wrong to take it, but left his bowling ball at home, and brought an empty bag so he could take the bowling alley's ball home with him. This was the only school-related incident of theft to date in which the student had been involved. Following this incident, the parents gave Mr. Walsh On [sic] March 23, 2005 permission orally to speak with Assistant Principal Steve Ouellette. P. 12.

14. On May 12, 2005, the student was in Meetings & Makeup period. He was working at a computer in the computer lab. Around 8:50 a.m., David Heckman, the teacher in that room, left the room to do some photocopying. S.20. While he was out of the classroom, the student walked over to Mr. Heckman's briefcase, which was on a cart behind the teacher's desk. The student opened the two latches that secured the bag, and looked in the several pockets inside. The left-hand pocket had an address book, which the student removed and placed on top of the computer tower. He also looked in the right pocket, and found a checkbook and a money folder containing \$1,100 in traveler's checks, and six \$100 bills. The student took the money folder. Approximately ten minutes later, Mr. Heckman returned to the classroom.

15. The student left the classroom and went to biology class. He then left biology class for at least five minutes to use the bathroom. While there, the student rolled up some of the money and placed it inside two pens. He hid the rest of the money in his compact disk player. He tossed the traveler's checks into the trash. The student then showed the money to his cousin, who attended

the same school, and his cousin told him that Mr. Heckman would notice that the money was missing.

16. In the meantime, another student found Mr. Heckman's address book on the computer tower, and brought it to Mr. Heckman. As Mr. Heckman knew it had been in his briefcase, he checked to see whether anything else was missing, and noticed that his checkbook and money folder were gone. Mr. Heckman reported this to Mr. Burnham, the principal, who suggested looking in trash cans. Mr. Heckman checked the trash in the boys' bathroom. He noticed that the student was in one of the stalls, as he recognized his shoes. After looking in several other places, he returned to his classroom, and found his checkbook in the large back pocket of his briefcase. The traveler's checks and money folder without the cash were later found in the trash can in the boys' bathroom. The insides of pens were found in one of the stalls.

17. Later that day, Mr. Morang spoke with the student about the missing money, and warned him that he might be implicated. Mr. Morang emphasized the importance of telling the truth, and the student admitted what he had done. The student was very distraught, and concerned both about how his parents would feel about what he did, and about going to jail. Because the student talked about running away and killing himself, Mr. Morang called Cathy Foyt, the school social worker, to join them, and they tried to calm him down. The student explained that he hated Mr. Heckman, and thought he should be fired. When Mr. Burnham asked him where the money was, the student removed it from the pens in his pocket, and handed it to him. S.17. He also gave him the money in his CD player.

18. That day, the student was suspended for his conduct, and [sic] following day, the PET met to conduct a manifestation determination. At the meeting, Debora Marshall, Director of Special Education, explained that the purpose of the meeting was to determine whether a causal

relationship existed between the student's disability and the misconduct. She used a manifestation determination worksheet, and walked the PET through it, along with a checklist. S.10-12. The first part of the form identified the student's disability as a Specific Learning Disability. During the discussion, the parents explained that the student had been involved in incidents of this nature outside of school about which the District was unaware. They explained that [sic] student was addressing these issues with his doctor, Dr. Fannin, and Mr. Walsh outside of school, and stopped receiving social work services from the District at the beginning of the school year because he was receiving support from Mr. Walsh. The PET determined that the student had demonstrated control over his behavior in the past, and that the IEP was not inappropriate, nor did it contribute to the misconduct. S.11. The PET further determined that the student understood the consequences of his actions, based upon his discussions with Mr. Morang shortly after the incident. S.11. The team decided that before it could complete the manifestation determination, however, it should obtain a functional behavior assessment (FBA) to address whether the student's disability impaired his ability to control his behavior. S.18. This was scheduled for May 17. The parents added that Mr. Walsh and Dr. Fannin would agree that the student's disability could impair his ability to control his behavior. S.18. The father said that he had given consent for District officials to speak with Mr. Walsh, although it was unclear who specifically had been given consent. S-18.

19. The PET discussed the first three questions on a manifestation determination checklist at the first meeting, which were:

- A. At the time of the incident, was the school failing to implement the IEP as it related to the behavior that is subject to disciplinary action?
- B. Was it obvious at the time of the incident that the IEP was inappropriate in relation to the behavior that is subject to disciplinary action?

C. Did the student's disability impair his ability to understand the impact and consequences of the behavior subject to disciplinary action?

There was no dispute about these questions, which were all answered in the negative.

20. On May 17, 2005, Jane Spencer-Sears, a behavior specialist from Spurwink, conducted the FBA by interviewing the student, his mother, Mr. Morang, Mr. Burnham, Monica Strobel, and Ms. Marshall. Time was very limited, as the PET was scheduled to meet the following day. Ms. Spencer-Sears observed that, while at times the student's actions appeared impulsive, other times, he planned them. S.13. She noted that he had some deficits in social skills, and did not have a good handle on his emotions, or how his behavior affected others. S.14. Among her concerns that warranted further investigation, discussion and program planning were: (1) that the student showed an apparent lack of judgment in certain situations in which he made poor choices; and (2) he "appears to not fully understand the consequences of his actions . . . (and feels) that with a good excuse he'll be able to talk himself out of trouble." S.14. Ms. Spencer-Sears did not feel that ADHD or depression affected one's judgment, and she did not think the misconduct was a manifestation of the student's disability.¹ She explained that, although impulsivity was an attribute of ADHD, it was not the case here, as the student did some planning. Although children with nonverbal learning disabilities have difficulty reading social cues, Ms. Spencer-Sears did not think that understanding the ramifications of one's conduct was in that category.

21. The PET reconvened on May 18, and Monica Strobel, the interim Director of Special Education, ran this meeting. The parents requested that Ms. Strobel be there, as the mother had been employed by the Augusta School Department when Ms. Strobel was Director of Special Education there. Ms. Strobel reminded people that the student was receiving services for a

¹ This and the two following sentences did not appear in her report, but were part of her testimony at the hearing.

Specific Learning Disability, and that his most recent IEP did not include services addressing behavioral issues. S.7. At the May 18 meeting, the PET focused primarily on the last question on the manifestation determination checklist:

D. Did the student's disability impair his ability to control the behavior subject to disciplinary action?

S. 12. The parents expressed their concern that behavioral components from middle school IEPs were not being considered during this process, and that the District did not listen to their concerns about the student's behavior this school year. The District staff disagreed, and felt that the parents had consented to removing behavioral aspects from the IEP, and did not bring up concerns about this throughout the school year. No one from the District spoke with Mr. Walsh about the student before completing the manifestation determination, and he did not attend the meeting. The parents did not obtain any written documentation from either Dr. Fannin or Mr. Walsh about the student. As the last question on the checklist was answered in the negative, the PET determined that the student's behavior was not a manifestation of his disability. His suspension continued, and he received tutoring through the end of the school year.²

22. Mr. Walsh testified that he felt that the student's conduct was a manifestation of his disability. He believed the student's impulse control was problematic, although he did not feel that the student had no control. Mr. Walsh had been working with the student on his problem with stealing, and the student had effectively resisted the urge to steal on a number of occasions. According to Mr. Walsh, leaving the date book on [sic] table showed the student's deficiency in planning, which he also thought was impulsive. Mr. Walsh acknowledged that the student clearly knew what he was doing was wrong, but he did not think it through. The student told Mr.

² There was no dispute about the adequacy of the student's suspension placement.

Walsh that he stole the money because he wanted to get the teacher back for being a jerk. S.185.

Mr. Walsh felt the student had poor judgment.³ He explained that although people steal for various reasons, it was always the result of poor judgment. Sometimes, the student could control the temptation, but other times, he could not.

23. Mr. Morang did not see the student's behaviors as impeding his learning, and felt the IEP was appropriate. He had a very good relationship with the parents, and believed that one reason the student was progressing was because the parents were good at communicating with him. He also did not feel that the student's theft was a manifestation of his learning disability, ADHD or depression.

IV. DISCUSSION AND CONCLUSIONS

The parents assert that the PET's decision in the manifestation determination was based upon a flawed procedural approach to the manifestation determination questions, and that the result was substantively incorrect. They contend that the District should have, but did not, consider all of the relevant information or all of the student's disabilities, not simply the one identified in his most recent IEP. Furthermore, as the answers to each of the four questions were incorrect, the hearing officer must reverse the PET's conclusion.

The District argues that the definition of disability contained in the IDEA is applicable, which in this case would be the student's NLD, but even if all of the student's disabilities were considered, the result would be the same. The PET correctly answered the four questions considered during the manifestation determination, so the decision must be upheld.

³ Mr. Walsh's testimony regarding the student's sense of cause and effect was inconsistent. On direct examination, Mr. Walsh said the student had a poor sense of cause and effect. He wrote, "cause, effect deficits" in his notes. S.168. On cross-examination, however, he stated that the student had a pretty good sense of cause and effect.

A.

Regarding which of the student's disabilities should be considered in the manifestation determination, the court in *Farrin v. M.S.A.D. No. 59*, 165 F. Supp. 2d 37 (D. Me. 2001) addressed this issue under a distinguishable set of facts. The *Farrin* court held that it could consider both the identified disability and any alleged disability that had yet to be identified in the child. 165 F. Supp. 2d at 52. This does not specifically address whether the PET must consider previously identified disabilities that may no longer require special education and related services for the child to benefit educationally.

To interpret *Farrin* as requiring PETs to consider every disability a child has or may have would be contrary to the purpose and goals of IDEA. To be eligible for IDEA, a child must have a disability for which the child requires special education and related services to benefit from the educational program. Not every child with a disability meets these criteria. For this reason, "disability" with respect to manifestation determinations must be interpreted as within the definition of the IDEA. This could include previously unidentified disabilities, but would not include disabilities that do not have a detrimental effect upon a child's ability to benefit from his educational program.⁴

The evidence does not support a conclusion that the student required special education due to his depression or ADHD. To the contrary, the PET unanimously agreed that the student required services for his NLD only. There was evidence that the student's behavior had improved considerably since early adolescence, and was not interfering with his learning. In the fall of 2004, the mother acknowledged that the student had fewer discipline problems. The

⁴ The parents cited a number of cases to support their position on this issue. Those cases are all distinguishable from this case. For example, the *Rutland (VT) City Pub.Sch.*, 42 IDELR 180 (OCR 2004) interprets the requirements of Section 504, not IDEA. In *Richland Sch. Dist v. Thomas*, 32 IDELR 55 (Wisc. Dept of Ed 2000), the hearing officer found that the student's previously undiagnosed disorders had a direct impact on his educational performance.

parents, who were both well informed about special education and took an active role in their son's education, did not contest the determination of the PET to change the student's identification, either when the IEP was drafted or thereafter. Although the discussion about this change was not extensive, it was raised at both PET meetings in the fall of 2004, in which both parents participated, and Mr. Morang spoke with the mother personally about it following one of these meetings. Had the parents objected, they were well aware of their rights, and they had previously reviewed and corrected what they perceived were inaccuracies to the student's IEPs.

S. 159. The evidence supports a conclusion that the District properly changed the student's disability classification, based upon his current needs. It therefore did not have to collect information on all of the student's diagnoses for consideration by the PET when it conducted its manifestation determination.

B.

The parents also assert that the PET failed to take into account all relevant information, as required in the regulations, and that this is fatal to the validity of the manifestation determination. They cite no law to support this assertion, and the *Farrin* court reached a contrary conclusion. 165 F. Supp. 2d 44. In *Farrin*, the Court examined the impact of the failure to consider the omitted evidence on the rights of the parents and student, and concluded that if the exclusion of certain information from the manifestation review would not change the results, the error was harmless. *Farrin*. 165 F. Supp.2d 44. Therefore, it is necessary to examine whether the PET failed to take into account all relevant information, and if not, whether it affected the results of the manifestation determination.

The parents contend that it was an error for the District to fail to contact Mr. Walsh for his views about the student's behavior. Section 14.6(C) of the regulations requires the PET, before making a determination,

“to consider, in terms of the behavior subject to disciplinary action, all relevant information, including: (a) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the student; (b) Observations of the student; and (c) The student's IEP and placement.”

Mr. Walsh's views, as the student's private counselor were certainly relevant to this proceeding, and the PET did not have this information. For reasons discussed below, however, his opinion would not have affected the outcome of the manifestation determination, so failure to consider it is harmless error.⁵

C.

Federal regulations require the PET to make the following specific findings when conducting a manifestation determination review: (1) whether, at the time of the behavior at issue, the IEP was appropriate and the special education services provided to the student were consistent with that IEP; (2) whether the student's disability impaired his ability to understand the impact and consequences of his behavior; and, (3) whether the student's ability to control his behavior was impaired by his disability. 34 CFR 300.523(c)(2). The burden is upon the school to demonstrate that the student's behavior is not a manifestation of his disability. 34 CFR 300.525(b).

⁵ This should not be read as interpreting the regulation as placing upon the District the burden of collecting evidence that the parents would like considered from the student's private counselor. It would certainly be the District's burden if the evidence were from someone with whom the District contracted, or who was providing services pursuant to the IEP. On the other hand, the regulation assures parents that any relevant information they offer must be considered by the PET, which can be read to assume the parents have the responsibility for gathering the information they wish to have considered. To require the District to do so under these circumstances might not be the best way to obtain the needed information. For example, in this case, the District's counsel initially encountered difficulty getting Mr. Walsh to produce his notes. Additionally, although the parents contended that they gave Mr. Walsh permission to *speak* with school officials, it was not clear who had permission to do so, and a hearsay report of his opinion would not be the best evidence.

In their closing memoranda, the parents argue that the IEP was inappropriate because it did not address the student's behaviors. As discussed above, the evidence does not support a conclusion that the student required additional behavior supports in his IEP to address impulse control or other behaviors related to theft. His parents consented to the IEP and did not contest its appropriateness. There was no evidence at the hearing regarding the relationship between the appropriateness of the student's IEP and the behavior at issue, nor was there anything about the student's behavior in school to warrant IEP intervention. Furthermore, the evidence does not support a conclusion that the IEP was not being implemented appropriately.

Although the student's NLD may account for his deficits in social perception, social judgment, and social interaction skills, it did not impair his ability to understand the impact or consequences of stealing. The father, Mr. Morang and Mr. Walsh all testified that the student knew that stealing was wrong, and understood that there were serious consequences attached to it. As Mr. Walsh noted, although the student had poor judgment, all stealing is the result of poor judgment. *See footnote 3.* Mr. Walsh was not talking about the student's judgment in social situations, which could be related to his NLD. In his testimony, he also admitted that the student had a pretty good sense of cause and effect. The student's poor judgment is not unusual in adolescents, who like the student, frequently understand the risks involved with inappropriate behavior, but engage in such behavior nonetheless, thinking there is a chance they will get away with it. The student understood the impact and consequences of his behavior.

As noted above, it was only necessary for the PET to consider whether the student's NLD impaired his ability to control his behavior, and impulsivity was not a characteristic of his identified disability. The evidence did not support a conclusion of such an impairment.

Nonetheless, assuming for the sake of argument that the student's ADHD and related impulsivity were considered, the result would not be different. While there was testimony about the student's impulsivity causing him to steal, the evidence did not support a conclusion that the behavior in this case was an impulsive act. With the exception of the soccer ball incident, the student did not have an impulsivity problem at school. It was not a situation in which the money was in plain sight, and the student could not resist the impulse to take it. Additionally, Mr. Walsh testified that the student had the ability to make choices regarding whether to steal, and sometimes made the wrong ones, but his testimony did not support a conclusion that the student's various incidents of stealing, both at home and otherwise, were impulsive acts. To the contrary, the student thought about it in advance, and planned to steal, but often decided against it. The student could control his behavior in this regard, and usually did. The fact that he did not in this case does not make it an impulsive act.

The PET reviewed the IEP and available information concerning the student, considered the behavior at issue, and reached conclusions on the questions set forth in 300.523. Based upon that information, the PET reached the correct conclusion that the behavior for which the student was disciplined was not a manifestation of the student's disability. When the testimony and notes of Frank Walsh are added to the record before the PET, the result is no different, for reasons already set forth in the above discussion. Thus, even if the District were at fault for the failure to obtain Mr. Walsh's opinion during the manifestation determination process, an issue not directly addressed in this proceeding, the error would be harmless.

ORDER

After consideration of the evidence presented during this due process hearing, the District did not violate the rights of the student when it concluded that the behavior for which the student

was suspended was not a manifestation of his disability. The parent's appeal is therefore denied.

In view of these conclusions, no order is required.

SHARI B. BRODER. ESQ.
Hearing Officer