

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

March 10, 1999

CASE # 99.044

Parents, on behalf of student, v. Sanford School Department

Counsel for parent: Thomas G. VanHouten, Esq.

Counsel for school: Eric R. Herlan, Esq.

Hearing Officer: Jeannie M. Hamrin, Ed.D.

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, MRSA, SECTION 7207; TITLE 20 USC, SECTION 1415, the *Individuals with Disabilities Act*.

A Special Education Expedited Hearing was held on March 1, 1999 to resolve a conflict between parent , on behalf of student, and the Sanford School Department . In preparation for this hearing a pre-hearing conference was held on March 4, 1999. One-hundred and fifty-three pages of documentation were entered into the record and six witnesses presented testimony.

This hearing was requested by parents, on behalf of student, to resolve the dispute regarding:

1. Whether the PET properly determined that the student's Behavior was not a manifestation of his disability under the federal standard in IDEA; and
2. Whether the services ordered by the PET for the 45 day suspension period were appropriate under the federal standard in IDEA?

I. PRELIMINARY STATEMENT

The student is an almost xx year old male who attended the eighth grade at Sanford Junior High School until he was removed from school on December 21, 1998 for violating the school policy regarding marijuana. Parents were notified by letter [12/24/98] that there would be a disciplinary hearing on January 13, 1999. A PET meeting was held on 1/4/99 to determine whether coming to school under the influence of marijuana was related to the student's special education diagnosis. The school committee, based on the findings of the PET, suspended the student for 45 days which would end on March 16, 1999.

II. ISSUES

1. Did the PET properly determine that the student's Behavior was not a manifestation of his disability under the federal standard in IDEA; and
2. Were the services ordered by the PET for the 45 day suspension period appropriate under the federal standard in IDEA?

III. TIME-LINE INFORMATION

The attorney for the parents initiated a request for a Complaint pursuant to 20-A M.R.S.A. which was received by the Department of Education on February 19, 1999. On February 23, 1999, the Department of Education received a Facsimile from parents' attorney requesting an Expedited Hearing, pursuant to 20 U.S.C. §1415(k), which amends the Complaint dated February 16, 1999 in the same matter. The pre-hearing was held on March 1, 1999 and the hearing on March 4, 1999. The decision was relayed to the parties by FAX on March 5, 1999.

IV. STIPULATIONS

There were no stipulations.

V. SUMMARY OF TESTIMONY

1. The student is currently identified as a student with learning disabilities. He received 104 minutes/day of services from Mr. Grogan in the Behavior Improvement Program (BIP) and 52 minutes a day with Ms. Ela for language arts [Testimony of Mr.Grogan; school records].
2. Mr. Grogan has been the student's special education teacher for two years. He had the student for the BIP, a very structured self-contained

program. The student is together with Mr. Grogan, an Ed Tech, a counselor and from four to eight other students. The rules for the program were positive reinforcement for behaviors based on a level system designed to help the student with organization, daily work, and task completion. The student started on level 2 and moved to level 3, the highest level, on September 10, 1998, where he has been ever since. He sometimes stays on the same day many days in a row, but has never had to drop back a level. To stay on the same day is similar to a "pause" and is the result of some little thing like "not bringing back a paper." [Testimony of Mr. Grogan & Ms. Rochat; S-51; S-42-101]

3. The school drug policy was taught to the BIP students in October of the seventh grade year, and in September and November of the eighth grade year. In addition, the School Handbook with the drug policy was distributed to every student. [Testimony of Mr. Grogan]
4. Ms. Rochat, MSW, had the student in a social skills small group with one other student. She works with the BIP twenty hours per week. She counseled each student in the program weekly, made family contacts and dealt with crises as they arose. Ms. Rochat stated that the student liked the small class, was good natured and happy in school. She felt that the student had the ability to make good judgments and understand abstractions. He demonstrated that he understood school drug policy and understood the consequences of violating the school policy.
5. The student has been successful in the BIP program. He likes school, is a leader, participates in discussions, generally obeyed rules and made good choices. Mr. Grogan had a good rapport with the student. [Testimony of Ms. Rochat & Mr. Grogan; S-42-101]
6. The Sanford School Committee adopted a "Drug and Alcohol Use by Students" Policy [JICH] on December 15, 1997. This policy states that: "Following an investigation, if a student is suspected of using or being under the influence of alcohol or other drugs, (illegal or non-prescribed), in school or at a school sponsored function...the Principal or his/her designee shall suspend the student for up to ten days..." [S-12-15]
7. Dr. Terracin, Principal of Sanford Junior High School, interviewed the

student on December 21, 1998. The student had been brought to school by a parent of another child involved in the incident. Both boys told slightly different stories but both admitted to smoking pot. When the students did not come to school, the school called the student's mother who told them that the student left for school with a friend. The school sent an attendance officer to the friend's house but no one came to the door. The school then called the friend's mother who left work, went home and drove the boys to school. [Testimony of the parent & Dr. Terracin]

8. The boys stated that they had found a "baggie of grass" "some time" over the weekend and had hidden it "somewhere." They decided at "some time" to smoke the grass. They did not go to school on Monday following the weekend they found the marijuana, but retrieved the baggie of pot and smoked it. The school stated that the boys could have chosen to give the pot to their parents, they could have chosen to come to school, they could have chosen not to smoke it. It was the students who made the choices. After arriving at school, Mr. Chessie, Assistant Principal, interviewed the student who denied using pot. After the Ed Tech thought the student might have been "high," the student was sent to the school nurse who took his vital signs and sent him back to Mr. Chessie. The student again denied smoking marijuana. At this point Dr. Terracin was called in. She told the student that this was a significant situation and asked him if he had been smoking pot and he admitted that he had. [Testimony of Dr. Terracin]

9. Mr. Yarlott, School Psychological Service Provider, tested the student in March 1998 for his triennial evaluation. He displayed high levels of motoric activity, sub-vocalization and frequently expressed frustration which was typical of the way he expressed his ADHD. On the WISC-III he had a full scale IQ of 94, a VIQ of 99 and a PIQ of 90. He had a strength in the Comprehension subtest and weakness in Arithmetic and Digit Span. He also demonstrated a relative strength in Similarities. Mr. Yarlott wrote that verbal areas were relative strengths. Tasks involving verbal conceptualization and reasoning, particularly when information was contextualized within familiar, everyday scenarios and related to information in long-term memory were somewhat of a strength. His comprehension of social situations is better than most children his age.

He understands social rules and constructs. The information about the drug policy was presented to the student during the two years using the student's strengths in comprehending real life situations. [Testimony of Mr. Grogan and Mr. Yarlott; S-30-34]

10. Mr. Yarlott has also conducted a Functional Behavioral Assessment for the student over the past month. This included Connors Behavior Checklist [three teachers], Behavior Assessment Scale for Children [self, parent, and teachers] and Attention Deficit Disorder Evaluation Scales. The results have shown no traits in the problematic range. Sensation seeking is the highest score the student received on the Connors, and that was four points below the problem cut-off. On the basis of his testing, Mr. Yarlott stated that the student could understand the rules and could control his behavior. [Testimony of Mr. Yarlott]
11. A PET was held on January 4, 1999 to determine whether the behavior was a manifestation of the student's disability. There was conflicted testimony about the issues discussed and the role of the parent. The minutes reflect that seven people attended the PET meeting. The student's program and progress were discussed in general terms. The Triennial Evaluation was discussed in general terms. The PET discussed the student's diagnosis of ADHD and processing disorder and whether it impaired his ability to understand that smoking pot was a violation. Mr. Grogan stated that the policy and consequences were known to the student. His mother concurred. His diagnosis was discussed as to whether it impaired his ability to be in control. The PET reviewed the incident of delaying smoking the pot, planning a new hiding place, and plotting their truancy. The PET discussed whether changes should be made in his current IEP. Mr. Grogan commented that the IEP and behavior plan worked very well as documented by consistently being on level and ready for increased mainstreaming. The parent commented that "a series of events began when the student began associating with another student. She had a feeling that peers were significantly influencing the student. The parent commented on peer associations and behavior changes noted, especially his story telling and lying." [S-7-9]
12. The parent felt that since she arrived late for the PET, the decision had been already made. The team members vehemently denied that any

substantive conversation took place in the 10 minutes prior to the parent's arrival. The parent felt that she was "blamed" for her son's behavior. She felt there was no discussion around short term memory, the student's understanding of cause and effect [Testimony of the parent] The other team members were in agreement that it was a "difficult" PET because of the issue, but felt it generally went well considering the circumstances. They did not feel that the parent was treated rudely or ignored. [Testimony of Ms. St.Cyr, Mr. Grogan, Dr. Terracin, Mr. Yarlott] The parent stated that she was unaware of the purpose of the PET meeting. School did not submit any evidence that they notified the mother, but in a letter to the parent on December 24, 1998, it was stated that "Mrs. St.Cyr will be in touch with you regarding a PET to determine if this behavior was related to his disability." [S-19]

13. The Sanford School Committee met on January 13, 1999 and as a result of the findings at the PET meeting, the student could be disciplined in the same manner as a non-disabled student. He was removed from the school until March 16, 1999. [S-3-6]
14. The PET met on 1/21/99 to determine the student's program while he was suspended from school. The school agreed to provide 10 hours of tutoring per week at the Goodall Library, a substance abuse evaluation and counseling. Tutoring included two hours of direct instruction and additional time for homework. [S-1; S-104-109] His tutoring time was determined by the team to be sufficient to allow the student to stay caught up. It was related to the general curriculum with goals and objectives from Maine's Learning Results. [Testimony of Mr. Grogan]

VI. DISCUSSION

Was the student's behavior properly determined to not be a manifestation of his disability under the federal standard in IDEA?

The issue of whether a misbehavior is a manifestation of the student's disability is a decision to be made by the PET. In this case, a manifestation determination meeting was held on January 4, 1999. It was attended by seven persons including the student's mother. The purpose of the meeting was to look at the misconduct and determine if there was a causal relationship with the disability. The decision of the team was that the smoking of marijuana was not directly related or caused by this student's disability. Mr. Yarlott, Psychological Examiner, testified that he did not see any link between the

student's action and his disability. Ms. Rochat, MSW, stated that the student had the ability to make good judgments. The student understood the choice he was making to smoke pot on a school day. The student was capable of "abstraction." The student admitted he hid the pot to smoke it at a later date. It was a plan and no matter when he decided to do it, it was not an impulsive act. The PET agreed after reviewing the student's program and behavior plan, the student's success in the program, and prior test results that the behavior was not related to the student's diagnosis of ADHD and identification as a student with learning disabilities.

As indicated above, a manifestation decision is to be made by a group of individuals at a PET meeting. It is not a decision that could be made unilaterally by any individual, including the parent. The ultimate decision of whether the behavior is a manifestation of the disability is made by the team as a whole. The testimony presented at this hearing does not support the position of the parents that the school improperly suspended their son because of his deficit in short term memory, poor planning or lack of understanding cause and effect. The minutes indicate that the student was very angry with himself now and with his parents. There was no indication that the parent was not in agreement with the determination. There was no complaint brought by the parent until February 16, 1999 or six weeks after the PET determination.

Were the services ordered by the PET for the 45 day suspension period appropriate under the federal standard in IDEA?

In determining whether the student was receiving a *free appropriate public education* at the time he was suspended, this Hearing Officer is guided by the following two-fold inquiry set forth in *Board of Education of Hendrick Hudson Cent. School Dist. V. Rowley*, **458 U.S. 176, 102 S.Ct. 3034 (1982)**:

First, has the school complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Regarding the first inquiry, this Hearing Officer finds that the Sanford School Department has complied with the procedures set forth in the Act.

The second part of the *Rowley* inquiry is whether the student's IEP was reasonably calculated to enable the student to receive educational benefit was met. The PET was convened on January 21, 1999 and six people attended. An IEP was written that was effective on January 25, 1999. The tutoring enabled the student to continue to participate in the general curriculum in another setting. He continued to receive those services and modifications that were in his previous IEP with the exception of his behavior weekly progress reports which were no longer necessary as he was working one on one. The student's mother agreed to the IEP.

The student began attending the tutoring placement on Monday, January 25, 1999. He

has had good attendance and has kept up with the work. At the time of the hearing, there were only six days left in the tutoring placement. The school announced its intention to return the student to his regular placement on Monday, March 16, 1999.

This Hearing Officer concludes that the school has provided an interim alternative educational placement which complies with the requirements set forth in the IDEA 1997 pertaining to the removal of a special education student from an educational placement for more than 10 days.

The parent did not prove that the school failed to provide the student with procedural safeguards following its decision to discipline him for smoking marijuana and coming to school under the influence. Any delay in holding manifestation determination meeting in connection with the discipline was caused by the Christmas holiday. The student's behavior in smoking marijuana and coming to school was not a manifestation of his disability, and he has been offered a free appropriate public education in the alternative placement.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The student qualifies for special education and related services as a student who has a learning disability, and is entitled to a *free appropriate public education* under **IDEA, 20 U.S.C. § 1400 et seq.**, as amended, and related statutes and regulations.
2. The Sanford School Department has the responsibility of providing the student with a free appropriate public education. [20 U.S.C. § 1400 et seq.]
3. The Sanford School Department has identified the student as a student with learning disabilities. The student has an Individualized Education Plan and a Behavior Plan. The IEP as developed at the January 21, 1999 PET meeting was appropriate to address his academic, emotional, social and behavioral needs. [Board of Education Of Hendrick Hudson Cent. School Dist. v. Rowley. 458 U.S. 176; 102 S.Ct 3034 (1982)].
4. The student resides in the Town of Sanford which runs a school department within the State of Maine.
3. The school's PET held a proper manifestation determination meeting and did not err in determining that the student's behavior of smoking marijuana and then coming to school was not a manifestation of his learning disability. [20 U.S.C. § 1415(k)(4)].

5. The student can be disciplined for possession of marijuana in the same manner as a non-disabled student because his behavior was not a manifestation of his disability, but he must receive FAPE in the alternative placement during the suspension. [20 U.S.C. § 1415(k)(5)(A)].
6. The student can receive a free appropriate public education in the alternative placement and the school has an appropriate IEP in place for that placement. [20 U.S.C. § 1415(k)(3)].
7. The parent did not prove that Sanford School Department failed to develop and implement an appropriate educational program for the interim placement.
9. The Hearing Officer does not have jurisdiction under IDEA over the Sanford School Committee's decision to suspend the student for his violation of the Drug and Alcohol Use by Students Policy [JICH] passed on December 15, 1997. [20 U.S.C. § 1400 et seq., as amended].

VIII. ORDER

Based upon the evidence and the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief requested by the parent is DENIED.

Jeannie M. Hamrin, Ed.D.
Hearing Officer

**#99.044, "Parent v. Sanford Public Schools"
List of Witnesses**

Parent, mother of the student

Ray Grogan, Special Education Teacher

Nancy Rochat, Behavior Impairment Program Counselor

Elizabeth J. St. Cyr , Director of Special Services

D'Lila Terracin, Principal of Sanford Junior High School

David Yarlott, Psychological Examiner

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Index of Documents

School's Documents

- S-1 PET minutes, dated 1/21/99
- S-2 Expulsion letter and expulsion record, dated 1/20/99
- S-7 PET minutes, dated 1/4/99
- S-10 Expulsion hearing notice, dated 12/24/98, with attached substance policy and expulsion statute
- S-18 Letter from Principal Terracin to parents, dated 12/23/98
- S-20 Police report, dated 12/23/98
- S-21 PET minutes, dated 4/15/98
- S-22 IEP for 1998-99, dated 4/15/98
- S-28 First quarter grades for 1998-99
- S-29 Grades for 1997-98
- S-30 Psycho-educational evaluation, dated 3/13/98
- S-35 Educational assessment, dated 5/12/97
- S-42 Report Card, tutoring notes and behavior progress reports, dated from September to December 1998
- S-103 Modifications checklist
- S-104 IEP from 1/21/99

Parents' Documents

- P-110 *DSM IV* materials concerning *Attention Deficit/Hyperactivity Disorder*
- P-118 Sanford School Committee Findings of Fact concerning the suspension of Student, same as S-3-6

P-122 1997 PET Minutes and IEP

P-130 Selected Behavior Improvement Program Weekly Reports, same as S-42

P-147 Educational Assessment, dated 5/12/98, same as S-35

P-152 WIAT, date 2/25/98 [2 pp.]