

Before the
Administrative Hearing Commission
State of Missouri



, IN THE INTEREST)
OF,)
)
Petitioner,)
)
vs.) No. 14-0708 ED
)
SPECIAL SCHOOL DISTRICT)
OF ST. LOUIS COUNTY,)
)
Respondent.)

DECISION

The mother of a -year-old girl with an educational diagnosis of autism (“Student”) filed a due process complaint against the Special School District of St. Louis County (“SSD”), alleging that SSD failed to provide a free and appropriate education to her daughter. Parent attacks the determination that Student’s conduct was not a manifestation of her disability, and the resulting change of placement in the IEP to homebound education with services. We find that the manifestation determination review meeting was conducted in compliance with the Individuals with Disability Education Act (“IDEA”), the determination as to Student’s conduct and disability was appropriate, and SSD offered a free and appropriate public education to Student.

Procedure

On May 15, 2014, (“Parent”) filed a due process complaint in the interest of her daughter, Student. We set the hearing for June 23-24, 2014. On May 19, 2014, SSD filed a response to the due process complaint and motion for summary decision. On May 27, 2014, Parent responded to the motion, and on May 28, 2014, we held a telephone conference on the motion. By order issued June 3, 2014, we determined that the only new issue not decided in a prior case involving the same parties, Case No. 13-1819 ED, is the manifestation determination review and suspension for Student’s assault on another student.

We held a hearing on June 23, 2014. Robert J. Thomeczek and Michael D. Hodge represented SSD. Neither Mother, Student, nor anyone representing them appeared. The transcript was filed on June 24, 2014. We issued a schedule for Parent to file proposed findings of fact, conclusions of law, and written argument, no later than June 26, 2014, for Respondent to file proposed findings of fact, conclusions of law, and written argument, by June 30, 2014, with a reply due no later than July 1, 2014. Respondent filed its brief on June 27, 2014. Parent did not file an initial brief or a reply brief. The matter became ready for our decision on July 1, 2014.

Findings of Fact

1. Student is a -year-old girl in ninth grade. During the 2013-2014 school year, she attended school at Ritenour High School. During all relevant times, Student resided with her Parent within the boundaries of SSD and Ritenour School District (“Ritenour”).

2. Both SSD and Ritenour are Missouri public school districts and are located in St. Louis County, Missouri.

The Districts’ Staff

3. Catherine Peterson is an employee of SSD and is case manager at Ritenour High School. Peterson has extensive training in autism.

4. Abby Callier is an employee of SSD and is special education teacher in the classroom at Ritenour High School.

5. Michelle Quinlivan is an employee of SSD in the position of area coordinator for special education services provided at Ritenour High School. Quinlivan has extensive experience working with students with autism.

6. Jennifer Nilges is an employee of Ritenour in the position of assistant principal at Ritenour High School.

7. Lindsey Webster is an employee of Ritenour and is guidance counselor at Ritenour High School.

Student's IEP

8. On May 3, 2013, an individualized education program (“IEP”) was written for Student to transition her to the high school, while she was at Ritenour Middle School.

9. Student's class schedule was changed on one occasion, at the beginning of the Fall 2013 semester to include the autism class on her schedule. This class teaches organizational skills and teaches about the diagnosis of autism “so that the students are better prepared to manage their own behaviors, et cetera, throughout the day and their course work as well.”¹

10. On September 6, 2013, after she was at Ritenour High School, a new IEP was written for Student. Parent and Student's grandparent attended the September 6, 2013, IEP meeting.

11. The IEP team addressed Student's behaviors at the September 6, 2013, IEP meeting and adjusted her crisis plan.

¹ Tr. at 11.

Student's Suspensions

12. Student was suspended out-of-school (“OSS”) for three days from September 24-26, 2013.
13. Student was suspended OSS for three days from January 30-February 3, 2014.
14. On March 17, 2014, Student assaulted another student, B.,² by punching him in the back of the neck. Before the assault, Student had asked A. whether she should “beat him up.”³ When A. said no, Student hit B. “in the back of the head with all her force.”⁴ Student then accused A. of the assault. Student later admitted that she had committed the assault.
15. On March 19, 2014, Student was suspended OSS for ten days, with a request for a Superintendent’s hearing.
16. As a result of this suspension and previous suspensions, Peterson completed the discipline documentation form to determine whether a pattern had been created.
17. Because the total OSS days was greater than ten days and the determination was made that a pattern had been created, a manifestation determination review (“MDR”) was required.
18. On March 18, 2014, Parent was contacted by phone and notified that the MDR meeting was scheduled for Friday, March 21, 2014. The time of the meeting was changed from 7:30 a.m. to 9:00 a.m. at Parent’s request. Parent indicated that she would attend the meeting.
19. The team convened on Friday, March 21, 2014, to conduct the MDR. The participants of the MDR were Peterson (case manager), Quinlivan (area coordinator), Ms. Schindler⁵ (general education teacher), Webster (guidance counselor), Callier (special education teacher) and Nilges (principal).

² The student who was assaulted was referenced as Student B, and the witness was Student A.

³ Respondent’s ex. B at 5.

⁴ *Id.*

⁵ No first name was provided.

20. Parent was not at the meeting at 9:00 a.m. After about 15 minutes, Nilges placed a telephone call to Parent. Parent initially stated that, while she could not attend the MDR in person, she would participate in the MDR via telephone conference. After the participants introduced themselves, Parent indicated that she would not participate in the meeting and hung up the phone. Nilges called Parent back, but Parent hung up again. Although she attempted to do so, Nilges was not able to reconnect with Parent after she hung up the second time.

21. The team conducted an MDR to determine whether the conduct in question (assault on another student) was a manifestation of Student's disability.

22. The team reviewed the conduct in question (assault on another student), all relevant information in Student's file, her IEP, Review of Existing Data, Evaluation Results and Interpretations, Evaluation Reports and teacher observations.

23. The team determined that the conduct was not a manifestation of Student's disability because the conduct was neither caused by nor had a direct and substantial relationship to Student's disability. The team also determined that the conduct was not the direct result of the failure to implement the IEP.

24. Because the conduct was not a manifestation of Student's disability, the team then determined the services that would enable Student to continue to receive educational services to continue to participate in the general education curriculum, although in another setting, to progress toward meeting the goals in her IEP.

25. Parent was sent and received a copy of the outcome of the MDR and the IEP Amendment with the Notice of Action changing Student's educational placement.

26. Because the conduct was not a manifestation of Student's disability, Ritenour's disciplinary proceedings were followed. By letter dated April 11, 2014, Robert D. Mitchell, Ritenour's Specialist for Student/ Parent Support Services, informed Parent that, following a

hearing held on April 9, 2014, Student was being suspended for 140 days. The letter stated that the suspension would be held in abeyance “if she attends Keeping Pace Program (KPP) at Hoech Middle School[.]”⁶

27. Student continued to receive educational services through the Homebound placement for which she received high school credits.

28. SSD is currently in the process of conducting a functional behavior analysis on Student. A functional behavior assessment was previously completed on Student in April, 2013.

29. Parent filed the due process complaint on May 15, 2014.

Conclusions of Law

This Commission has jurisdiction over this case.⁷ The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, in this case the Parent.⁸

I. FAPE in General

Under the IDEA, all children with disabilities are entitled to a free appropriate public education (“FAPE”) designed to meet their unique needs.⁹ The IDEA defines FAPE as individualized special education and related services that: have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the state educational agency; include an appropriate preschool, elementary school, or secondary school education in the state involved; and are provided in conformity with the individualized education program.¹⁰ The IDEA does not prescribe any substantive standard regarding the level of education to be afforded to disabled children.¹¹ Rather, a school district fulfills the requirement of FAPE “by providing personalized instruction with sufficient support services to permit the

⁶ Respondent’s ex. K. We have no information as to whether Student attended this program.

⁷ Section 162.961, RSMo Supp. 2013.

⁸ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁹ 20 U.S.C. § 1412.

¹⁰ *See* 20 U.S.C. § 1401(9).

¹¹ *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 189, 195 (1982).

child to benefit educationally from that instruction.”¹² The IDEA does not mandate that special education “maximize the capabilities” of disabled children, nor is a school district required to furnish every service necessary to maximize a child's educational potential.¹³

The primary vehicle for carrying out the IDEA’s goals is the IEP.¹⁴ An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities.¹⁵ The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit.¹⁶

If a child's special education program or placement, as defined in the child’s IEP, is disputed by the child's parents, the IDEA provides for a review procedure.¹⁷ In this case, Parent attacks the MDR team’s finding that Student’s conduct was not a manifestation of her disability, and the resulting change of placement in the IEP to homebound education with services.

II. Manifestation Determination Review

An MDR is an evaluation of a student’s conduct to determine whether that conduct is a manifestation of the student’s disability. An MDR must be performed when a school district proposes disciplinary measures that will result in the change of placement for a child with a disability.¹⁸ A change of placement occurs when:

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

¹² *Id.* at 203.

¹³ *Id.* at 198.

¹⁴ 20 U.S.C. § 1414.

¹⁵ 20 U.S.C. § 1414(d)(1)(A).

¹⁶ *Rowley*, 458 U.S. at 199; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (IDEA does not require a school district to maximize a student’s potential or provide the best education possible); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (Missouri requires an appropriate and not a maximizing standard).

¹⁷ 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–.580.

¹⁸ 34 CFR. 300.530(e).

- (i) because the series of removals totals 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.[¹⁹]

A. MDR Meeting

Having determined that the proposed disciplinary measures would cause Student to experience a change of placement, SSD properly conducted an MDR meeting on March 21, 2014. In her due process complaint, Parent makes no specific allegations of procedural irregularities with the meeting, and we see none. The members of the team included many professionals involved in Student's education, including her classroom teacher and several educators with extensive experience with autism. During the MDR meeting, the team reviewed all relevant information in Student's file, including her IEP, other existing data, evaluations, and teacher observations in order to determine if the conduct (assault) was caused by, or had a direct and substantial relationship to, Student's disability, or if the conduct was the direct result of SSD's failure to implement the IEP.²⁰

The only clue we have concerning Parent's potential problem with the meeting is testimony that, when Nilges contacted her on the telephone, Parent indicated that she believed they could not hold the meeting if she did not attend. Then she hung up the phone twice and was unavailable despite repeated attempts to reestablish contact.

To the extent that Parent argues the team could not proceed without her, she is incorrect. The MDR team is comprised of the "parent and relevant members of the child's IEP team."²¹

¹⁹ 34 CFR 300.536(a).

²⁰ 34 CFR 300.530(e)(i) and (ii).

²¹ 34 CFR 300.530(e).

The school must “ensure” that the IEP team²² includes the child’s parents.²³ 34 CFR 300.322(a) states:

Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

On March 18, 2014, Parent was contacted by telephone and informed of the meeting scheduled for March 21. SSD changed the time of the proposed meeting from 7:30 a.m. to 9:00 a.m. at Parent’s request. Parent stated that she would attend, and SSD made a record of her acceptance of the meeting. When she did not attend, SSD staff telephoned Parent and offered her the opportunity to participate by telephone. We find that SSD complied with the provisions of 34 CFR 300.322(a).

The IDEA also provides for situations in which a meeting may proceed without the parent in attendance. 34 CFR 300.322(d) states:

A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as –

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and

²² We consider the regulations addressing members of the IEP team in our discussion of the MDR team because both were required to have the same members until recently. Currently, the MDR team is only required to consist of “the LEA, the parent, and **relevant** members of the IEP Team (as determined by the parent and the LEA)[.]” 34 CFR 300.530(e) (emphasis added). See *Hollingsworth v. Hackler*, 303 S.W.3d 884, 889 (Tex. Ct. App., 2009) (equating the IEP team with the Admission, Review, and Dismissal (ARD) committee making the manifestation determination decision).

²³ 34 CFR 300.321(a)(1).

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

Several witnesses testified about the attempts to offer Parent the opportunity to participate and Parent's refusal to do so. Peterson testified:

Q: Can you describe what happened at the beginning of the meeting?

A: Yes. The team waited for approximately fifteen minutes. Ms. Nilges went into her office to place a phone call to [Parent]. While Ms. Nilges was speaking with her, [Parent] said that she could not be at the meeting but she agreed to meet with us via teleconference. So we all moved into Ms. Nilges's office. Ms. Nilges placed us on speaker phone. We all introduced ourselves. When [Parent] realized, I don't know if she said there were a lot of people there and I don't know if that somehow triggered, but she said that then she would not participate in a teleconference meeting. And she hung up on Ms. Nilges. We called back. I think we reconnected. When [Parent] said that we couldn't hold a manifestation without her, Ms. Quilivan said that we could hold a manifestation without her and that we were going to proceed to make sure that [Student] had the services and [Parent] hung up a second time.

Q: Were any additional attempts to reconnect with [Parent] made?

A: Yes, several attempts were made.

Q: Were they successful?

A: I don't recall. To the best of my recollection, we never did re-establish.^[24]

Nilges and Quilivan also testified that Parent first agreed to participate in the meeting by telephone, and then hung up twice. Although she attempted to do so, Nilges was not able to reconnect with Parent after she hung up the second time. Parent was sent and received a copy of the outcome of the MDR and the IEP Amendment with the Notice of Action changing Student's educational placement.

²⁴ Tr. at 16-17.

We find that Parent was offered an opportunity to participate in the MDR meeting and refused to do so. SSD's decision to proceed with the meeting without Parent did not violate the IDEA or deny FAPE to Student.

B. MDR Determination

During the MDR meeting on March 21, 2014, the team determined that Student's conduct on March 17, 2014, was not a manifestation of her disability.

The MDR team reviewed the conduct in question (assault on another student), all relevant information in Student's file, her IEP, Review of Existing Data, Evaluation Results and Interpretations, Evaluation Reports and teacher observations. Specifically, Student's IEP states:

[Student] has an educational diagnosis of Autism. This disability affects her progress and performance in the general education setting in the following ways: a high level of distractibility leads to difficulty remaining on task, inconsistent task initiation and completion; due to social and emotional deficits she may require prompting to participate in class discussions; she requires a quiet place and support of a predetermined adult to problem solve and calm herself if she becomes agitated and frustrated.[²⁵]

The team considered these factors, among others, during the manifestation determination review.

The team reviewed the documentation and statements of the students involved in the assault. In the documentation and statements regarding the assault, Student discussed committing the assault with another student prior to doing it. The team determined that the assault was not an impulsive act. Peterson testified:

Q: Why do you believe that the assault, the unprovoked assault by [Student] is not related to her disability of autism?

A: When we reviewed the documentation provided by the other student who was involved in the issue and [Student's] own statement, it indicated that [Student] had discussed making the attack on the student prior to doing it. So we thought that it lacked any impulsivity which would have led us more to think about the autism as part of it. She also discussed the consequences with the

²⁵ Respondent's ex. F at 45.

other student, and there didn't seem to be any lack of theory of mind. So in all of the ways that the diagnosis affects [Student] we didn't feel that it pertained, that it related in this way. It was totally separate.²⁶

Parent presented no evidence to counter the determination that the conduct in question (assault on another student) was not caused by or had a direct and substantial relationship to Student's autism. Once that determination was made, Ritenour proceeded with its disciplinary proceedings, and the level of discipline was Ritenour's decision.²⁷

We find that the MDR determination is in compliance with the IDEA and State Plan.

C. Changes in Placement in IEP

As a result of the MDR determination, Ritenour's disciplinary procedures were followed and Student was given a long-term, out-of-school suspension. Pursuant to 34 CFR 300.530(d):

(1) A child who is removed from the current placement pursuant to paragraphs (c) or (g) of this section must --

(i) Continue to receive educational services, as provided in 34 CFR 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, an functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Witnesses testified that SSD continued to provide educational services for which Student received high school credits. SSD also has started the process to conduct a functional behavioral assessment of Student. There is no evidence that these services do not provide FAPE to Student. We find that SSD offered FAPE to Student.

²⁶ Tr. at 20.

²⁷ *Hollingsworth v. Hackler*, 303 S.W.3d 884 (Tex. Ct. App., 2009).

Summary

We find that the manifestation determination review meeting was conducted in compliance with the IDEA, the MDR determination was appropriate, and SSD offered FAPE to Student.

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision.

2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence.

Please take notice that you also have a right to file a civil action in federal or state court pursuant to the IDEA. See 34 C.F.R. § 300.512.

SO ORDERED on July 11, 2014.

SREENIVASA RAO DANDAMUDI
Commissioner