

ILLINOIS STATE BOARD OF EDUCATION

IN THE MATTER OF)
THE SPECIAL EDUCATION OF)

No. 2007-0145

Zachary "Nick")

v.)

Marie A. Bracki, Psy.D.
Impartial Hearing Officer

Monticello Community School)
District No. 25)

DECISION AND ORDER

This matter is before the undersigned for a Due Process Hearing concerning the disputed identification, and services recommended for the student. The Hearing Officer has jurisdiction to hear and decide the matter under 14-8.02 a (g) of the Illinois School Code, 34 C.F.R. 300.506-509 issued pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), and 23 Illinois Administrative Code 226, Subtitle A, Subchapter F. The parties have been informed of their rights pursuant to these statutes and regulations.

Procedural History

A request for Due Process Hearing was filed by the student's mother on January 22, 2007. Another hearing officer was assigned the case but was unavailable to accept the appointment. The current hearing officer was appointed by letter on February 1, 2007. The parties were contacted and a prehearing conference was set for March 12, 2007. Evaluations were scheduled and the parties were to meet on March 1, 2007 for a resolution session after the completion of the evaluations. The parties met as planned on that day, but were still in disagreement.

The prehearing conference was held on March 12, 2007 by telephone conference. The Illinois State Board of Education training entity representative was also on the line. Document and witness lists were exchanged. The issues as previously presented were reviewed. Arrangements were made for the hearing. Documents were to be exchanged by April 5, 2007. The hearing was to be closed to the public; the student would not be present; witnesses were to be sequestered; teleconference equipment should be available if needed; and a neutral location was requested. Subpoenas were executed for witnesses for the parent. The hearing was held at the Best Western Gateway Inn in Monticello, Illinois on April 12 and 13, 2007. Additional days were set aside, but were not needed.

Issues

The parent enumerated the following issues in the request for due process:

1. Failure to provide Nick with an Individualized Education Program ("IEP"), including goals and objectives and related services, adaptations and accommodations, despite knowledge of Nick's disabilities.
2. Failure of Child Find Duty.
3. The school incorrectly found that Nick's behavior was not a manifestation of his disability.
4. Inappropriate expulsion of Nick.
5. Failure to provide sufficient services during Nick's expulsion.
6. Failure to provide an appropriate placement for Nick.
7. Failure to consider outside evaluations.
8. Failure to conduct a Functional Behavior Analysis or prepare a Behavior Intervention Plan.
9. Failure to provide Nick a free, appropriate public education.

Remedies presented by the parent include the following:

1. Development and implementation of an appropriate IEP for Nick.
2. Expungement of expulsion records.
3. Compensatory services.

The district's position was that the student was not determined to be eligible for special education services; that the behavior leading to his expulsion was not a manifestation of his disability; and that the 504 Plan should be considered sufficient to meet his needs. The district contended that there were no adverse effects for any of Nick's conditions on academic achievement and he exhibited no social/emotional concerns while in school. The district indicated that social work services could be provided as a related service and that Nick should not be considered a child with a disability under IDEIA.

Findings of Fact

At the time that the request for the due process hearing was filed, the student had been in the eighth grade at the Monticello Middle School, having transferred to the school in August 2006. On September 6, 2006 district staff and Nick's mother met to develop a 504 Plan. The plan that was developed was based on a plan that been utilized in a previous district and on an evaluation conducted in 2002. The conditions identified in the Plan (Parent Document pages 170-171) include "Attention Deficit Disorder (ADD), Obsessive Compulsive Disorder (OCD), clinical depression, anxiety, and mild word retrieval processing" and further stated "Nick's presenting disability is affecting his progress in school. Organizational skills seem to be the major area of concern." On November 2, 2006 the student was found to be in possession of a knife and threatened another student; he was suspended for ten days. Nick didn't take his medication on that date. On November 17, 2006 a manifestation determination conference was held and the team decided that the behavior was not caused by the student's disabilities. He was

subsequently expelled. On November 14, 2006 a comprehensive evaluation was requested by the parent to determine whether the student might be eligible for special education services. After the incident the student was hospitalized. Evaluations were completed by the clinic and by the school district. Initially the school district indicated there wasn't enough information to conduct an autism evaluation and requested that the parent have an outside evaluation done so that the district could address the concerns. The components to be assessed were coordinated by the personnel who would be doing the evaluations.

Instructional services were being provided to the student for two hours per day at the public library. Placement in an alternative school was offered, but the parent refused the placement because she thought it was inappropriate for her son. At the time of this hearing, the student had recently been re-hospitalized.

Additional diagnoses that would be presented and discussed included autism spectrum disorder, Asperger's Syndrome, and pervasive development disorder (PDD). At an eligibility determination conference (EDC) on March 1, 2007 the team made the determination that Asperger's Syndrome was appropriate. District witnesses testified about the utilization of the federal regulations and the Illinois regulations to determine eligibility and some of the differences between those regulations and the DSM IV-TR. Although the district identified another disability, it determined that special education services were not needed. The premise of this was that the student was able to achieve academically, that Asperger's Syndrome did not have an adverse effect on education. His achievement scores were commensurate with his abilities and no concerns were noted in this area. The biggest concern was organizational skills. OHI (other health impairment) was not considered. Witnesses testified that co morbid conditions of autism and emotional disturbance couldn't be identified. Emotional disturbance was not considered.

The student's English teacher testified regarding the student's behavior, his completion of academic work, and her efforts to increase his productivity. Ms. Benedict indicated that the student had difficulty staying on task, wouldn't complete his work outside of class, and had trouble getting started on assignments. She also noted that the student had limited interactions with other students. The teacher met with the student after school in an effort to have more work completed. She testified that the student also met with the science teacher. The teacher also said that the student teased other students, didn't relate to peers, but talked with adults. The principal testified that Nick "had some trouble fitting in, struggling with identity, and depression." Nick went to the principal relating various incidents about teasing or harassment by other students. The principal was identified as "the safe person in school" to whom Nick could go when problems arose.

Documents presented by both parties indicated that there were many emails sent between the parent, the school principal, and Nick's teachers noting concern about completion of assignments, attempting to identify consequences for work completion, concern about his grades, and questioning whether other meetings or interventions would

be necessary. But in testimony no school personnel indicated that it would be helpful to revise the 504 Plan or to consider its adequacy.

Documents revealed that the student brought a knife to school in September 2005 in a previous district and was suspended for three days. On November 2, 2006 the student was suspended for ten days pending an expulsion hearing for bringing a knife to school and for threatening another student. Staff testified that they had not seen the letter from the previous district documenting the 2005 incident until recently.

The 504 Plan that was developed on September 6, 2006 identified the same disabilities/conditions that were previously known, although a copy of the prior 504 Plan was not available at that time. The parent provided the information to be included. Organizational skills were the "adverse effect" of the diagnoses that were included (Attention Deficit Disorder ADD, Obsessive Compulsive Disorder OCD, clinical depression, anxiety, and mild word retrieval processing). Accommodations included the following: preferential seating; email home with late and missing assignments; prompts to attend; assignment book completion and monitoring; given one extra day for late assignments without penalty; encouraged to stay for tutorials to complete homework; extended time may be given on written tests and quizzes, as determined by the teacher; extra set of books at home if deemed necessary. The previous 504 Plan was not available to the district until special education personnel specifically requested a copy from the previous district and the evaluations in the current district were under way.

According to district personnel, the accommodations as listed above were believed to be appropriate to address the problem of organizational skills and to improve Nick's work completion and hence improve his grades. The accommodations don't address the social or emotional problems that were identified in the 504 Plan. Nick was receiving more than what was intended in the "tutorial" service according to Ms. Benedict's testimony. The tutorial was considered to be a study hall, whereas Nick was working in a one on one situation with Ms. Benedict or with the science teacher, but was still unable to initiate class work or complete what was required. Testimony by the teacher who was working with Nick for two hours per day revealed the extent of modifications and accommodations she had to make to elicit task completion.

Evaluations conducted by school personnel were reviewed in testimony and contained in the evidence presented by the parties. Based on the domains to be identified, the autism team was requested to be among the evaluators. The school psychologist, social workers, speech therapists, and an occupational therapist conducted a series of tests, interviews, observations, and elicited behavior ratings from teachers. Some of the evaluators spent a few hours with Nick, some interviewed his parent, and some requested information from teachers. The occupational therapist relied on a survey completed by Nick's mother for her part of the evaluation. Ms. Phelps, Monticello Middle School social worker, testified that she thought Nick was a "loner" and indicated that maybe she wrote that because she saw him playing his game boy at the lunch table rather than interacting with other students. She further noted that she didn't interview the student at this time or on any other occasion.

Testimony by clinic and hospital staff and evidence presented by others indicated that Nick was socially immature, anxious, and very impulsive in social situations. He seemed to be able to relate more easily to girls, but had great difficulty in relating to male age peers. Hospital staff didn't believe that Nick was aggressive. Instances were related regarding Nick's poor social judgment. Mr. Dillon stated that if Nick wanted to hurt someone, the knife (on November 2, 2006) would have been open. But supposedly Nick simply showed the knife to the other student who, according to Nick, pushed him to get in line. Testimony was given that indicated Nick had been a student who was teased on several occasions in more schools besides Monticello Middle School.

Staff testified that not all students with autism or Asperger's Syndrome have IEP's. Many have social work services, but no IEP or instructional intervention may be required. At the time of the hearing no proposed services for social work intervention to address Nick's varied needs had been made.

School staff testified that drafts of reports were shared and personnel met to discuss what other information might be required to make a determination of eligibility for special education. Some staff members don't remember exactly what was discussed or indicated that their reports weren't changed prior to the eligibility determination conference.

Conclusions of Law

The district is obligated according the Rules and Regulations (23 Illinois Administration Code CH I, S226.100) to govern special education in the State of Illinois to screen and to correctly identify students who may have a disability and to provide appropriate services and placement if necessary based on the student's disability. School personnel met with the parent and formulated a 504 Plan on September 6, 2006 to address the problems previously identified, which included Attention Deficit Disorder, Obsessive Compulsive Disorder, clinical depression, anxiety, and mild word retrieval processing. A 504 Plan was developed the previous year in another district. The 504 Plan that was created was based on information from a 2002 report, when the student was nine and a half years old, and the school district didn't receive a copy of the previous district's plan until after the student's suspension/expulsion. However, the district failed to meet to review the plan when parent and teachers and the school administrator exchanged many emails, phone calls, and meetings that indicated the student was not responding to the plan as formulated. The diagnoses that were included presented a complex array of problems that could be manifested in many behaviors besides "organizational skills," the only adverse effect noted in the Plan. The student had already reported to the principal that he had been teased/bullied by other students in the building.

Staff testified that they didn't know whether Nick had an extra set of books at home, one of the provisions of the 504 Plan. No testimony or evidence was presented about an assignment book or its monitoring. The only information in this regard has to

do with emails back and forth between the parent and the teachers and the parent's initiation of a behavior plan to assist Nick in assignment completion.

The district asserted that the protections of IDEIA did not apply based on 300.534 of the Federal Rules and Regulations pertaining to Special Education. The district contended that the district did not have knowledge that the child was eligible for special education. The parent was the person who identified the diagnoses that the district used to develop the 504 Plan, any one of which could have lead to identification for special education. After the suspension, the parent requested an evaluation to consider eligibility for special education.

The district then proceeded to conduct its evaluation and used components from the Carle Clinic evaluators. The district determined that Asperger's Syndrome, an autism spectrum disorder diagnosis, could be applied to the student, but he did not qualify for special education arguing that there was no adverse effect on his educational performance since he was able to access the general education curriculum. There was discussion about the application of the federal regulation criteria versus the criteria listed in the DSM-IV TR. Further, the Federal Regulations [300.8(c) (ii)]state that "autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section." Once the Asperger's Syndrome was acknowledged, no other considerations seemed to have been made.

Nick has been identified as a bright student, with his overall IQ about two standard deviations above the mean. Many of his measured academic skills are commensurate with his potential. But some aren't. Specifically some language scores would be considered average, considerably less than what would be expected.

The 23 Illinois Administrative Code 226.75 defines educational performance as "a student's academic achievement and ability to establish and maintain social relationships and to experience a sound emotional development in the school environment." Case law that was presented by the parent was instructive for this matter. In the Mr. and Mrs. I case from Maine (43 IDELR 197; 105LRP 25339), the court advised that social and emotional needs must be considered. Social skills instruction included direct teaching and was, therefore, considered special education, not a related service. A case from the 7th Circuit (Westlaw 919 F.Supp. 1173) also provided guidance about educational performance, noting that it is more than academic achievement and passing from one grade to another.

The district was obliged under Child Find to screen students for possible special education eligibility. Nick was a student whom the district knew had a complex array of diagnoses, further was experiencing difficulty with academic task completion, had told the principal and others he that he had been teased and bullied, and had poor social interactions with his peers. The 504 Plan was based on an evaluation from 2002. The district failed to review the appropriateness of the Plan or to consider whether an

evaluation should be done or to request more recent evaluative information from the parent.

Related services should be available to handicapped students to assist them in benefiting from special education (Illinois Administrative Code 226.75). At the time of the hearing, even though the district's position was that social work services could be provided to address the student's needs, no proposed plan was made.


The parent has met the burden of persuasion that Nick was a student who presented with a complex array of diagnoses and behaviors. In its presentation the district asserted that although Nick had a number of problems, special education was not required because he was able to achieve, based on academic achievement levels, and grades. However, educational performance had a broader definition as contained in the Illinois Rules and Regulations. This position was further corroborated by case law from this 7th Circuit and from others as well as instruction from OSEP (23 IDELR 714; 23 LRP 3420).

The Order should not be construed as a means to provide an opportunity to maximize the student's potential, but rather as what was required to provide a free and appropriate public education for him.

ORDER

1. Nick should be considered eligible for special education. The district is ordered to convene an IEP meeting within fifteen days of the receipt of this Order to determine appropriate services and placement. The IEP should address, but not be limited, to the following:
 - a. social skills training;
 - b. counseling/social work services;
 - c. organizational skills;
 - d. transition plan.
2. An occupational therapy evaluation should be completed within fifteen day of the receipt of this Order.
3. Nick's behavior should be considered a manifestation of his disability (ies), specifically attributed to impulsivity and inability to understand social cues, exacerbated by harassment by other students.
4. The District is ordered to demonstrate compliance with this Order within forty-five (45) days of the receipt of this Order to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777-0001.

This Order issued the 23rd day of April 2007.


Marie A. Bracki, Psy.D.
Impartial Hearing Officer

Right to Request Clarification

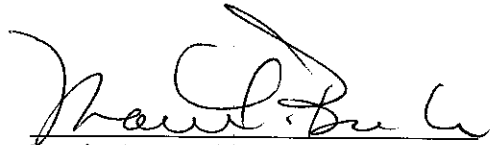
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned-hearing officer with five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

Right to File Civil Action

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 Ill. Comp. Stat. 5/14.8.01(I), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

Certificate of Service

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent and District, through counsel, and the Illinois State Board of Education at their stated addresses by depositing same with the United States Postal Service at Lombard, Illinois 60148 with postage prepaid on April 23, 2007.


Marie A. Bracki, Psy.D.
Impartial Due Process Hearing Officer