

**HEARING OFFICER EMPOWERED PURSUANT
TO 162.961(6) R.S.MO.**

HEARING DECISION

Students Name:

Parents Name:

Local Education Agencies:

Parkway C-2 School District
455 N. Woods Mill Road
Chesterfield, MO 63017-3327

Special School District of St. Louis County
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St. Louis, MO 63132

Agency Representatives:

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Hearing Date: February 28, 2006

Date of Report: March 7, 2006

Hearing Officer: Patrick O. Boyle
755 Rue St. Francois
Florissant, MO 63031

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ISSUE

Petitioners requested an expedited due process hearing to challenge the results of a manifestation determination meeting held on January 26, 2006 relating to student's use of a controlled substance on January 20, 2006.

A further request was submitted after referral of the case to the hearing officer which challenged the results of a discipline review committee held on February 2, 2006.

Petitioners at the hearing limited their challenge to the results of the manifestation meeting held on January 26, 2006. (Transcript hereinafter designated by the letter T at Pages 11 to 17.) Further, Petitioner's lead witness stated that the consequences for the student's conduct are appropriate. (T 40)

The issue as submitted is whether the student's conduct was:

1. Caused by or had a direct and substantial relationship to the child's disability; or
2. Was a direct result of the School District's failure to implement the child's IEP.

TIME LINE

Parent's request for an expedited due process hearing was received by the Missouri Department of Elementary and Secondary Education on January 31, 2006. A resolution session was held by the parties on February 15, 2006 and, the due process hearing was conducted on February 28, 2006. The hearing was held within twenty school days from the receipt of parent's request for an expedited hearing.

FINDINGS OF FACT

1. Student (DOB 09/25/91) resides with student's parents within the boundaries of the Parkway C-2 School District ("Parkway") and the Special School District of St. Louis County ("SSD"). (Ex. R-10).

2. Parkway is a Missouri school district organized pursuant to Section 162.461 et seq. RSMO.

3. SSD is responsible for identifying and serving special education students in Parkway, pursuant to the directives of the Missouri Department of Elementary and Secondary Education ("DESE") Missouri State Plan for Special Education, Reg. X ("State Plan").

4. On November 12, 1996, student's mother gave written consent for an initial evaluation to determine whether student was eligible for services under the Individuals with Disabilities Education Act ("IDEA"). (Ex. R-2). At a meeting on November 18, 1996, it was determined that student met the Missouri criteria for a student with a behavior disorder. (Ex. R-3).

5. On December 6, 1996, an Individualized Education Program ("IEP") was developed for student. (Ex. R-4). At the time, student resided and attended school in the Rockwood School District. (Ex. R-4 at 12).

6. At a meeting on April 25, 2003, it was determined that student met Missouri criteria for the disability of emotional disturbance. (Ex. R-5). This diagnosis was not substantive, but merely reflected a change in name under Missouri criteria for the prior behavior disorder diagnosis. (Dutcher testimony T 141).

7. At the time of the April 25, 2003 meeting, student's educational placement was at Edgewood Children's Center. (Ex. R-5 at 23). In the spring of 2004, Edgewood determined that student was ready for a less restrictive setting. Parents agreed with this determination. (Ex. P-11; McMahon testimony T 52-53).

8. Student attended Logos school during the 2004-2005 school year. (Ex. R-7 at 52; Dutcher testimony T 141-146). Student resided in the Parkway School District at the time. (Ex. R-7 at 49). Student's IEP team met on February 17, 2005. (Ex. R-7 at 49). The team noted that student had made a successful transition to Logos and did not appear to need as much intervention from a therapist. (Ex. R-7 at 52). The IEP team determined that student was ready to begin integrating back into the local school for partial days and developed an IEP that provided such a transition. (Ex. R-7 at 52, 57, 67).

9. Student's IEP team met on April 27, 2005. (Ex. R-8 at 68). The IEP team noted that toward the end of April, student was displaying more inappropriate behaviors at Logos, but at Parkway South Middle School ("PSMS") student had little to no behavior issues in general education, and only some behavior issues in the group resource setting. (Ex. R-8 at 71). Student's placement was changed to full day public school. (Ex. R-8 at 86).

10. Student attended PSMS during the 2005-2006 school year. On December 20, 2005, student's IEP team met. (Ex. R-10 at 89). At the meeting, the team noted that student's disability affected performance in academic and non-academic areas in the following ways: task avoidance, inconsistent task completion, taking notes,

noncompliance/insubordination, and peer and adult interactions. (Ex. R-10 at 90). The consistent testimony of school district witnesses showed that these concerns were mild and in some settings virtually nonexistent. In particular, student's regular education teachers reported little more than occasional noncompliance which could be corrected with limited redirection. Student's parents reported at the December 20 meeting that the team approach at PSMS allowed for teachers to be aware of and assist student. (Ex. R-10 at 90). In response to the question "does the student exhibit behaviors that impede his/her learning or that of others," the December 20, 2005 IEP states "no". (Ex. R-10 at 91). There was no evidence that student's parents disagreed with the characterizations of student's disability as stated in the December 20 IEP.

11. Student was successful academically during the 2005-2006 school year. (Ex. R-12 at 124).

12. At the December 20, 2005 meeting, the team, including student's parents, determined that it was not necessary to gather additional data through reevaluation. (Ex. R-11).

13. On January 20, 2006, PSMS staff received information that student was lighting something behind a bush at the bus stop and had smoked something that smelled like "herb". (Ex. R-12 at 118).

14. Angela Frye – PSMS assistant principal, Mr. Fenner – PSMS principal, and Karen Weinberg – student's special education teacher, met with student on January 20, 2005. After denying that anything had happened at the bus stop or on the bus, student shrugged shoulders when asked whether student had been smoking on the bus. (Ex. R-12 at 118).

15. Student consented to a search, during which a bag containing marijuana was found in a tear in student's hoodie. (Ex. R-12 and 118). Student then admitted to smoking marijuana on the bus and at the bus stop and added that there was more "stuff" in a tear in a seat on the bus. (Ex. R-12 at 118).

16. A search of the bus, conducted with student's assistance, disclosed a hidden foil makeshift pipe that had marijuana residue and which smelled strongly of marijuana. (Ex. R-12 at 118). Student admitted to using the pipe to smoke marijuana at the bus stop and on the bus. (Ex. R-12 at 118, 122).

17. Student had purchased the marijuana on the bus about a week before January 20, 2005. (Ex. R-12 at 118).

18. Student was suspended for purchasing, possessing, and using marijuana. (Ex. R-12 at 123).

19. A manifestation determination meeting was held on January 26, 2006. (Ex. R-13). Among those in attendance were student, his parents, student's regular education teachers, and Karen Weinberg, student's special education teacher. (Ex. R-13 at 125). The meeting lasted approximately 1 ½ hours. (Weinberg testimony T 177-180).

20. The group considered relevant information in student's file, student's IEP, information provided by student's teachers, and information provided by student's parents. (Ex. R-13 at 126). Information provided by student's teachers indicated that student was doing well and that they were not seeing any significant behavior issues. (Weinberg, Greco, and Miller testimony T 177-183, T 233-235, and T 224-226).

21. The group determined that student's conduct in purchasing, possessing, and using the marijuana was not caused by and did not have a direct and substantial relationship to student's disability. (Ex. R-12 at 126). Student's parents did not agree with the determination.

22. Karen Weinberg testified that she had regular contact with student's regular education teachers and that the teaches did not express concerns with student to her. (T 173). Ms. Weinberg's testimony showed that she did not see any significant behavior issues when working with student. (T 186-196). The hearing officer finds Ms. Weinberg's testimony to be credible.

23. Ellen Dunne is a social worker who provided psychological counseling to student and additional social work services. She met with student on a regular basis and also had regular contact with Ms. Weinberg and student's regular education teachers regarding student. Ms. Dunne testified that Ms. Weinberg and student's teachers did not express concerns to her about student's behavior. (T 204-207). Ms. Dunne did not observe any significant behavioral concerns. (T207-208) The hearing officer finds Ms. Dunne's testimony to be credible.

24. Frank Greco – student's Pre-Algebra teacher, and Beth Miller – student's Communications Arts teacher, testified about their experience with student. Their testimony showed that student generally did well academically in class, had appropriate relationships with them and with peers, that student tended to be quiet and reserved in class, and that they did not have significant behavior concerns about student. Both

teachers testified that they had not heard student's other teachers express any significant concerns about student. The hearing officer finds Mr. Greco's and Ms. Miller's testimony to be credible.

25. At the hearing Angela Frye, Cathy Dutcher – SSD Area Coordinator, Karen Weinberg, Ellen Dunne, Frank Greco, and Beth Miller, all testified that they continued to believe that student's conduct in purchasing, possessing, and using the marijuana was not caused by and did not have a direct and substantial relationship to student's disability.

26. There was no evidence that the parents ever expressed concern to SSD or Parkway that student's disability-related needs were not being addressed appropriately during the time that student attended PSMS.

27. Keith Komorowski and Molly McMahon provided therapeutic services to student during the time student was at Edgewood. Neither Mr. Komorowski nor Ms. McMahon observed student at PSMS or spoke with SSD or Parkway staff members about student. The testimony of Mr. Komorowski and Ms. McMahon failed to show any connection between student's disability and his conduct in purchasing, possessing, and using the marijuana on January 20, 2006.

28. Kevin Otis, who is currently providing drug treatment to student, testified for Petitioner. Mr. Otis never observed student at PSMS and only spoke with SSD or Parkway staff members about student at a resolution session. The Hearing Officer does not find the opinion of Mr. Otis to be relevant or substantiated concerning the manifestation of student's disability. (T 65-74).

29. Beverly Nance, student's great-aunt, testified for Petitioner. Ms. Nance never observed student at PSMS or spoke with SSD or Parkway staff members about student. Ms. Nance's testimony failed to show a direct and substantial connection between student's disability and his conduct in purchasing, possessing, and using the controlled substance. She further stated that the consequences imposed by the school were appropriate (T 40).

30. Student sat with his parents during the hearing. Student sat attentively and behave appropriately throughout the hearing.

DECISION AND RATIONALE

CONCLUSIONS OF LAW

If a school district decides to change the placement of a child with a disability because of a violation of a code of student conduct, it must conduct a manifestation determination within ten school days of the decision. *Missouri State Plan for Special Education* ("State Plan") at 60. There is no dispute in this case as to whether a manifestation determination should have been conducted.

Manifestation determination reviews are conducted by the local education agency, the parents, and relevant members of the IEP team. *State Plan* at 60. When conducting a manifestation determination review, this group must review all relevant information in the student's file, the child's IEP, any teacher observations, and any relevant information provided by the parents. 20 U.S.C. 1415(k)(1)(E)(i); *State Plan* at 60. The evidence here showed that an appropriate group of persons conducted an appropriate review of relevant information.

After reviewing the relevant information, the group conducting the manifestation determination review must consider two questions. The first inquiry is whether the conduct in question was “caused by, or had a direct and substantial relationship to the child’s disability.” 20 U.S.C. 1415(k)(1)(E)(i)(I); *State Plan* at 60. With regard to this initial inquiry, the *IDEA Guide to Frequently Asked Questions*, published by the Committee on Education and the Workforce, is particularly instructive. In response to the question, “What does the term manifestation of a child’s disability mean?” the Committee answered:

“This term has been significantly changed in this reauthorization. Previously any tangential or attenuated relationship between the discipline infraction and the child’s disability was sufficient to determine that the infraction was a ‘manifestation’ of the child’s disability. In the new IDEA, the bipartisan consensus acknowledged that ‘[i]t is the intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child’s disability, and is not an attenuated association, such as low self-esteem, to the child’s disability.’ Accordingly, **it is now clear in the new IDEA that the disciplinary infraction must be caused by or be the direct result of a child’s disability, and not a mere correlation or attenuation.**” *FAQ* at 18, emphasis added.

BURDEN OF PROOF

The United States Supreme Court recently resolved the question of which party bears the burden of proof at an administrative hearing assessing the appropriateness of an IEP. In *Schaffer v. Weast*, the Court followed the “ordinary default rule” in concluding that “(a)bsent some reason to believe that Congress intended otherwise . . . the burden of persuasion lies where it usually falls, upon the party seeking relief.” 126 S.Ct. 528, 534,

535 (2005). The rationale of the decision in *Weast* applies with equal force to the issue of the burden of proof when a parent challenges the determination reached at a manifestation determination meeting.

Any question regarding Congress's intent on the issue has been removed by the United States Congressional Committee on Education and the Workforce. The Committee published the *IDEA Guide to Frequently Asked Questions* ("FAQ") on February 17, 2005. In response to the question, "Can a parent appeal the decision regarding the manifestation?" the Committee answered:

"Yes, if the parent of a child with a disability disagrees with the manifestation determination or placement, the parent may request a hearing. At such hearing (as for the manifestation determination), **the obligation is on the parent to show that the child's action resulting in the discipline infraction was the direct result of the child's disability.** *FAQ* at 19, emphasis added.

Taken together, the decision in *Weast* and the statement by the Congressional Committee demonstrate that Petitioner bears the burden of proving their claim.

DECISION

Parents have failed to carry their burden of proof that the decision of the Manifestation Determination meeting was incorrect.

Student's parents are to be commended for their concern and strong support of their child. No objection has been made of the discipline imposed and, the hearing officer infers that the parent's concern centers on the refinement of a behavior modification plan to be incorporated in their child's IEP.

Whether or not such a behavior modification plan is needed as a related service to enable the student to receive instruction in the least restrictive environment is not an issue in this hearing which sought an expedited review of issues related to a manifestation determination for student discipline.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 45 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri or to a Federal Court.

So Ordered,

Patrick O. Boyle,
Hearing Officer

Dated: March 7, 2007