

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
Petitioner,)
vs.)
GRANDVIEW C-4 SCHOOL DISTRICT,)
Respondent.)

DECISION COVER SHEETS

This is the decision of the hearing panel following an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (2004), and Missouri law, §162.961 RSMo.

THE PARTIES

Student:

Petitioner:

Respondent: GRANDVIEW C-4 SCHOOL DISTRICT.

The petitioner was represented by:

Scott Wasserman
Scott Wasserman & Associates, LLC
8889 Bourgade
Lenexa, KS 66219

The school district was represented by:

Ransom A. Ellis, III
Ellis, Ellis, Hammons & Johnson, P.C.
901 St. Louis St., Suite 600
Springfield, MO 65806

HEARING OFFICERS:

Kenneth M. Chackes
Jeffi Jessee
Dr. Patty Smith

Hearing Chair
Panel Member selected by parent
Panel Member selected by school district

RELEVANT DATES

Request for due process hearing: May 15, 2008

Dates of hearing: September 15 and 16, 2008

Date of Decision: November 3, 2008

Explanation of deviation from time-line:

On May 15, 2008, the petitioner submitted a complaint and request for due process hearing to the Missouri Department of Elementary and Secondary Education (DESE). A resolution conference should have been conducted within 15 days after the district's receipt of the complaint, that is, by May 30, 2008, and the resolution period ended 15 days thereafter, on June 14, 2008. The parties stated that they held the resolution conference on May 29, 2008, and the parties were unsuccessful in their attempt to resolve the issues in the case. The 45-day timeline for completing the hearing and decision began at the end of resolution period, on June 14, 2008, and, unless extended at the request of a party, would have ended on July 29, 2008.

The Hearing Chair scheduled a pre-hearing conference for June 17, 2008, but the student's surrogate parent was not available during the week of June 16th. At the surrogate parent's request, the pre-hearing conference was postponed and conducted on June 24, 2008. The attorney for the school district, the surrogate parent, and an attorney he retained to represent the student all participated in the pre-hearing conference. Based upon the availability of the attorneys and hearing officers, the school district proposed that the hearing be conducted during middle to late September 2008. The attorney for the district submitted a written request to extend the timeline for completion of the decision in this case through October 31, 2008.

On June 25, 2008, the Hearing Chair granted the school district's request and extended the timeline for the case to October 31, 2008. The hearing was scheduled for and conducted on September 15 and 16, 2008, in Grandview, Missouri.

On October 31, 2008, the Chair notified the parties that the panel needed some additional time, until Monday, November 3, 2008, to complete the decision. The School District requested, with the consent of the parent, that the deadline be extended to that date. The Chair granted that request and extended the deadline to November 3, 2008.

Mr. Ellis sent his proposed issue the same day, June 24, 2008, and suggested that the issue be as follows:

Whether the Manifestation Determination on March 13 and 25, 2008, inappropriately failed to find that the Student's conduct in question was caused by, or had a direct and substantial relationship to the Student's educational disability. If so, what is the remedy?

On June 25, 2008, the Hearing Chair issued a Scheduling Order setting the hearing for September 15, 2008. As the petitioner's attorney had not yet responded to the statement of the issue proposed by the district's attorney, the Chair did not state the issues in that Order. On August 27, 2008, the Chair contacted the parties again, and, among other things, asked whether the parties agreed that the issue proposed by the district's attorney was the issue to be decided by the panel. The Chair requested the attorney for the student to respond by September 3, 2008.

Mr. Wasserman did respond by that date and proposed the following issues for the hearing:

1. Was the conduct in question caused by, or did it have a substantial relationship to, the child's disability?
2. Did the district violate the student's procedural safeguards in determining that his conduct was not a manifestation of his disability?
3. Did the district violate the Student's procedural safeguards by removing him to an interim alternative educational setting that was not determined by the IEP team?

In a letter dated September 3, 2008, the school district objected to the second and third issues as being beyond the allegations of the due process complaint. Petitioner responded on September 5, 2008, arguing why all three issues were properly before the panel.

On September 8, 2008, after reviewing the complaint, the district's response to the complaint, my notes from the pre-hearing conference, the school district's proposed statement of issue, petitioner's proposed statement of issues, the district's objections to the petitioner's

proposed issues, petitioners argument in response, and the applicable statutory and regulatory provisions, the Chair conducted two more telephone conferences with the attorneys. As a result, the parties agreed on the following issue for the hearing:

Whether during the Manifestation Determination on March 13 and 25, 2008, the District complied with 34 C.F.R. § 300.530(e)(1) and (2) in making the Manifestation Determination.

In addition, the Hearing Chair denied, without prejudice, the request of the petitioner's attorney to add the third issue he proposed on September 3, 2008, to the issues to be decided during the hearing scheduled for September 15, 2008 ("Did the district violate the Student's procedural safeguards by removing him to an interim alternative educational setting that was not determined by the IEP team?"). The Chair believed that issue was outside the scope of the complaint filed by the surrogate and, even if the complaint could be read to include it, for practical reasons it should not be added to this hearing. Even though the issue as stated was a procedural one, which by itself would not add to the evidence to be considered at the hearing, in order for it to be a violation of the IDEA substantive harm must be shown. 20 U.S.C. §1415(f)(3)(E). To get into the question whether the student or his surrogate parent was harmed by the district's removal of the student to an interim alternative educational setting would have greatly expanded the hearing as it was contemplated at the time of the prehearing conference over two months ago. The Chair believed it would be unfair to the district and could be detrimental to the student to delay the hearing by expanding the issues.

Therefore, the Hearing Chair issued an Order on September 8, 2008, that the issue for the hearing in this case would be as follows:

Whether during the Manifestation Determination on March 13 and 25, 2008, the District complied with 34 C.F.R. § 300.530(e)(1) and (2) in making the Manifestation Determination.

If the District did not so comply, what is the remedy?

FINDINGS OF FACT

1. At the start of the hearing, all of the Exhibits identified by the parties were introduced and admitted into evidence. (Tr. 3-4).

2. At the time of hearing, the Student was a 13 year old male who resided at Ozanam, a residential facility for children with emotional disturbance and behavior problems. (Tr. 13-14). Ozanam is within the boundaries of the Grandview C-4 School District (referred to as the District).

3. The Student's educational surrogate is Sean Swindler (referred to as parent or surrogate), who was appointed to that position by the Missouri Department of Elementary and Secondary Education (DESE) on February 23, 2007, at the request of the district. (SD Ex. 5).

4. The Student entered the District on January 9, 2007, as a Fifth Grade transfer student from the Kansas City School District (KCSD). SD Ex. 1-2; Tr. 171-172. Upon receipt of the transfer notification, the District received the following information:

A. An educational evaluation that had been completed by the KCSD on March 21, 2005. (SD Ex. 1, pp. 1-12). This evaluation educationally assessed the Student as having an Emotional Disturbance. (SD Ex. 1, pp. 7-10).

B. The Student's most recent Individualized Education Program (IEP), dated March 16, 2006. (SD Ex. 1, pp. 13-27).

C. The Student's Behavior Intervention Plan dated March 2, 2006. (SD Ex. 1, pp. 28-31).

5. On January 8, 2007, Sheryl Malloy, a Process Coordinator with the District, completed the transfer information forms (Tr. 211-12; SD Ex. 2, pp. 35-37) and spoke with the Student's Case Manager and classroom teacher at KCSD, Valerie Roberts, concerning pertinent information about the Student. Ms. Malloy obtained the following information from Ms.

Roberts:

[The Student] has a history of hitting other students. His educational needs are currently addressed in the public school setting. At this time there was no recommendation for a change of placement to an outside, separate facility.

Ms. Roberts reported [the Student] is a likeable kid, but he can be impulsive. He tends to stir things up in the classroom, although he is very quiet about it. She also reports that [the Student] no longer throws tantrums or cries and he is less inclined to run and tell on others to adults. He still attempts to "bully" other students.

[The Student] has made progress since leaving Niles. Ms. Roberts indicated he was heavily medicated when he first left Niles. Meds were stopped and he began doing better. At this time he is reading at the 4.1 reading level and other academics have also improved.

(SD Ex. 2, pp. 36-37; see also SD Ex. 21, p. 280; Tr. 212-213). Ms. Roberts did not indicate during this conversation that the Student had engaged in any conduct of a sexual nature during the time he was in her classroom in the Kansas City School District. (Tr. p. 213).

6. On January 9, 2007, the District accepted the KCSD Educational Evaluation and prepared an IEP Addendum for the Student. (Tr. 172-73; SD Ex. 2, pp. 38-40; SD Ex. 21, pp. 278, 280). A Notice of Action was sent out that day which indicated a change of services for the Student and described the proposed action as follows:

The change of service time is proposed based on [the Student's] educational needs at this time. A change of service time for specialized instruction in academics and behavior will change from 1480 minutes per week to 1720 minutes per week. At this time, [the Student] will participate in specials (art, music, physical education) with his special education peers instead of regular class peers. Counseling for 30 minutes per week will continue. [The Student's] placement continues to be outside regular class more than 60% of time.

(SD Ex. 3, pp. 60-61; SD Ex. 21, p. 280; Tr. p. 172).

7. On February 8, 2007, the District requested that the Missouri Department of Elementary and Secondary Education ("DESE") appoint an Educational Surrogate for the Student. (Tr. 173, 214; SD Ex. 5, pp. 65-66; SD Ex. 21, p. 280). On February 27, 2007, the District received notice that Sean Swindler had been appointed to be the Student's Educational Surrogate. (Tr. 173-74; SD Ex. 5, p. 66; SD Ex. 21, p. 281).

8. On February 21, 2007, the District conducted an IEP Meeting to review and/or revise the Student's IEP. (Tr. 172-73; SD Ex. 4, pp. 63-64; SD Ex. 21, pp. 278, 280). Present at this meeting, in addition to school staff, were Stephen Wyly, the Director of Education at Ozanam, and Sandy Williamson, the Student's Therapist at Ozanam. During this meeting an IEP was developed for the Student and the Student's IEP Team determined that the appropriate placement for the Student was "Outside Regular Class 21% to 60% of day." (SD Ex. 6, pp. 68-84; SD Ex. 21, pp. 278, 280). The Student's IEP Team also determined that the Student was not eligible for Extended School Year Services. (Tr. 174-175; SD Ex. 6, pp. 71, 79). The Student's Present Levels section of the IEP indicates that the Student's past problem behaviors

included, as reported by the KCSD, "leaving the classroom, threatening peers, non-compliance towards adults, poor impulse control, an inability to understand how his behaviors influence the reactions of others toward him," and as observed in the Grandview District, "the inability to take responsibility for actions, cursing at others and out loud, threatening and bullying peers, walking out of classrooms, hitting peers, sneaky behavior and several behavioral issues on the school bus." (SD Ex. 6, p. 70). Among the Student's strengths, the IEP notes: "Once [the Student] has had time to cool off, he is able to process and take responsibility for his actions." *Id.*

9. On February 21, 2007, the District issued a Notice of Action which set forth the proposed change of services that had been discussed and agreed-to at the IEP meeting that day. The Notice of Action describes the proposed change of services as follows: "Change of services for 890 min/wk in the self-contained ED classroom at Butcher-Greene Elementary, 21-60% of his school day." (SD Ex. 6, p. 85; SD Ex. 21, p. 280).

10. On April 25, 2007, the District conducted the Student's annual IEP meeting to review and/or revise the Student's IEP, in part because he would be moving into the District's Middle School program the following school year. (SD Ex. 7, p. 86; SD Ex. 21, pp. 279, 281). The following persons were present at this meeting: Sean Swindler, Stephen Wyly, Joan Levinson, Sherry McCombs, Amanda Benneson, Pam Lott, Sandra Williamson and Christopher Geil. The Student's Present Levels section of the IEP indicates that the Student's past problem behaviors, as reported by the KCSD, included: "leaving the classroom, threatening peers, non-compliance towards adults, poor impulse control, refusal to do school work, difficulty in accepting responsibility for personal behaviors and accepting consequences for those behaviors and an inability to understand how his behaviors influence the reactions of others toward him;"

and the following behaviors that have been observed in the Grandview District: “the inability to take responsibility for actions, threatening and bullying peers on the bus, noncompliance on the bus, sneaky behaviors, horseplay and inappropriate comments toward younger female students.” (SD Ex. 7, p. 90). The IEP again reported that among the Student’s strengths was, after having time to cool off, his ability “to process and take responsibility for his actions.” *Id.* The Student's IEP Team determined that the Student was not eligible for Extended School Year Services (SD Ex. 7, pp. 91, 100; Tr. pp. 176-177) and that his placement should be changed to: "Outside the Regular Class more than 60% of day." (SD Ex. 7, p. 99).

11. The April 25, 2007, IEP contains four goals, all behavioral or social in nature. (SD Ex. 7, pp. 92-95). The Student has no academic goals in his IEP. The four behavioral goals were based on the IEP Team’s assessments of the Student’s unique needs and each goal was directly related to the Student’s disabilities. (Tr. 265-66). The goals relate to improved social interaction (Goal 1), improved interpersonal skills (Goal 2), improved behavior on the bus (Goal 3), and improved self-advocacy skills (Goal 4). (SD Ex. 7, pp. 92-95; Tr. 234-36). The goal regarding behavior on the bus was on the Student’s IEP from his previous school year, when he was still in elementary school. (Tr. 236-37).

12. On April 25, 2007, the District issued a Notice of Action which set forth the proposed change of services that had been discussed and agreed-to at the IEP meeting that day. The Notice of Action describes the proposed change of services as follows:

Change of services to the following: ED class for Social Skills Development; 235 min/wk; ED class for Math, 235 min/wk. Reading 470 min/wk (Read 180) and Communication Arts, 235 min/wk; and Counseling, 30 min/wk. for services

more than 60% of his school day to meet his academic and behavioral needs at the middle school level.

(SD Ex. 7, pp. 105-106).

13. During the first semester of school year 2007-08, while the Student was attending Grandview Middle School, he received the following discipline for violation of the District's Student Discipline policy:

A. On August 20, 2007, the Student received a two (2) day out-of-school suspension for hitting another student in the cafeteria. (SD Ex. 20, pp. 245-247).

B. On September 18, 2007, the Student received a one (1) days out-of-school suspension and was reassigned for three (3) days to the District's Crossroads program for disrespect to a teacher. (SD Ex. 20, pp. 248-250).

C. On October 4, 2007, the Student received a five (5) day in-school suspension for touching a female student's backside -- sexual harassment. (SD Ex. 8, pp. 107-111).

D. On November 5, 2007, the Student received a one (1) day in-school suspension for writing on another student's clothing with a marker. (SD Ex. 20, pp. 251-254).

E. On November 8, 2007, the Student received a two (2) day in-school suspension for hitting another student in the head with a notebook. (SD Ex. 20, p. 255).

F. On December 5, 2007, the Student received a ten (10) day reassignment to the District's Crossroads program for possession and distribution of drugs -"energy pills". (SD Ex. 20, pp. 256-264).

14. During all times relevant to this proceeding the District has maintained an alternative educational program called Crossroads. The Crossroads program provides on-site

educational programming for students who have been suspended from school. Students who are assigned to attend the program are provided all of their educational services. The Crossroads program provides services for students with disabilities and their non-disabled peers. During the time that the Student attended the Crossroads program he received all of the special education and related services that were specified in this IEP. (Tr. 178, Ins. 6-25; p. 179, Ins. 1-19).

15. On September 24, 2007, Christopher Geil, the Process Coordinator at Grandview Middle School, met with the Student's teachers and paraprofessionals to review the Student's current progress and to make plans to support his behaviors. (SD Ex. 21, pp. 281, 282). At that time, the staff determined that the Student's problem times were during passing times and on the bus and that he tended to react poorly to staff and engage in horseplay. (SD Ex. 21, p. 282).

16. On December 6, 2007, Geil prepared a Functional Assessment Checklist after receiving feedback from the Student's teachers and paraprofessionals. (SD Ex. 9, p. 112; SD Ex. 21, p. 281; Tr. 240-241). The "Behaviors of Concern" noted on the Functional Assessment Checklist were: "aggression, verbally harassing others, disruptive behaviors, insubordination/disrespect." (SD Ex. 9, p. 112).

17. On December 12, 2007, while the Student was assigned to the Crossroads program, he and several other students assaulted another student on the school bus. The Student was charged with (a) assault/battery of another student; (b) assault/battery of a staff member; (c) fighting; and, (d) disruption - gangs. (SD Ex. 10, pp. 113-126). As a result of the seriousness of the incident, the Student was referred to the District's Discipline Hearing Committee.

18. On December 17, 2007, the Student's Surrogate was provided notice of a Manifestation Determination Meeting that was scheduled on December 20, 2007. (SD Ex. 11, pp. 127-30). The Manifestation Determination Meeting was subsequently rescheduled for December 21, 2007, at the request of the Surrogate. (SD Ex. 11, pp. 131-33; SD Ex. 21, p. 281).

19. On December 21, 2007, a Manifestation Determination meeting was held concerning the incident on the bus on December 12, 2007. Present at this meeting were Sean Swindler, Stephen Wyly, Sheryl Malloy and Christopher Geil. The Student's Team: (a) reviewed the Student's behavior during the incident in question; (b) reviewed the Student's diagnostic results in relation to his behavior; (c) reviewed the Student's IEP in relation to his behavior; and, (d) determined that the Student's IEP was being implemented. The Student's Team concluded that the Student's conduct was related to his disability and explained that he "acted impulsively, without thought during the incident, which is a manifestation of his emotional disturbance." (SD Ex. 11, pp. 134-35; Tr. 241-43).

20. At the beginning of the second semester of school year 2007-08, the District began to prepare for the Student's three-year re-evaluation. On January 4, 2008, the District provided the Surrogate with a Notification of Meeting on January 15, 2008, for a review of existing data as a part of a reevaluation and to review/revise the IEP. (SD Ex. 12, pp. 136-38; SD Ex. 21, p. 281).

21. On January 15, 2008, the District conducted the meeting to review the Student's existing data. Present at this meeting were Sean Swindler, Christopher Geil, Dorothy Hook, Maria Brown-Tucker and Sandra Williams. The Student's Team determined that more information was needed. (SD Ex. 12, pp. 139-44; SD Ex. 21, p. 281). A Notice of Action was

provided to the Surrogate that day and the Surrogate consented to the proposed re-evaluation of the Student. (SD Ex. 12, pp. 145-46; Tr. pp. 243-44).

22. During January, 2008, while the Student was attending Grandview Middle School, he received the following discipline for violation of the District's Student Discipline policy:

A. On January 7, 2008, the Student received a one (1) day out-of-school suspension and was reassigned for four (4) days to the Crossroads program for pushing a student on the bleachers causing the student to fall into another student. (SD Ex. 20, pp. 265-75).

B. On January 17, 2008, the Student received a three (3) day in-school suspension for repeatedly saying "fuck that" in class. (SD Ex. 20, pp. 276-77).

23. On January 28, 2008, the District implemented a Positive Behavioral Support Plan in addition to the behavioral supports contained in his IEP. (SD Ex. 13, pp. 153-55; SD Ex. 21, p. 284; Tr. pp. 244-46). The Behavioral concerns listed in Plan are as follows:

[The Student] has demonstrated the following behaviors in the hall before school, during passing times, and after school, running, jumping, yelling, engaging in horseplay, being out of his designated area, being late to class, ignoring staff when being directed to his designated area, defying staff and speaking disrespectfully to those who re-direct him.

(SD Ex. 13, p. 153). Following its implementation, the Plan was reviewed by Christopher Geil on a weekly basis. (SD Ex. 21, pp. 284-85; Tr. 248-50). During the five week period following the implementation of the Plan on January 28, 2008, the Student improved in the hallway and

throughout his programming. (SD Ex. 21, pp. 284-85; Tr. 250-51) and during one week was nominated for Student of the Month in the Middle School. (Tr. 251-53).

24. On March 5, 2008, the Student received a ten (10) day out-of-school suspension for grabbing a female student on the backside, which was his second sexual harassment violation. (SD Ex. 15, pp. 170-74). During the interview with the Student on March 5, 2008, the Student provided a written statement which described his conduct as follows: "It was passing time and some of the boys in 6th grade were playing this game seeing who can grab the most butt in one day so we had been playing for like two weeks and I grabbed her butt and she said stop and I said ok then the bell rang so I ran to class . . ." (SD Ex. 18, pp. 194-95). The female student also provided a written statement which described the incident as follows: "What happened was [the Student] was putting his hand on my butt and then I told him to stop and he didn't so every time I told him to stop he didn't so I told Mr. Adams. . ." (SD Ex. 18, pp. 196-97).

25. On March 13, 2008, after appropriate notification, the Student's Team met to complete the Student's re-evaluation and to conduct a Manifestation Determination meeting. Present at this meeting were: Sean Swindler, Christopher Geil, the Student, Robert Adams, Dorothy Hook and Sandra Williamson. After much discussion, the Student's team determined that he continued to meet the eligibility requirements for an educational handicap of Emotional Disturbance. (SD Ex. 14, pp. 158-69; Tr. 253-57). The evaluation describes the Student as having "difficulty controlling his impulses," "severe levels for Hyperactivity and Aggression," "difficulty exercising self-control and making positive choices." (SD Ex. 14, pp. 165-67). Among the strengths noted on the Student's evaluation are his leadership potential, appropriate

classroom behavior, ability to demonstrate compassion and patience for others. (SD Ex. 14, p. 166).

26. During the March 13, 2008, meeting, the Student's Team also conducted a Manifestation Determination meeting concerning the Student's conduct on March 5, 2008. The following matters occurred during this meeting:

A. The Team reviewed the disciplinary infraction including the statements of the Student, the female student and the fact that the conduct had been witnessed by an adult staff member. During the discussion, the Student admitted that he had engaged in the conduct and said that on the morning of the incident he and other male students had decided to have a contest to see how many female students' rear ends they could grab throughout the day.

B. The Team reviewed the Student's disciplinary history at school including his incidents of physical aggression, noncompliance, cursing, bullying, one incident of vandalism, one incident of drug and alcohol possession and one incident of sexual harassment.

C. The Team reviewed the Student's most recent educational evaluation which identified the Student as having an educational diagnosis of Emotional Disturbance.

D. The Team reviewed the Student's most recent IEP and discussed his level of performance and goals and objectives. It was noted during this discussion that the Student was making progress on all goals and had demonstrated the ability to control his behaviors when he chose. The Team also considered the fact that the Student had

maintained appropriate behavior in the hallway for the past several weeks and no longer needed extra supervision in the hallway.

E. The Team discussed the disciplinary infraction and determined that it occurred at 2:13 p.m. in the afternoon, that the Student had touched the female student on a number of occasions that day, that the female student had told the Student not to touch her and that the Student touched her anyway. The Student stated that he knew he should not touch females on the rear end.

The consensus of the District's members of the Student's Team was that the Student "knew that the behavior was not allowed, had demonstrated the ability to control himself, and therefore, the behavior was not related to his disability." (SD Ex. 16, pp. 177-79).

27. The Team accepted as true that the Student's conduct resulted from the discussion with his peers on the morning of the incident. (Tr. 2790.

28. During the March 13, 2008, meeting the Student's Surrogate and his therapist from Ozanam, Sandra Williamson, stated that they were not in agreement with the District's determinations that the Student's behavior was not related to his disability. The notes of the meeting describe the Surrogate's position as follows:

The Surrogate stated that he was not in agreement. He further stated that his position would not change, and that he was unwilling to have [the Student] be in a situation where he was out of school for a long period of time, especially in light of the progress he had made. Additionally, the surrogate stated that he did not want an incident like sexual harassment on [the Student's] school discipline record. He stated that if such a behavior was attributed to his disability, that it

could offer some legal protections for [the Student] in case this type of behavior were to happen again in the community.

(SD Ex. 16, p. 179).

29. The Student's Surrogate and therapist testified that in their opinion, at breakfast with his peers the Student was given an inappropriate task to achieve and, given his need to impress others, the poor social choices he makes due to his disability, and given the Student's expected lack of ability to make good decisions in unstructured settings as described in his behavior support plan, he engaged in the conduct in question directly and substantially because of his disability. (Tr. 21, 24, 79, 98; SD Ex. 13, p. 153; SD Ex. 14, p. 167).

30. The Student has been diagnosed medically and psychologically with Oppositional Defiant Disorder, Adjustment Disorder with Disturbance of Mood, previous diagnosis of Attention Deficit Hyperactivity Disorder, and rule out Post Traumatic Stress Disorder. (Tr. 15). His cognitive ability according to the District's evaluation is an IQ of 75. (SD Ex. 14, p. 167; Tr. 292). He was tested at Ozanam and had an IQ of 83. (Tr. 18). The Student also has a history of sexual abuse. (Tr. 16).

31. Williamson testified that the student has multiple disabilities which interact to create his behavioral and social difficulties in school and with his peers. He has symptoms of Post Traumatic Stress Disorder. Williamson stated he cannot form relationships, he keeps everybody at a distance, and has very little capacity to form friendships and share feelings. The Student also has symptoms of impulsivity related to Attention Deficit Disorder, in that he constantly interrupts people verbally, annoys people, and intrudes on them verbally and physically. (Tr. 17-18).

32. Williamson explained that the Student's medical/psychological diagnoses and his low average IQ have a synergistic effect. She stated that the student's low average IQ combined with his impulsivity, and his inability to form positive healthy relationships with people, results in a child who makes impulsive and poor decisions. Williamson testified that the Student doesn't really know how to make friends and that peers will tell him to do things to other students, and he will follow through. (Tr. 18-19). The Student's Surrogate agreed. (Tr. 88-91).

33. The self-advocacy goal in the Student's IEP was added in 2007 at the suggestion of the Surrogate to address concerns expressed to him by members of the Student's Ozanam treatment team. According to the Surrogate, the goal was to assist the Student in speaking for himself and self-monitoring his behavior. (Tr. 69-73). The Student's therapist testified that she believes the Student has limited ability to conduct internal dialog; he does not stop and think about the consequences of his actions and is more focused on making people like him. (Tr. 21). The therapist believes that the Student's impulsivity is not just a sudden act, but can occur over long periods of time. (Tr. 21-22).

34. Christopher Geil, who was chairing the meeting, indicated that considering the Surrogate's position, he wanted to seek guidance concerning how to proceed. A continued meeting was scheduled for March 24, 2008. (SD Ex. 16, p. 179; Tr. 256-59).

35. The resumed Manifestation Determination meeting was held on March 25, 2008, at the request of the Surrogate. (SD Ex. 17, 180-84; SD Ex. 21, p. 285). Present at this meeting were Sean Swindler, Christopher Geil, Sheryl Malloy and Sandra Williamson. During the resumed meeting the Student's Team again reviewed the incident and all of the information presented during the meeting on March 13, 2008. The Student's Surrogate again stated his

disagreement that the behavior was not a manifestation of the Student's disability. After a thorough discussion, the District's members of Team determined that the Student's behavior on March 5, 2008, was not a manifestation of his educational disability. The Surrogate indicated that he would appeal the decision. (SD Ex. 17, pp. 184-186; SD Ex. 21, p. 285; Tr. 217-20; 260-64).

36. The Manifestation Determination meetings on March 13 and March 25, 2008, were attended by relevant members of the Student's IEP Team, as determined by the District and the Student's Surrogate.

37. During the Manifestation Determination meetings the Student's IEP Team:

A. Reviewed all relevant information in the Student's file, including the Student's IEP, any teacher observations, and any relevant information provided by the Student's Surrogate;

B. The District's members of the Team determined that the Student's conduct on March 5, 2008 was not caused by, and did not have a direct and substantial relationship to, the Student's educational disability;

C. The entire Team determined that the Student's conduct on March 5, 2008 was not a direct result of the District's failure to implement the Student's IEP.

38. At or following the Manifestation Determination Meeting, the Student's Surrogate was provided with the written Manifestation Determination Review summary (SD Ex. 17, 185-86); a copy of the Procedural Safeguards (SD Ex. 17, p. 184); and, a letter from Susan Kirkpatrick further explaining the right of the Surrogate to appeal the manifestation determination. (SD Ex. 19, p. 223).

39. On March 31, 2008, the District conducted a Discipline Hearing concerning the Student's conduct on March 5, 2008. Evidence was presented by the Student, Sandra Williamson, Stephen Wyly, the Student's Surrogate and Administrators from Grandview Middle School. The Student's Surrogate was informed of the District's decision by a letter from Dr. Ralph Teran, dated March 31, 2008. The letter stated in pertinent part as follows:

[T]he Hearing Panel has determined that [the Student] will be suspended from Grandview Middle School a total of 90 days. [The Student] will attend the in-school suspension program at Crossroads for the rest of this school year, ending on May 21, 2008. At the start of the 2008-09 school year [the Student's] suspension will be probated to allow him to return to Grandview Middle School on probation for the remainder of his 90-day suspension, from August 14, 2008 to October 14, 2008. [The Student] may not attend Summer School.

(SD Ex. 18, pp. 187-188).

40. The conduct that the Student engaged in on March 5, 2008, constituted a violation of the District's code of student conduct.

41. The Student attended the District's Crossroads program from around March 5, 2008 through the end of classes in school year 2007-08, in May, 2008. During that time period, the Student received all of the special education and related services specified in his IEP. (Tr. 179, Ins. 10-19).

42. The District also has maintained another alternative educational program called Transitions. The Transitions program provides both regular and special education students educational services in a smaller class setting while offering ongoing counseling and other similar services throughout the school day to allow students to problem-solve. The Student attended the Transitions program beginning on August 14, 2008, the beginning of the 2008-09 school year and was attending there at the time of the due process hearing. During the time that

the Student attended the Transitions program, he has received all of the special education and related services that were specified in this IEP. (Tr. 179, Ins. 24-25; 180, Ins. 1-19).

43. On April 23, 2008, after appropriate notice, (SD Ex. 19, 219-222), the District conducted an annual review of the Student's IEP. The Student's Surrogate did not attend. A revised IEP was prepared for the Student. (SD Ex. 19, pp. 227-244).

44. During school year 2007-08, the Student made progress on each of the goals and benchmarks in his IEP. (Tr. 231-39). Although he made progress on his IEP goals he did not master any of them. They were all left in place on his next IEP, developed April 23, 2008, even though the Student's Surrogate and therapist did not participate in that IEP meeting. (SD Ex. 19, pp. 231-34; Tr. 85-86, 240).

II. CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

The Student is now and has been during all times material to this proceeding, a "child with a disability" as that term is defined in the Individuals with Disabilities Education Act, 20 U.S.C. §1401(3)(a) ("IDEA") and its regulations, 34 C.F.R. §300.7. The Student is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

The issue for the hearing was:

Whether during the Manifestation Determination on March 13 and 25, 2008, the District complied with 34 C.F.R. § 300.530(e)(1) and (2) in making the Manifestation Determination. If the District did not so comply, what is the remedy?

The relevant IDEA Regulations, 34 C.F.R. § 300.530(e)(1) and (2), state as follows:

"(e) *Manifestation determination.*

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

- (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(I) or (1)(ii) of this section was met.

See also 20 U.S.C. §1415(k)(1)(E)(2004).

The parent focused his evidence and argument on two aspects of the regulations:

1. First, the parent claimed the district made the wrong decision on the substantive issue, whether “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability.” §300.530(e)(1)(I). The parent argued that the Student’s conduct was caused by or had a direct and substantial relationship to the Student’s disability, and the district violated the IDEA by determining otherwise.
2. Secondly, the parent claimed the district violated the procedural requirements of the regulations by making the manifestation determination without obtaining a consensus of “the LEA, the parent, and relevant members of the child’s IEP Team.” §300.530(e)(2).

In its post-hearing argument the district raised another issue, a threshold issue that it did not violate the IDEA Regulations, 34 C.F.R. § 300.530(e)(1) and (2), because it did not "change the placement" of the Student. School District’s Proposed Findings fo Fact, Conclusions of Law, Decision and Order (“SD Brief”), at 15-17. The district asserts that there was no “decision to change the placement of a child with a disability,” which is the triggering event for a manifestation determination meeting. Although it does not say so explicitly, the essence of the district’s argument on this point is that without a decision to change placement there was no need for a manifestation determination meeting at all.

So there are three issues presented by the parties:

1. Did the district make a “decision to change the placement” of the Student, so that a manifestation determination was required?
2. Did the district violate the procedural requirements of the IDEA by making a manifestation determination without a consensus of “the LEA, the parent, and relevant members of the child’s IEP Team?”
3. Did the district make the wrong substantive decision when it determined that the Student’s conduct was not a manifestation of his disability?

We will address those issues in the order listed above. The burden of proof in an administrative hearing arising under the IDEA is upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The due process complaint in this case was filed by the Student's Surrogate. The burden of proof in this case rests with the Student's Surrogate.

1. Did the district make a “decision to change the placement” of the Student, so that a manifestation determination was required?

The IDEA Regulations define when a change of placement occurs in the context of a disciplinary removal:

34 C.F.R. § 300.536 Change of placement because of disciplinary removals.

(a) For purposes of removals of a child with a disability from the child’s current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—

(I) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b) (1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.

It is not entirely clear from the evidence presented at the hearing whether a change of placement occurred. The district asserted that the Student did not miss more than 10 school days during the 2007-08 school year as a result of out-of-school suspensions. SD Brief at 16. But the district acknowledged earlier in its brief that during the 2007-08 school year it imposed three days of out-of-school suspension in the fall (SD Brief at ¶32) and one day in January (SD Brief at ¶41). In addition, the district's immediate response to the incident in question, was to impose a 10-day out-of-school suspension. SD Ex. 15, p. 170. Therefore, there might have been a series of removals during the course of the year that constituted a pattern and, thus, a change of placement under the regulations.

The district also argues that the Student's long-term suspension, during which the district moved him to two different alternative educational placements, Crossroads and Transitions, was

not a change of placement, but merely a change in location, because the Student “maintained his educational placement and received all of the special education and related services that were specified in his IEP.” SD Brief at 15-16. The district relies on regulatory comments and court cases that define educational placement as a point along the continuum and a program of services rather than a specific location. SD Brief at 16-17. Determination of that issue requires a fact intensive inquiry. *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002). In this case that inquiry would include a detailed analysis of the similarities and differences between the Student’s program at Grandview Middle School and his programs at Crossroads and Transitions.

Although this specific issue is part of the general issue in this case, the school district did not raise it at any time prior to or during the hearing. In the District’s Response to Due Process Complaint, the district did not raise this issue. In prehearing discussions and during the hearing both parties focused on the two specific issues raised by the parent, whether the Student’s conduct was a manifestation of his disability and whether the district was required to obtain a consensus of everyone at the meeting to make that determination. Moreover, the district did conduct a manifestation determination. SD Exs. 16 and 17. One could conclude from that fact that the district made the determination that a change of placement did occur. The regulation that defines “change of placement because of disciplinary removals,” 34 C.F.R. §300.536(b), requires the school district to determine “on a case-by-case basis whether a pattern of removals constitutes a change of placement.”

Because of the lack of notice by the district that it was going to raise the issue whether the Student was subjected to a change of placement, and the fact that the district did conduct the manifestation determination, the panel will not make a decision on this particular question.

2. Did the district violate the procedural requirements of the IDEA by making a manifestation determination without a consensus of “the LEA, the parent, and relevant members of the child’s IEP Team?”

The parent relies on the language of the regulation regarding manifestation determinations that suggests that all participants in the meeting make the decision whether the conduct was a manifestation of the student’s disability:

- (2) The conduct must be determined to be a manifestation of the child's disability if **the LEA, the parent, and relevant members of the child's IEP Team determine** that a condition in either paragraph (e)(1)(I) or (1)(ii) of this section was met.

34 C.F.R. § 300.530(e)(2) (emphasis added). Paragraphs (e)(1)(I) and (ii) contain the relevant factors that must be determined at the meeting:

- (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

The district argues that a parent has the right to participate and provide input that must be considered by the district, a parent has no right to veto the school district’s decision. If there is

no consensus, the district makes the determination and the parent's only recourse is to appeal. The panel agrees with this argument.

The identical issue was addressed in the recent case of *Fitzgerald v. Fairfax County School Board*, 556 F.Supp.2d 543, 557-558 (E.D. Vir. 2008). The plaintiffs in that case contended the school district "violated the IDEA by failing to give plaintiffs an 'equal right' to determine whether Kevin's conduct was a manifestation of his disability." 556 F.Supp.2d at 557. On that issue the court held: "Accordingly, the IDEA does not require the LEA and the parents to reach a consensus regarding the education or discipline of a disabled child. Instead, if a consensus cannot be reached, the LEA must make a determination, and the parents' only recourse is to appeal that determination." 556 F.Supp.2d at 558.

The IDEA and its Regulations, 20 U.S.C. § 1415(k)(3)(A)(2004) and 34 C.F.R. § 300.532(a), provide the recourse for a parent who disagrees with the determination made by the school district during a manifestation determination meeting -- to file an appeal of the decision by requesting a due process hearing, which was done in the case.

Thus, it is clear that unanimity is not required in the manifestation determination meeting.

3. Did the district make the wrong substantive decision when it determined that the Student's conduct was not a manifestation of his disability?

All four people who participated in the final manifestation determination meeting testified at the hearing: Christopher Geil and Sheryl Malloy, both of whom are Special Education Process Coordinators for the District; Sandra Williamson, Ozanam therapist for the Student; and the Sean Swindler, the Student's Surrogate. Williamson and Swindler testified that

they believed the Student was a follower and wanted to make friends. Because of his low IQ, impulsivity, and other disabilities, they believe he was led by other students into misbehaving and acted without thinking about the consequences. The Student's attorney also demonstrated how the Student's behavioral goals in his IEP and his behavior plan all relate to his behavior in unstructured settings and his lack of self advocacy skills. Therefore, the Student's attorney argues, his conduct was directly and substantially related to his disability. Geil and Malloy came to the conclusion that the Student's conduct of touching the female student's rear end was not a manifestation of his disability. Geil had knowledge of what the Student was like at school, from his own observations and reports from others. Geil testified that the Student was not a follower who would misbehave to impress and make friends, but appeared to be a student who others looked up to. There was also evidence that the Student engaged in the conduct throughout the school day and was warned by the student-victim that he should not do it. See Findings ¶26, above. Therefore, the panel has determined that the theory of Williamson and Swindler that the Student acted without thinking and without awareness of the consequences doesn't hold up against the opinion of Geil. Although all four witnesses testified credibly based upon their experience and beliefs, the panel believes the District's witnesses were in a better position to determine how the Student acted at school. For example, there was no evidence that the Student was a follower at school who would act without thinking in order to impress his peers. In fact, the only evidence regarding school was that the Student was more of a leader. Unlike the incident on the school bus earlier in the school year, when all members of the Student's Team determined his joining in on a fight was a manifestation of his disability, the sexual harassment incident resulted from a plan that was discussed early in the day and was

carried out throughout the day. The student had the ability to consider his actions and their consequences.

Therefore, the hearing panel unanimously concludes that the Surrogate failed to meet his burden of proving that the Student's conduct was caused by or had a direct and substantial relationship to his disability.

DECISION

The hearing panel unanimously finds the issues in favor of the School District. During the Manifestation Determination on March 13 and 25, 2008, the District complied with 34 C.F.R. § 300.530(e)(1) and (2) in making the Manifestation Determination.

APPEAL PROCEDURE

This is the final decision of the Department of Elementary and Secondary Education in this matter. Either party has a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. The parties also have a right to file a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(I).

Dated: November 4, 2008

Kenneth M. Chackes
Hearing Chair

Jeffi Jessee
Panel Member

Dr. Patty Smith
Panel Member

Copies of this decision will be delivered to the parties on November 4, 2008, by email and by certified mail, return receipt requested:

Scott Wasserman
Scott Wasserman & Associates, LLC
8889 Bourgade Street
Lenexa, KS 66219
scott@yourchild1st.com
TELEPHONE: (913) 438-4636 • Fax: (913)
438-4637

Ransom A Ellis, III
Hammons Tower, Suite 600
901 St. Louis Street
Springfield, MO 65806-2505
rellis3@eejhfir.com