

**BEFORE THE THREE PERSON DUE PROCESS HEARING PANEL**

**EMPOWERED BY THE MISSOURI BOARD OF EDUCATION**

**PURSUANT TO SECTION 162.961 RSMo.**

\_\_\_\_\_Petitioner,

v.

FRANCIS HOWELL SCHOOL DISTRICT,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

This matter was heard before the panel on December 11 and 12, 1997. Parents' due process request was received on or about October 25, 1996. Certain extensions of the timeline were granted pursuant to request. One request by District for continuance, coupled with a request for a psychiatric evaluation, was denied.

Following hearing, briefs and proposed findings were submitted by counsel. In accordance with a previous order, an objection by district as the form of one exhibit was withdrawn by counsel following hearing but prior to the issuance of this order. Being fully advised in the premises, the panel finds as follows:

1. \_ is \_ year old \_ student who resides in the Francis Howell School District ("District").
2. \_ is currently attending the Metropolitan School. The Metropolitan School is a private school in St. Louis County, Missouri.
3. The District is in St Charles County, Missouri.
4. \_ parents ("Parents") claim that he is a student with a disability for purposes of the Individuals with Disabilities Education Act ("IDEA"); the District claims that he is not. This difference has significant implications for \_ because he is the subject of disciplinary measures meted out by the District.

5. Parents seek a declaration from this Panel that \_ is a student with a disability for purposes of the IDEA, and request that the District reimburse Parents for a) \_ education at Metropolitan, and b) attorneys' fees and related expenses incurred by them in pursuing this due process hearing.

6. On or about April 22, 1996, Assistant Principal Terry Kasper found \_ to be in possession of materials which could be used to make an explosive device. \_ had brought the materials to school. The materials were in a gym bag which \_ had in his possession. The gym bag contained shotgun plungers, wicks, electrical tape, a precision screw driver set, a small Tupperware container with shotgun powder in it, matches, plastic ties, circuit board, and plans for making an explosive device. [R-36, R-37, R-61]

7. Because \_ was in possession of the materials, Assistant Principal Kasper suspend \_ for ten school days - the maximum number of days that a principal may suspend a student - and referred the matter to a Committee on Conduct. The Committee on Conduct met on May 2, 1996. Parents were present. Mr. Jerry Burbes served as the chairperson of the Committee on Conduct. After reviewing the facts, the Committee on Conduct recommended that the suspension be extended to 180 school days and that the Superintendent further recommend to the Francis Howell Board of Education that \_ be expelled from the District. [R-37]

8. During the meeting of the Committee on Conduct, Parents indicated that \_ had been diagnosed as having an attention deficit disorder. Although information available to Mr. Burbes suggested that \_ did not meet eligibility criteria to be considered a disabled student for purposes of Section 504, he did ask Ms. Sue Dame, the Director of Student Services for the District, to conduct a review to determine whether there was reason to suspect - and therefore reason to conduct an evaluation to determine if \_ came within the purview of Section 504 of the Rehabilitation Act of 1973 [R-371]

9. On or about May 6, 1996, the District conducted a Student Review to determine whether an evaluation for Section 504 was warranted. The District concluded that there was insufficient reason to suspect that \_ was a disabled student for purposes of Section 504. [R-39]

10. Superintendent Lee Brittenham reviewed and agreed with the Committee on Conduct. In a letter dated May 6, 1996, Dr. Brittenham extended the period of suspension to 180 school days (the maximum number of days that a superintendent may suspend a student under Missouri law) and informed Parents that he would recommend to the Board of Education that \_ be expelled.

11. In response to a request from Mrs. \_ the District agreed to conduct a complete multidisciplinary evaluation. In that evaluation the District focused on the possibility that \_ attention deficit disorder might be significantly interfering with his ability to function in the school setting and might give rise to a disability for purposes of the IDEA. The District also closely looked to see if \_ might have a specific learning disability. [R45]

12. The results of the multi-disciplinary evaluation are reported in Exhibit R-45. The committee which conducted the testing and reviewed the results concluded: "No educational handicapping condition is found at this time under PL 94-142 [the IDEA] or 504. \_ ADD is currently not substantially limiting his school functioning. Diagnosis is based upon this comprehensive educational evaluation including teacher reports, observations of a specialist in the teaching of students with disabilities work samples, testing, grades, etc." [R - 5 at 29] The Hearing Panel adopts the results of the multi-disciplinary evaluation, as set out in R-45.

13. The Hearing Panel notes that Missouri defines specific learning disability as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken and written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include students who have learning problems which are primarily the result of visual, hearing, or motor handicaps, mental retardation emotional disturbance, or environmental, cultural, or economic disadvantage."

14. The Hearing Panel farther notes that Missouri has developed criteria to assist school districts in determining whether a student has a specific learning disability, and that to be diagnosed as a student with a specific learning disability, the student must (1) display observable characteristics which indicate deficits in basic psychological processing; (2) fail to achieve because of the psychological process deficit and have a significant discrepancy between achievement and ability in certain established academic skills; and (3) not have the deficits as the result of visual or auditory deficits, motor deficits, mental retardation, emotional disturbances, environmental or economic disadvantage, or cultural differences. Basically, the significant discrepancy and processing deficits are presumed to be intrinsic to the student and due to central nervous system dysfunction.

15. \_ does not meet the criteria to be considered a student with a disability for purposes of the IDEA, as a student with a specific learning disability. [R-45]

16. The conclusion of the evaluation committee is supported in part by testimony of Dr. Warren Kass, a psychologist who saw \_ on an occasional basis. Dr. Kass ruled out the existence of a learning disability. However, Dr. Kass suggested that\_ might qualify under the category "other health impaired." [Tr. -1 ]

17. The Hearing Panel also notes that Missouri defines other health impaired as "a medically diagnosed physical or physiological condition which causes educationally related problems. These conditions will require specific material modification, special adaptations, equipment, therapies, and/or instruction."

18. \_ does not meet the criteria to be considered a student with a disability for purposes of the IDEA, as a student with an other health impairment. [R-45]

19. While the presence of an attention deficit disorder was confirmed by Dr. James Edwards, a pediatric psychiatrist, the Hearing Panel finds that the attention deficit disorder does not significantly interfere with \_ ability to function in the school setting. [R-45]

20. Historical documentation submitted into evidence by the District suggests that \_ performed no better after the introduction of pharmaceutical treatment for the ADD than he did prior to the medications. [R-31] did seem to respond better to certain teachers and alternative intervention strategic. Documentation submitted into evidence indicates that Mrs. \_ confirmed this finding. [R-19]

21. There was also no evidence at hearing that the attention deficit disorder significantly interferes with any other major life activity.

22. A review of \_ grades in eighth grade indicate that he received all passing marks - 1-A, 3-B's, 4-C's and 3-D's. In ninth grade, \_ received 4-B's, 1-C and 2-Fs. He attained average scores in all areas in achievement testing. \_ was passing from grade to grade and achieving average scores on achievement tests without receiving special education services. [R-45]

23. The Hearing Panel finds that \_does not have a disability for purposes of the IDEA or Section 504 of the Rehabilitation Act.

24. However, even if \_ were a student with a disability were considered a student with a disability for purposes of the IDEA or Section 504, there would need to be a demonstration that the behavior of bringing explosive devices was a manifestation of his disability, the attention deficit disorder.

25. Dr. Kass suggested that \_ might have carried the device to school to get some recognition. [Tr. 224] If there is a relationship between \_ attention deficit disorder and \_ bringing the materials for an explosive device to school, the relationship is, at best, diminimus.

26. Dr. Edwards reported that Mrs. \_ reported to him that \_ "had some plans for a bomb and was going to blow up the school." [R-55]

27. This is in contrast to statements made by\_ at the Committee on Conduct, during which \_ "indicated that he had forgot and not had time to take the materials out of his gym bag and he did not mean to bring them to school nor did he intend to harm anybody or do anything." [R-37]

28. Lee Hearing Panel credits the statement of Mrs. \_ to Dr. Edwards.

29. The Hearing Panel finds that \_ bringing the materials to make an explosive device to school was not a manifestation of any disorder discussed at hearing.

30. Parents spent a significant amount of time presenting an historical perspective, suggestion that \_ has at all times been a student with a disability, and that the District failed to identify \_ as such throughout his school career.

31. The Hearing Panel finds that the historical perspective is, for the most part, irrelevant to the presenting issue.

32. To the extent that the historical perspective is relevant, the Hearing Panel notes that a) throughout his school career, \_ was able to achieve passing grades without needing special education services \_ did receive speech therapy for an articulation problem), b) speech services were discontinued when \_ entered junior high school, and c) Parents agreed that the speech services should be discontinued. Parents did not contend at hearing that the speech impairment played any role in the explosive device incident or that \_ continues to be a student with a disability because of the articulation problem.

33. The Hearing Panel finds that Parents did raise concerns with the District. However, in each case the District addressed the concerns, either by intervening with other sound, regular teaching techniques, by conducting screenings' or by conducting as evaluation and noting no problems other than the articulation problem.

34. The Hearing Panel finds that the District evaluate \_for the disabilities suspected. Further, the Healing Panel finds that the District properly introduced alternative intervention strategies before

proceeding with a complete multidisciplinary evaluation. Evaluations previously conducted by the District were limited in scope, because the only disability suspected was a speech impairment. Other disabilities, which were thought might exist by Mrs. \_ were ruled out through the screening/alternative intervention strategies process, which is required in most circumstances under Missouri law.

35. With that, the Hearing Panel finds no procedural or other violation which has a material bearing on this case.

### **CONCLUSIONS OF LAW**

1. This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S. C. § 1400, *et seq.*, and examines the issue of whether Parents are entitled to recover tuition and related expenses incurred by them in sending \_ to a private school in St. Louis County from the District. The resolution to the issue turns on a more fundamental issue: whether \_ is a student with a disability for purposes of the IDEA.

2. \_ was suspended from school in April 1996. He was ultimately expelled by the Board of Education of the District because he brought the making of an explosive device to school. At the time, he was not identified as a student with a disability. Prior to the passage of the 1997 Amendments, the IDEA defined, in pertinent part, "children with disabilities" as

*(ii) who, by reason thereof; need special education and related services*

20 U.S.C. § 1401(a)(1)(1990).

3. Thus, an essential element of the definition is that the student must be in need of special education and related services in order to be identified as a student with a disability.

4. \_ has been able to succeed at Francis Howell without the need of special education and related services.

5. Missouri's State Plan provides:

Before a referral for special education evaluation is made, students experiencing learning difficulties shall receive alternative intervention strategies within the regular education program. The progress of such students should be monitored to determine if student learning has improved or has remained unaffected. Alternative intervention strategies shall be continued for those students who are progressing through the regular curriculum at an acceptable rate. A

decision to refer for special education evaluation shall be made when acceptable progress is not evident.

Missouri State Plan at 15.

6. The District did implement Alternative Intervention Strategies. The strategies implemented by the District were consistent with those suggested in the State Plan. State Plan at A-42 to A47. \_ demonstrated success when the alternative intervention strategies were introduced. That a district successfully implements alternative intervention strategies does not mean that the student is a child with a disability. If anything, a finding that the child is not disabled is indicated.

7. \_ does not meet Missouri's criteria to be identified as a student with a specific learning disability. Missouri State Plan at A- 1 9 to A-22.

8.\_does not meet Missouri's criteria to be identified as a student with an other health impairment. Missouri State Plan at A-30.

9. Although not required to do so, this Hearing Panel also concludes that\_ is not a person with a disability for purposes of Section 504 of the Rehabilitation Act of 1973. Specifically, the Hearing Panel finds that, assuming \_ does have an attention deficit disorder, the disorder is not such that it significantly interferes with his ability to function in the school setting. 34 C.FR. § 104.3.

10. Similarly, the Hearing Panel concludes that prior evaluations met the requirements of the IDEA and Section 504, in that the only suspected disability for which an evaluation was administered was a speech impairment. To identify additional disabilities would have required additional testing. An additional evaluation was not warranted, in that the alternative intervention strategies were successful.

11. With respect to Section 504, the pertinent regulation reads:

(b) Evaluation procedures

A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer,

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

4 C.F.R. § 104.35.

With respect to the IDEA, the pertinent regulation - including the applicable Note - reads:

*Sec. 300.532 Evaluation procedures*

State educational agencies and LEAs shall ensure, at a minimum, that:

(a) Tests and other evaluation materials to do so;

( 1 ) Are provided and administered in the child's native language or over mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

3) Are administered by trained personnel in conformance with the instructions provided by their producer.

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed provide a single general intelligence quotient.

(c) Tests are selected and administered so as best to ensure that when a test is administered child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure,

than reflecting the child's impaired sensory, manual, or speaking skills (except where those are the factors that the test purports to measure).

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child.

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Note: Children who have a speech or language impairment as their primary disability may need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would: (1) Evaluate each child with a speech or language impairment using procedures that are appropriate for the diagnosis and appraisal of speech and language impairments, and (2) if *necessary*, make referrals for additional assessment needed to make an appropriate placement decision.

34 C.F.R. § 300.532 (emphasis added).

### **DECISION**

The foregoing duly considered, it is the decision of the Hearing Panel that \_ is not a child with a disability for purposes of the IDEA or Section 504 of the Rehabilitation Act of 1973. Therefore, the family is not entitled to reimbursement for sending \_ to the Metropolitan, nor is the family entitled to recover attorney's fees and related costs.

DONE THIS 16th day of April, 1998.

Robert L. Hawkins, III, Panel Chairman

All Concur.