STATE BOARD OF EDUCATION

STATE OF GEORGIA

Appellant,

vs.

CASE NO. 2000-5

BURKE COUNTY
BOARD OF EDUCATION,
Appellee.

DECISION

This is an appeal by C.D. (Student) from a decision by the Burke County Board of Education (Local Board) to permanently expel him after a student disciplinary tribunal found him guilty of striking a teacher. The Student claims the decision was too harsh because the Local Board failed to consider his special education status and that he was denied due process.

The Student, a tenth grader receiving special education services with an eligibility category of mildly intellectually disabled, pushed a teacher and caused her to fall over some desks on December 2, 1999. The incident occurred after the teacher removed the Student from the lunchroom because he was creating a disturbance. The teacher took the Student to her room and sat with him while he ate his lunch. While the Student ate, he berated the teacher. When the lunch period was over, the teacher attempted to hand the Student a disciplinary slip for his signature. Rather than taking the disciplinary slip, the Student grabbed the teacher's arm. The teacher lost her balance and fell over some desks.

The teacher was not injured, but the Student was charged with simple battery. Because the Student is a student with a disability receiving special education services, a hearing was held to determine whether the Student's conduct was caused by his disability.

Disabled students may be disciplined subject to certain specific provisions under the Individuals With Disabilities Act, 20 U.S.C. § 1400 *et seq.,* (IDEA). Generally, a student cannot be subject to the routine disciplinary practices of the school system if the student's disability is a causative factor in the student's misbehavior. IDEA requires that the IEP team "and other qualified personnel" conduct a "manifestation determination" review before imposing any punishment on a special education student. 20 U.S.C. § *1415(k)(4).* The purpose of this manifestation determination is to review "the relationship between the child's disability and the behavior subject to the disciplinary action" and to determine whether the student's behavior is a manifestation of the student's disability. 20 U.S.C. § 1415(k)(4)(c); 34 C.F.R. §~ 300.523 (a)(2) and *300.524* (a). If it is, the student cannot generally be subjected to the disciplinary procedures applicable to children without disabilities but can be disciplined subject to certain provisions of IDEA. In 20 U.S.C. § 1415 *(k)(5)* and in 34 C.F.R. § 300.524(a) it is provided that if a determination is made that the behavior is not related to the disability, ...the relevant disciplinary procedures applicable to children without disabilities may be applied to the child m the same manner in which they would be applied to children without disabilities except as provided in [~ 1412(a)(l)/ §300.121(d).]" (The applicability of 20 U.S.C. § 1412(a)(1) and 34 C.F.R. § 300.12 1(d) is discussed below in this opinion.) However, special education and related services may not be terminated as specifically provided by IDEA and the regulations thereunder.

To establish that the student's behavior was not a manifestation of the student's disability, the manifestation review group has to consider "all relevant information" including evaluation and diagnostic results, other relevant information supplied by the parents of the child, observations of the child, the IEP and placement (20 U.S.C. § 1415(k)(4)(c)(i)(I-III), then determine that:

> (I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

20 U.S.C. § *1415(k)(4)(C).*

In the instant case, the school system conducted a manifestation determination review and concluded that the Student's behavior was not a manifestation of his mildly intellectually disabled eligibility category. A student disciplinary tribunal then held a hearing on the battery charges. At the end of the hearing, the tribunal spent two minutes to decide that the Student was guilty of the charge. The tribunal then spent four minutes to decide to permanently expel the Student, although the recommendation was to expel the Student only through the end of the 1999-2000 school year.

For purpose of this appeal, 20 U.S.C. § 1415(k)(5) and 34 C.F.R. § 300.524(b) provide, "If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action." There is nothing in the record to indicate that the Student's special education records were made a part of the tribunal's consideration. In any event neither the Student's special education records nor the Student's disciplinary records were made a part of the record on the appeal to this Board. Pursuant to the above regulation, the Local Board has the burden of providing such records if a determination is made, as was made in the instant case, that the behavior of the child with a disability was not a manifestation of the child's disability. Thus, there is nothing in the record to establish that the relevant information was considered or that the determinations required were properly made as required by 20 U.S.C. § 1415(k)(4)(C).

The Student then proceeded on two separate courses of action –he appealed the tribunal's decision to the Local Board, and he filed a complaint under IDEA to contest the determination that this behavior was not a manifestation of his disability. The Local Board upheld the student disciplinary tribunal's decision to expel the Student. The Student then filed an appeal from the Local Board's decision to the State Board of Education.[1]

In his appeal from the Local Board's decision, the Student argues that the punishment is so excessive that it is illegal and that the school system denied him procedural due process in the conduct of the student disciplinary tribunal hearing.

The Student argues that the punishment was too harsh because there was no evidence that he intended to harm the teacher, the teacher was not injured, the teacher did not follow the behavior management interventions prescribed for the Student, and the tribunal did not provide any justification for deciding, in four minutes, to greatly exceed the recommended punishment. The Local Board argues that the punishment was not excessive because the Student previously assaulted teachers, the Student has been in alternative school, and the Student's behavior was not caused by his disability.

The Student claims that he has multiple disabilities that affect his behavior, but that the tribunal did not consider his disabilities. Apparently, the hearing conducted under IDEA, however, determined that the Student was receiving the proper special education services, the Student's disability did not impact his ability to understand the

'To address the IDEA complaint, another hearing was conducted before a State-appointed hearing officer. The hearing officer concluded that the Student's mild intellectual disability did not impair his ability to understand the impact and consequences of his conduct on December 2, 1999, and that the conduct was not a manifestation of his mild intellectual disability. *CD. v. Burke County School District,* Docket OSAH-DOE-SE-00 11 392-CJR (Office of State Administrative Hearings, Jan, 20,2000). An appeal from that decision goes into court rather than to the State Board of Education. However, the decision on the manifestation determination apparently is not final because the Student has appealed that determination to court.

consequences of his behavior, and the Student's disability did not impair his ability to control his behavior. Consequently, these determinations established that the Student could be treated like any other student and the tribunal did not have to accord the Student's disabilities any additional consideration, other than as required by federal and state law.

Expulsion is a serious consequence and should only be used as a final resort. *See, Michael C. v. Houston County Board of Education.,* Case No. 1992-19 (Ga. SBE, Sep. 10, 1992). In the instant case, the Student has previously assaulted teachers, and the school system has attempted to work with him. The Student threatened a teacher in 1997. In 1998, the Student pushed a teacher and was assigned to an alternative school. The Student threatened another teacher in September 1999. The school system has thus attempted to provide various forms of discipline to the Student and the tribunal's decision was not the result of a first-time offense. However, based upon these prior actions, the Student had a behavioral intervention plan and was receiving special education services.

"A local board of education. ..is charged with the responsibility of managing the operation of its schools, and, in matters of discipline, the State Board of Education cannot substitute its judgment for the judgment of the local board." *See, Boney v. County Board of Education for Telfair County,* 203 Ga. 152, 45 S.E. 2d 442 (1947); *Braceley v. Burke County Board of Education,* Case No. 1978-7; *Joseph M v. Jasper County Board of Education,* Case No. 1981-4 (Ga. SHE, Feb. 11, 1982). In the instant case, the Local Board has provided the Student with different and progressive forms of discipline, but the Student continued to attack his teachers. The State Board of Education concludes that the punishment on its face is not too excessive and is authorized by law. *See, D.B. v. Clarke County Board of Education.,* 220 Ga. App. 330, 469 S.E.2d 438 (1996). However, this determination is not despositive of the Student's placement because of overriding considerations of Federal law.

As discussed above, if the result of the manifestation review is, as in the instant case, that the behavior of the Student was not a manifestation of his disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the student in the same manner in which they would be applied to children without disabilities, "except as provided in § 300.121(d)." 34 C.F.R. § 300.524(a). 34 C.F.R. § 300.121(d) provides, in relevant part, regarding suspensions of more than ten days, that the Local Board must, "Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP, if the removal is ...[For behavior that is not a manifestation of the child's disability consistent with § 300.524...".

34 C.F.R. § 300.5 14(a) provides, "Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 3 00.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement". *See,* 20 U.S.C. § 1415(j). The cited exception of 34 C.F.R. § 300.526, regarding placement during appeals, only applies if an "interim alternative educational setting" was imposed pursuant to the regulations. Since the Local Board failed to include the relevant records in this appeal as required by 34 C.F.R. § 300.524(b), there is nothing in the record to indicate that an "alternative educational setting" or "interim alternative educational setting" was imposed or is applicable to the instant case. Therefore, pursuant to 34 C.F.R. § 300.514(a) the Student has the unqualified right to remain in his current educational placement during the course of the IDEA appeal, and thereafter, the provisions of 34 C.F.R. § 300.524 is applicable. This provision is the so-called "stay-put" provision of IDEA. This means that as long as the IDEA manifestation determination is not "final" or enforceable, the prior placement cannot be altered, except pursuant to the procedures specified in IDEA. *See,* 34 C.F.R. §~ 300.5 14 and 300.524(c). These procedures have been applied directly to disciplinary matters limiting and preventing aspects of expulsion and suspension orders. *See, Honig v. Doe,* 484 U.S. 305 (1998); *5-1 v. Turlington,* 635 F. 2d 342 (5"' Cir.), *cert. denied,* 454 U.S.1030 (1981). They do not supplant the equitable powers of a court. See, *Honig.* Under IDEA, a decision is not final if appealed within 30 days of the administrative determination. On appeal to a court, that judicial body conducts a *de novo* review utilizing the previous record, and it may or may not use or admit additional evidence. *See e.g.,* 20 U.S.C. § 14 *15(i).* Thus, the administrative determination that there is no manifestation which impacts the punishment directly may be premature if the Student has timely and properly placed the administrative decision into issue on appeal.

This Board cannot determine from the record whether the manifestation decision is final, and it appears it is not since the Student has appealed that matter to court. It therefore need not further resolve the more difficult issue as to whether the tribunal proceeding can proceed concurrently with the IDEA matter in court or the appeal thereof,

or whether the Local Board disciplinary decision and this Board's review of that decision is but an advisory opinion until the IDEA procedure is complete. That issue is reserved for a later case where the record is more complete and the claims are clearly presented and addressed by the parties.

This case presents the difficult interplay of the Local Board's and this Board's jurisdiction and duties under the disciplinary codes, as modified by the provisions of IDEA. This Board in this matter must review the record and findings on "any evidence" standard, and must also look to see if the proceeding was held properly and whether the Student was afforded all the rights and protections under the law. This, among other reasons, is apparently the reason for the provision that a student's disciplinary and special education records are required to be included in the record on appeal and the basis for the burden of producing those records being placed on the Local Board. To the extent that this was not complied with, the record is inadequate as a matter of law to support the punishment in violation of the provisions of "stay-put".

The basis of the specific provisions regarding the discipline and punishment of children with disabilities is a part of the very foundation of IDEA, the basic premise of which is that the State must ensure that "all children with disabilities age 3 through 21 residing in the State have the right to [Free Appropriate Public Education], including children with disabilities who have been suspended or expelled from school". 34 C.F.R. § 300.121(a). This basic provision of IDEA is further embodied in that same section wherein it is provided that, even during such a suspension, the Local Board must, "Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. .." 34 C.F.R. § 300.12 1(d). This does not mean that the Local Board may not seek to alter these services pursuant to the provisions of IDEA through the due process mechanisms provided therein, nor does it mean that dangerous students cannot be removed, as IDEA-related claims and remedies exist for such situations. Here, where the expulsion order does not provide for the continuation of services as required by IDEA, and where the legal obligation to continue such services has not been limited by law or by any order of a court of competent jurisdiction, the expulsion coupled with a removal of the Student in violation of the provisions of "stay-put" is overly broad and beyond the authority of the Local Board.

The record does reflect that a behavioral intervention plan was in effect for the Student, apparently because of prior incidents, but the record does not indicate what that plan entailed or whether it was followed. It is noted that 34 C.F.R. §300.520 requires that the IEP team meet to review the behavioral intervention plan and its implementation, and to modify' the plan and implementation, as necessary, to address the Student's behavior. Such a meeting is required to be held not later than 10 business days after a student is first removed from his current setting for more than 10 school days or commencing with a removal that constitutes a change of placement under 34 C.F.R. §300.519. Clearly, such a required procedure is in contemplation of the required "stay-put" provisions and the continuation of services provisions of IDEA.

It is specifically noted by this Board that while the provisions of "stay-put" are applicable, IDEA first provides that the Local Board and the parents may otherwise agree as to the placement of the Student. 34 C.F.R. §300.514(a) and (c). It appears this would be an appropriate case for the Parents and the Local Board to make an attempt to "otherwise agree" given the record of the Student's prior behavior. Such an attempt should include a review of the effect of the Student's disability on his behavior, the appropriateness of services, the appropriateness of the method of delivery of services, the appropriateness of the Student's placement and such other factors as might help improve the situation, including examination of the existing behavioral modification plan, given that there has apparently been no improvement in the Student's behavior under the Student's prior placement and services delivery. Such a discussion should include a specific agreement as to the shared responsibilities of the parents, the Student and the Local Board.

Therefore, based on the foregoing, it is the opinion of the State Board of Education that the Local Board had the authority to expel the Student, but that the Local Board has the duty to comply with the provisions of 34 C.F.R. § 300.514(a), requiring that the Student must remain in his current educational placement. Therefore, it is ORDERED that the Local Board's decision as to expulsion is SUSTAINED but that the Local Board is ORDERED to comply with the provisions of IDEA regarding "stay-put" and continuation of services pursuant to 34 C.F.R. §~ 300. 514(a) and 300.121(d).

This 29th day of June 2000.

Bruce Jackson
Vice Chairman for Appeals