DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

Case No. L99-105

FINDINGS and DECISION

[Student] by his father [Father]

Petitioner,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1

Respondent.

INTRODUCTORY STATEMENT

The above captioned case was heard beginning Tuesday morning, April 20, 1999, and was then recessed to Wednesday, May 5, 1999 with final testimony and closing arguments competed Thursday, May 6, 1999. All testimony was taken at Red Rocks Community College, 13300 W. 6th Ave., Golden, CO.

Jurisdiction is conferred by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sec. 1401 et. seq., 34 C.F.R. Sec. 300 et. seq. And under Part B of the Colorado Department of Education State Plan for the Individuals with Disabilities Act.

Petitioner filed a request for this Due Process Hearing through his attorney on February 11, 1999. He withdrew prior to April 20, 1999. Petitioner stated that he was aware of the various resources from which he might seek help and elected to proceed pro se.

Respondent Jefferson County School District R-1 (Jeffco) was represented by Susan M. Schermerhorn of the law firm of Caplan & Earnest. Also present on behalf of Jeffco was [Director], the District's Director of Intervention Services.

The subject of this action is a 14 year old male, nearly 15, whose IEP indicates his primary disability to be Perceptual Communicative Disorder (PCD). His secondary diagnosed disability is an Attention Deficit Hyperactive Disorder (ADHD). It is admitted that he is a person eligible for services under the Act.

Early this year he was re-enrolled in classes in [High School]. Before that he received his education through Homebound study and the public school system.

Almost immediately upon returning to High School he was charged with deliberately injuring another student while riding a school bus. His Principal conducted and investigation and recommended this student's expulsion from school for 1 year. At a disciplinary hearing held by the school district, Petitioner was found to have in fact caused injury to another student, that he should be disciplined by being expelled from school for 1 year. An expulsion hearing is held by other school regulations independent of due process hearings held under the IDEA.

However, it is to be noted that Jeffco, before it may enforce such discipline and expel a child with disabilities for one year must convene the student's IEP team and hold a manifestation hearing pursuant to 20 U.S.C. 1415 (k)(3), 34 C.F.R. Sec. 300.523 to determine whether or not the child's actions are a manifestation of his disability. Only if the IEP team finds the student with disabilities actions were not a manifestation of his disability may Jeffco expel him. Such a manifestation hearing was held. The team considered the child's IEP, found his IEP to be appropriate, with no deficiencies therein, and determined that his behavior, as defined in said section 20 U.S.C. 1415 (k)(3), was not a manifestation of his disability. It is that finding Petitioner here contests.

PRELIMINARY RULINGS

The following preliminary matters were considered:

1. Exhibit C. Petitioner objected to Petitioner submitting as Exhibit C, a copy of the Due Process Findings and Decision from a different hearing officer (IHO) who conducted a four day hearing involving this student and another student in a combined case decided in January of 1999.

The exhibit is admitted. It provided this IHO with notice of a previous decision relating to this student's IEP. See Weingarten v. Board of Assessment Appeals of the State of Colorado, 876 P2d 118 in which the BAA took judicial notice of its previous decision. It has served to alert this IHO to those facts and issues previously heard and determined. They having been determined, those matters are res judicata and ought not be tried a second time.

2. Exhibit 1. Respondent objected to the admission of Exhibit 1, the exhibits being statements of unidentified witnesses concerning that alleged incident giving rise to an expulsion hearing.

Exhibit 1's admission was denied. The evidence is excluded because the primary issue concerns that of a manifestation of disability and not with the guilt or innocence of the student to the charge. The evidence would not be of probative value to the matters before this IHO. See People v. Rubanowitz, 688 P2d 231.

3. Admission of additional issues and exhibits. Further Pre-hearing issues arose from an April 14, 1999 IEP staffing meeting. (This hearing originally began April 20, 1999). Petitioner requested permission to raise the issues, and Respondent was in agreement.

After discussion, permission was granted, additional information was to be exchanged and the suggested issues were included in this IHO's Order of April 26, 1998.

Those issues involved: 1. The appropriateness of a behavior plan formulated and adopted on April 14, 1999, and 2. the necessity for an independent assessment of the student, and if so, whether guidelines met IDEA requirements.

On May 29, 1999 Petitioner faxed a complaint that he had not yet received the additional information Respondent was to send him. He objected to proceeding with a hearing concerning an independent assessment of the student but would be prepared to hear the matter of the appropriateness of the April 14, 1999 behavior plan.

After hearing from Petitioner and Respondent this IHO found that (1) Respondent had provided the required information within the April 30 deadline and had complied with his order. (2) This IHO had granted the parties an opportunity to bring the above additional issues before him, that the grant was permissive, that the parties having reached no agreement to hear the issue of an independent assessment, as witnessed by Petitioner's objection to hearing the issue, and it being an issue raised subsequent to this due process request, it would not be heard. Respondent's objection to this ruling is here noted.

Petitioner and Respondent then asserted that they both wished to proceed with the issue of the appropriateness of the April 14, 1999 behavior plan, both contending it was capable of being heard without consideration of the independent assessment issue.

This IHO determined he would hear the appropriateness issue and not the assessment issue.

FINDINGS OF FACT AND DETERMINATION

1. Hearing Unwarranted.

The first issues to be here heard were raised as a result of the manifestation hearing meeting held February 10, 1999. Parent's first objection was to the holding of any manifestation hearing since there was no evidence of any behavior which warranted the holding of such a hearing.

This parent misconceives the reason for holding such a hearing. Under Sec. 300.519 C.F.R. the earlier 10 day expulsion, when coupled with a one-year expulsion constituted a change in placement requiring the holding of a manifestation hearing. The holding of the hearing was mandatory. The determination to be there made was whether, if the charge of a student with disabilities injuring another student was true, such act was a manifestation of said student's disability. If such were the case, then no expulsion hearing would go forward as IDEA would shield the child from being disciplined.

Sec. 300.523 sets forth rather specifically that it is the student's IEP team that will

consider and is charged with determining whether or not the student's actions were a manifestation of his disability.

The IEP team found in this case that the alleged act would not be a manifestation of the student's disability.

The holding of a manifestation determination hearing was proper.

2. Understand Rules.

Parent, who was one of the team, objected the team finding that student understood the schools conduct rules. All but one of the remaining members of the team rejected that argument.

I find the testimony during the IEP hearing amply substantiated that student had been advised of the rules. The team believed student's disability did not prevent his understanding said rules. I concur.

3. Medical Team Member Requirement.

Parent took the position that to determine whether this student's disability impaired his ability to control his action's, (such being a defined manifestation of student's disability), required a medical practitioner's opinion from one who knew the student. He claimed that no IEP team member was so qualified.

In my review of the IDEA regulations I find no such requirement.

4. Appropriate Placement.

Approximately two weeks earlier the IEP placement had been found to be appropriate in the January due process hearing. The IEP team agreed that said IEP placement remained appropriate and that they need not review it further at that time. Parent again objected to the team's finding.

I find the team's conclusion to be reasonable.

Additionally, Petitioner complained that student's placement when expelled, and when transferred to a language arts class denied Petitioner a FAPE. He further claimed a FAPE was denied because the school authorities searched student, placed him under strict surveillance, etc. and that the school authorities actions were all designed to harass, discriminate, and/or retaliate against said student.

This IHO finds, from his review of the testimony and exhibits, the placements to have proper and that Petitioner failed to substantiate his allegations regarding harassment, discrimination and/or retaliation.

5. Stay Put.

Petitioner complained that the school district failed to comply with the "stay put" provision of the IDEA.

The "stay put" provision prohibits school authorities from unilaterally excluding children with disabilities for dangerous and disruptive conduct growing out of their disabilities during the pendency of this review. See Honig v. Doe, 484 U.S. 305. The testimony was that as to the proposed one-year suspension the student has remained in school and been allowed to attend classes during this due process appeal.

This IHO is aware of a six day disciplinary suspension given student on or about April 14, 1999 for rules violations subsequent to the imposition of the stay put. The latter suspension is for violations separate and apart from that of this hearing. The school district is not without a remedy. While the placement may not be changed it does not preclude the school district from using its normal procedures for dealing with children who are endangering themselves or others. Honig, supra.

6. Behavior Plan

By April 14, 1999 testimony and exhibits indicated that the student's disruptive behavior had significantly escalated. An IEP team meeting was convened on that date to design a behavior plan for the student. This behavior plan is the added issue Petitioner and Respondent have asked be here addressed.

In reviewing the testimony and exhibits it appears that the Petitioner's major contention is that such a plan should not have been formulated because student is innocent of the alleged infraction which resulted in the expulsion hearing.

This IHO did not hear the expulsion case. Nor does he have the power to change its result. It is not an IDEA issue and is not one over which he has jurisdiction.

Objections to the behavior plan over which this IHO has authority stem from the appeal of the manifestation hearing.

In that regard, this IHO has reviewed Petitioner's exhibit 11, it being an audio tape of the IEP team's meeting on April 14, 1999.

In the team discussion, the main items of objection are the participatory role of the father in helping to implement the plan by his reviewing the schools' code of conduct with student (exhibit 6, item 4) and his attending classes (exhibit 6, item 6) with his son.

I find that the parents objection to his own participation do not affect the plan as it refers to the student. Parent is correct in that the school district would be hard pressed to enforce their will upon him. The objection to the behavior plan, except as above noted is denied.

7. Evaluations and Relevant Information.

This IHO is unsure, given the testimony and exhibits presented, whether the IEP team had before it for consideration sufficient past evaluation data related to student's behavior. I am satisfied that the team had no current evaluation data. Proof that such information as is referred to in Sec. 300.523 c(1) C.F.R. and whether it was available and whether it was duly considered during the manifestation hearing is not a part of this record. It is a necessary part of the manifestation hearing.

Good cause exists to call for a current evaluation. Therefor, pursuant to authority granted me by Sec. 300.502d) C.F.R. this IHO requests an independent educational evaluation which is to be made a part of this hearing, the same to be provided at public expense.

The IEP team shall receive a copy of said evaluation and shall call for such other information as is relevant.

Upon receipt of a current valuation the IEP team shall reconvene the manifestation hearing and reconsider their decision in light of the additional information they will then have.

Their decision shall be forwarded to me as soon as possible, with any objections thereto noted so that a final resolution of this matter may be reached.

This IHO would prefer for Petitioner and Respondent to agree upon the evaluator, and to rely upon that individual's judgment in selecting those tests which he will require to aid him in evaluating the student, recognizing that this evaluation is a tool for the school district to use in providing a free appropriate public education to this student.

If they do not agree upon an evaluator Petitioner and Respondent shall submit to me and to each other, names and vita's of independent evaluators they recommend. The information shall be due by no later than May 28, 1999. They shall then have until June 8, 1998 to file objections to the appointment of any evaluator recommended by the other party with reasons therefor. A telephone conference call shall be held at 9:00 a.m. on Friday, June 11, 1999. During that conference please be prepared to advise estimated time needed to complete the evaluation and reconvene the IEP for a manifestation determination meeting.

8. IEP Team Limitation.

Further, when the IEP team reconvenes, the school principal may attend, join in any discussion but shall abstain from participating with the team as it makes its decision relative to the manifestation issue. The reason is that he previously conducted the investigation which gave rise to calling the IEP team manifestation meeting and made a report that recommended the expulsion. He also voted in the meeting wherein the IEP team determined the manifestation issue. One ought not act as policeman, prosecutor,

and juror. The perception of others is that the person so serving is biased, whether or not that is in fact the case. Though the team is not a jury, it decided the issue as a group. The principle remains the same.

For instance, in a memo sent to all directors of special education by the Colorado Department of Education, dated March 27, 1996 regarding suspension/expulsion of students with disabilities specific reference was made to manifestation determinations (page 9). It stated that determinations should not be made by the same individuals responsible for the school's regular disciplinary procedures nor should they be made unilaterally.

Having reviewed the taped conversation of the IEP meeting of April 14, 1999 (exhibit 11), a cautionary reminder to the team members seems in order. Parent and other IEP members are referred to as a team. The regulations expect them to work together in providing this student with and appropriate education. Parents are to act as advocates and not as accusers. Teams that do not work together are generally unsuccessful in helping the student.

Jurisdiction over this matter is to be retained at this time. The previous May 28, 1999 date by which to complete this appeal is here set aside. This case is now scheduled to close at the earliest time possible and prior to December 1, 1999.

So ORDERED this 17th day of May, 1999.

(Raymond Lee Payne, Jr.)
Impartial Hearing Officer

DUE PROCESS HEARING L99:105

[Student], by his father, [Father], Petitioner

vs.

JEFFERSON COUNTY SCHOOL DISTRICT R-1, Respondent

MODIFIED ORDER CONCERNING EVALUATION

A telephone conference was held, beginning at 9:00 a.m. on June 14, 1999 to hear the objections Petitioner and Respondent each made to the evaluators suggested by the other party. Present were Petitioner's father and Cheryl M. Karstaedt, esq. for the Respondent School District.

Petitioner submitted only one name, that of [Doctor 1], Ph.D as the suggested evaluator. Respondent submitted the names of [Doctor 2], Ph.D or of [Doctor 3], Ph.D.

Respondent's objected to [Doctor 1] because of his practice emphasizing ADHD cases while the focus of this assessment would require equal consideration of additional areas of disability. This IHO rejects this argument and finds him to be well qualified.

Respondent further objected to [Doctor 1] because of his having previously tested and treated this student. This IHO finds [Doctor 1]'s previous association, while valuable if treatment were involved, leaves a perception of partiality which disqualifies him.

Petitioner objects to the selection of either [Doctor 2] or [Doctor 3] alleging each has suggested that they would include in an educational assessment of this student, psychological tests. Petitioner's parent alleges a psychological evaluation equates to a medical diagnosis of the student. Parent insists that it is his "constitutional right as a parent to have medical diagnosis and treatment conducted by ...(parent's)... provider". My Order provides for evaluation. Tests to evaluate do not infer medical treatment. Petitioner's argument is therefor not relevant to the testing issue.

Further, Petitioner's parent has intimated that he may not allow his son to be tested except on his terms, namely that he pre-approve the tests to be administered as well as the person making the evaluation. This IHO believes that the evaluator must be free of outside influences, be allowed to select tests and to conduct his investigation without interference. This testing has been requested because this IHO believes it to be in the best interests of the student.

However, the time and expense involved in providing a current evaluation by a psychologist would waste school district resources, since they are to pay for same, if the Parent and Student are so hostile to the school district and to the idea that they are now unwilling to participate.

Petitioners may therefor make one of the following choices:

1. Agree Student be tested by either [Doctor 2] or [Doctor 3]. I find Respondent's suggested evaluators to be qualified.

2. Agree Student be tested by a person, yet unknown, who will be selected by this IHO after he makes due inquiry and is satisfied as to the expertise of that assessor he will select.

3. Petitioner's may refuse testing and elect not to participate in an evaluation.

If testing is elected, the evaluator shall determine the tests required and shall impartially conduct the tests. He shall confidentially report his findings, conclusions and any recommendations to Petitioner and the school district. Copies of School records, medical records, with all else deemed reasonably necessary, shall be supplied him by Petitioner and Respondent on request, and without delay, time being of the essence. Evaluator shall be paid by the school district. In carrying out his evaluation, evaluator may apply to this IHO for assistance, if required.

Petitioners may have until June 23 to advise this IHO and Respondent of their decision. If either choice #1 or choice #2 is selected, the parties are to take responsibility to assure that tests and report are available for the IEP staffing which is to be held on or about August 14, 1999.

Item #7 of the Findings and Decision dated May 17, 1999, regarding this IHO calling for a current evaluation, is modified as above set forth.

ORDERED this 15th day of June, 1999.

(Raymond Lee Payne, Jr.)
Impartial Hearing Officer

DUE PROCESS HEARING L99:105
[Student], by his father, [Father], Petitioner

vs.

JEFFERSON COUNTY SCHOOL DISTRICT R-1, Respondent

RULING ON PETITIONER'S RESPONSE TO EVALUATION CHOICES

On June 15, 1999 this IHO issued a "Modified Order Concerning Evaluation". In that Order Petitioner was provided with 2 choices regarding evaluation of this student through tests selected and administered by a qualified professional or as a third choice, with an election to refuse to participate.

Earlier I had called for an evaluator's report to be provided the IEP team for their consideration in determining whether the student's behavior was a manifestation of his disability as defined in the IDEA.

Petitioner's parent responded to my Modified Order by letter dated June 21, 1999 and received June 23, 1999. In it he specifically objected to option 1, the appointment of either psychologist recommended by the school district. I find Petitioner has rejected option 1.

Instead of responding directly to options 2 and 3, Petitioner's renewed a request that this IHO appoint [Doctor 1]. Petitioner's are to be commended for independently retaining him. He is not however perceived as being impartial. Petitioner's request for [Doctor 1]'s appointment has been reconsidered and his appointment is again denied.

This IHO will assume from Petitioner's response that as to options 2 and 3 Petitioner rejects option 2 (wherein this IHO would search for, select and appoint a third party evaluator), and elects option 3, (refuses testing and elects not to be independently evaluated).

The parties may have until July 2, 1999 to advise me in writing why (1) my assumptions concerning Petitioner's unwritten responses as to options 2 and 3 are incorrect and (2) why I should not proceed to conclude this matter.

SO ORDERED this 25th day of June, 1999.

(Raymond Lee Payne, Jr.)
Impartial Hearing Officer

DUE PROCESS HEARING L99:105

[Student], by his father, [Father] Petitioner

vs.

JEFFERSON COUNTY SCHOOL DISTRICT R-1, Respondent

ADDENDUM TO PREVIOUS FINDINGS AND DECISION

INTRODUCTORY STATEMENT

Petitioner and Respondent have now responded to my June 25, 1999 Ruling on Petitioner's Response to Evaluation Choices.

By letter of June 30, 1999, Respondent concurred with my ruling.

Petitioner's father, by letter dated June 29, 1999, faxed to me on July 1, 1999, again confirmed that he would not consent to an evaluation of his son unless one [Doctor 1] do the evaluating or unless he, the father, approve the person selected and be allowed to limit the scope of the testing such evaluator might wish to do. It is to be noted that the Respondent had objected to [Doctor 1]'s appointment and that this IHO had earlier disqualified him.

FINDINGS OF FACT AND DETERMINATION

This addendum addresses remaining issues. The Findings and Decision of May 17, 1999 are incorporated herein by reference, as is the June 15, 1999 Modified Order Concerning Evaluation and the June 25, 1999 Ruling on Petitioner's Response to Evaluation Choices.

9. Petitioner's Evaluation Choice.

Father had earlier rejected option 1. Petitioner was then left with two options. Option 2 was to have this IHO find and select an independent impartial evaluator. Option 3 was to refuse testing and to elect not to have student evaluated.

Father found "option 2 was not an acceptable solution" according to his letter dated June 29, 1999. I find that Petitioner refused option 2.

As regards option 3, father states that "Petitioner's have not rejected participating in an evaluation". Instead he claims that as a parent he has "exercised his constitutional right to obtain diagnosis and recommended treatments by the provider of his choice".

The question of the right of the parent to provide medical and physical treatment was not raised in this matter by anyone other than the parent. I find this not to be an issue.

I am unable to find authority for a Parent's claimed constitutional right referred to by

the father. His constitutional right claim is denied.

Parent has sought to withold or withdraw information relevant to student's disability by attempting to control the information to be given the school district. Providing the school district with little or no information which parent selectively releases, works to the ultimate detriment of the student. This matter is not a criminal case. It involves review of the actions of the school district and of the student in a continuing attempt to provide an appropriate education for this student.

> "The education of the children of this state should be a partnership between the parent and the state, or school district. . . . . It is best achieved by cooperation between the student, his parent, the teacher's and the school administrators involved in the child's education." In re Michael T., 1984-85 EHLR Dec. 506:333.

While Petitioner's father claims a willingness to allow an evaluation, Petitioner's have in fact elected to refuse to participate in any valuative process not controlled by him.

10. Rehearing the Manifestation Issue.

The IEP team, had father agreed to an evaluation as a part of this hearing, would have been required to hold another manifestation hearing for the purpose of considering the evaluator's report. In the May 5, 1999 hearing, the principal, who conducted the investigation of the student's actions and participated in the expulsion hearing, was also an IEP team voting member at the manifestation hearing. I had earlier determined his participation as a voting member to be improper because it gave the impression of bias.

Exhibit 11, the audio tape of the May 5, 1999 manifestation hearing, was reviewed. Petitioner's father objected to the team being able to determine the student's then ability to distinguish right from wrong as applied to the manifestation issue because no medical practitioner was present at the hearing to express an opinion. The majority proceeded with the hearing nevertheless and determined that the student's actions were not a manifestation of his disability. This IHO is satisfied that the decision was fairly arrived at, that the Principal's participation and statements were dispassionate and factual, and that they did not unfairly influence the remaining participants in arriving at their respective opinions.

Petitioner may not object to the manifestation hearing decision by taking inconsistent positions. He pleaded that medical information and/or psychological evaluations were needed by the IEP team before it could decide the manifestation issue. Meanwhile he refuses to furnish such records or to participate in an independent and impartial evaluation. Petitioner's father made his election. He may not now complain of a decision made on the basis of that information available to the team at the time the decision was made.

I find that an additional manifestation hearing need not be held to satisfy due

process. Should the team believe it appropriate to revue their original finding at a later date, this finding, allowing the original decision to stand, is not to be construed as forbidding such an action.

This decision shall be final and shall conclude this appeal.

This decision and findings will be mailed to the parent, the Superintendent of Jefferson County School District R-1 and to the Colorado Department of Education.

Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by this Impartial Hearing Officer. An Administrative Law Judge shall be appointed to hear the appeal. Any party wishing to appeal the Impartial Hearing Officer's order has the same rights as they had for this hearing. Either party may appeal to a court of appropriate jurisdiction if dissatisfied with the final order.

This Order is entered this 9th day of July, 1999.

(Raymond Lee Payne, Jr.)
Impartial Hearing Officer