03-0320004

OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

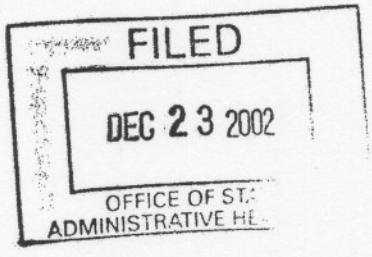
Petitioner,

v.

DOUGLAS COUNTY SCHOOL SYSTEM,

Respondent.

Case No.
OSAH-DOE-SE-0320004-48-JBG



FINAL ORDER

Appearances: For Petitioner, [redacted]. Lee Breedlove, Esq., Breedlove & Lassiter, LLP

For the Respondent, Douglas County School System: Kenneth R. Bernard, Jr., Esq., Sherrod & Bernard

I. INTRODUCTION

[redacted], by and through her mother, [redacted], brought this expedited administrative action before the Tribunal pursuant to Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Ga DOE Rule 160-4-7-.18(2), alleging that the School System's manifestation determination of October 31, 2002 and the subsequent "stay put" violated her procedural and substantive rights under Section 504.

II. FINDINGS OF FACT

During the time period relevant to this dispute, [redacted] was being served by the Douglas County School System as a student with a disability pursuant to Section 504. 29 U.S.C. § 794(a).

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[redacted]'s Section 504 plan was created for her at a meeting on April 30, 2002, with her mother's participation and consent. (Ex. R-15) The Section 504 plan was based upon evaluations completed by the School System (per Ms. [redacted]'s consent), as well as a medical diagnosis provided to the Section 504 team by Ms. [redacted] (See Consent for Evaluation dated August 29, 2001, Ex. R-1; Section 504 Plan, Ex. R-15.) Specifically, [redacted]. had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), a condition which manifests itself educationally in a difficulty sustaining attention, difficulty completing assignments, weak organization skills and difficulty with multi-step directions. (Section 504 Accommodation Plan, Ex. R-15 at p. 1; Hamilton TR 70-71.) The Section 504 plan did not provide [redacted] with special education and related services, but rather provided accommodations in the regular education classroom. (Id.; Hamilton TR 60.)

Regarding discipline, the Section 504 plan specifically provided that if the accommodations contemplated in the plan were attempted, "regular discipline procedures will be utilized." (Ex. P-15, p. 3.) The team also agreed that a Functional Behavior Assessment would be completed. (Ex. P-15, p. 3.) Ms. [redacted] signed the plan indicating that she had participated in the meeting and had received notice of her parental rights under Section 504. (Ex. R-15, p. 2; [redacted] TR 199-200, 241-241.)

Notably, [redacted]. had not been identified and was not being served as a disabled student under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. or implementing Georgia laws and rules. (Hamilton TR 98.) A multi-disciplinary team had previously considered [redacted]'s IDEA eligibility and found her *not* to

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be eligible for special education and related services under IDEA. (Id.; Ex. P-25, p. 3.) Indeed, Ms. [redacted] had agreed with this determination. (Id.)

This dispute focuses on the beginning of the 2002-2003 school year. In August 2002, Ms. [redacted] spoke with the School System about the need for an evaluation for [redacted]. which was followed by a letter from Ms. [redacted] to the School System on August 16, 2002 requesting that [redacted] be evaluated for special education services. (P-25, TR 112-113) However, [redacted]. did not attend school in Douglas County until October 8, 2002, after she was released from an adolescent group home for troubled girls. (Ex. P-25, p. 1; Hamilton TR 61-62.) [redacted] then attended the School System's [redacted] High School from October 8 until October 18, 2002. (Hamilton TR 57.)

On October 18, 2002, [redacted]. was accused of making terroristic threats on the life of a fellow student over a period of several days. The Behavior involved a series of phone calls between [redacted]. and the other student not on school property between October 14-17, and a series of notes between the students during one class period on October 14, 2002. (Hamilton TR 57, 71.)[1] (Charge letter of October 18, 2002, Ex. R-4.) For this conduct, the School System charged [redacted]. with making "terroristic threats" and instituted disciplinary proceedings against her.

As a result of the alleged terroristic threats, the juvenile court ordered [redacted].'s incarceration in the Youth Detention Center (YDC). [redacted]. was incarcerated from October 18, 2002 to October 31, 2002 (TR 44; Hamilton TR 57.)

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[1] [redacted].'s guilt or innocence of that charge was the subject of a separate tribunal proceeding and is not before this Tribunal.

On October 29, 2002 (while [redacted] was still in YDC and thus before any suspension from school could commence), Ms. Jane Hamilton, the School System's special education director, called Ms. [redacted] on the telephone and discussed the need to hold a manifestation determination meeting. (Hamilton TR 56.) Ms. [redacted] requested that the meeting be scheduled on October 31, 2002 at 11:00 a.m. (Id.) Ms. Hamilton agreed that the meeting could be held at that time. (Id.) Ms. [redacted] indicated that time would be convenient for her because she had to be out of work anyway for [redacted]'s juvenile court hearing which was also scheduled for that day. (Hamilton TR 59.) During that telephone conversation, Ms. [redacted] mentioned for the first time that [redacted] had been diagnosed with bipolar disorder, but she provided no documentation or evaluation report substantiating that diagnosis prior to the October 31 manifestation determination meeting. (Hamilton TR 58-59.)

On October 30, 2002, Ms. [redacted] called Ms. Hamilton inquiring as to whether a School System employee would be attending [redacted]'s juvenile court hearing. (Hamilton TR 67-68.) During that phone conversation, Ms. [redacted] became very agitated and indicated that she would not be attending the manifestation meeting the next day. (Hamilton TR 68-69.) That same day, Ms. Hamilton sent Ms. [redacted] a letter confirming that she (Ms. [redacted]) would not be attending the manifestation determination meeting, and providing her with the School System's policies regarding Section 504. (Ex. R-11.)

The manifestation determination meeting was held as scheduled on October 31 at 11 a.m. (Hamilton TR 58-59.) In attendance were Ms. Hamilton, the special education director, Ms. Holenstein (special education evaluator), Ms. Davis (principal), Mr.

Shelton (regular education teacher), Ms. Rollinson (counselor), Ms. Blakey (CDAE/special education), and Mr. Ruble (general administration director). (Ex. R-2; Hamilton TR 66-67.) These individuals were all familiar with [redacted] and had extensive experience dealing with the symptoms of ADHD and with behavioral problems in the educational setting. (Hamilton TR 142-144.) Ms. [redacted] did not participate, as she had chosen not to attend. ([redacted] TR 249.)

At the manifestation determination meeting, the team considered the relevant information available to it. Specifically, the team considered the nature of the conduct alleged in the charge letter, specifically that [redacted] had threatened an individual in a series of letters over a period of days. (Hamilton TR 72-76; Exs. R-2, R-4, R-5 and P-3.) Indeed, according to the charge letter, [redacted] admitted having written the letters and acknowledged their threatening tone. (Id.) The team also examined [redacted]'s disciplinary history, considered her Section 504 plan and whether it had been implemented and the fact that [redacted]'s mother was being treated for breast cancer. (Id.)

The committee met for approximately one and one-half hours. (Hamilton TR 78.) After considering the relevant evidence, the team concluded that [redacted]'s conduct was not a manifestation of ADHD. (Ex. P-3.) The team determined that [redacted] was able to understand the school rules and the consequences of her actions, and that a series of threats communicated through telephone calls and letters were deliberate and planned, thus indicating that ADHD-related impulsivity was not a factor. (Hamilton TR 71-73; Ex. P-3.) No placement decision was made during this manifestation determination meeting. (Hamilton TR 87.)

[redacted] was released from the YDC on October 31, 2002 and was placed on a 10 day suspension by the School System on November 1, 2002. (TR 45.)

On November 7, 2002, Ms. [redacted] requested an expedited due process hearing contesting the determination of the October 31, 2002 manifestation determination meeting. (Ex. R-3); TR 51.) However, as indicated above, no placement decision was made during this manifestation determination meeting.

On November 13, 2002, Ms. [redacted] requested an expedited due process hearing contesting the "stay put" (suspension) status of [redacted]. (TR 45.)

III. CONCLUSIONS OF LAW

Section 504 is an anti-discrimination statute that prohibits discrimination on the basis of disability.

> No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a). Section 504 does not require affirmative efforts to overcome the disabilities caused by handicaps, but instead "simply prevents discrimination on the basis of handicap." Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 3471 (1984)[2]; Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361 (1979); Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 921 (11th Cir. 1985). Section 504 does not require "accommodations beyond those necessary to eliminate discrimination." Davis, 99 S. Ct. at 2269.

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[2] Congress overruled Smith v. Robinson only to the extent that Smith held that IDEA was the exclusive avenue to bring claims relating to a child's right to special education services. See 20 U.S.C. § 1415(l). The Supreme Court's analysis of Section 504 as an anti-discrimination statute remains good law.

In order to establish a violation under Section 504, a "qualifying individual with a disability" must show that they were subjected to prohibited discrimination, i.e., denied "the opportunity to participate in or benefit from the aid, benefit, or service" because of disability. 34 C.F.R. § 104.4(b). In the special education context, a claimant would have to show that without special modifications under Section 504, a student's disability would prevent him or her from being able to participate in or receive the benefit of the education program being offered, or would deny access, on the basis of disability, to services or programs that were offered to nondisabled students. Id.

> [Section 504] does not compel educational institutions ... to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified [individual with a disability]" not be excluded from participation in a federal funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

Davis, 99 S. Ct. at 2366. Section 504 does not require adjustments in existing programs "beyond those necessary to eliminate discrimination against otherwise qualified individuals." Id. at 2369.

Ms. [redacted] contends that [redacted]'s Section 504 rights were violated because Ms. [redacted] was not included in the manifestation meeting, because certain individuals (such as a psychologist) were not included, and because she was not provided with prior written notice of the meeting. (Ex. R-3.)

A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the School, may assert any of the protections provided under IDEA if the School had knowledge that the student was a student with a disability before the

behavior that precipitated the disciplinary action occurred. Ga DOE Rule 160-4-7-.14(9)(a). The School is deemed to have knowledge that a student is a student with a disability if the parent of the student has requested an evaluation of the student. Ga DOE Rule 160-4-7-.14(9)(b)(3).

In the present case, Ms. [redacted] spoke with the School System sometime in August 2002 about the need for an evaluation for [redacted] and sent a letter to the School System on August 16, 2002 requesting that [redacted] be evaluated for special education services. Thus, the School System had knowledge that [redacted] was a student with a disability and [redacted] was entitled to the same procedural safeguards that a student receiving special education services was entitled to.

Therefore, any team assembled to conduct the manifestation determination hearing should have been an IEP Team and Ms. [redacted] should have been provided the procedural safeguards notice described in Ga Rules 160-4-7-.05; 160-4-7-.14(5)(a)(2)(i).

However, this Tribunal finds that the team assembled to conduct the manifestation determination review on October 31, 2002 met the requirements of a proper IEP team notwithstanding the fact that Ms. [redacted] was not present since she had been provided notice of the time, place and purpose of the meeting and chose not to attend. Although Ms. [redacted] received a defective notice since she was given a Section 504 notice rather than an IDEA notice, this tribunal finds no harm as a result of such notice defect.

Ms. [redacted] also argues that there was a change in placement since [redacted] was taken from school and placed in the custody and control of the YDC. However, this

Tribunal finds no merit in this argument. A change in placement as contemplated by state and federal regulations refers to an order to change a placement *made by the School System*. Since [redacted]'s placement in the YDC was by order of the *juvenile court* and not by order of the School System, it is not a change in placement for purposes of an expedited due process hearing.

Even assuming, *arguendo*, that the October 31, 2002 team was not properly composed and that the procedural safeguards notice was deficient, since the committee did not make any placement decision, there was no harm to J.M.

On November 13, 2002, Ms. [redacted] filed a second expedited due process hearing request which contested the "stay put" (suspension). However, DOE Rule 160-4-7-.14(2)(b) provides that students may be removed from school for not more than 10 consecutive school days for any violation of school rules. From November 1, 2002 until the November 13, 2002 expedited due process hearing request, [redacted] would have been in school only eight days excluding weekends and holidays. Thus, the "stay put" as of the November 13, 2002 expedited due process hearing was proper.[3]

Ms. [redacted] also raised a number of issues in her expedited hearing request in addition to the procedural and substantive appropriateness of the manifestation hearing. See Ex. R-3. Specifically, Ms. [redacted] raised issues related to the timeliness of any evaluation under IDEA, [redacted]'s guilt or innocence of the underlying charges, or the appropriateness of any educational services. Although these issues, may be properly raised in a due process hearing under IDEA, they may not be raised in an

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[3] The School System subsequently held a second manifestation determination meeting on November 14, 2002. This meeting was still within 10 consecutive days of November 1, 2002. This Tribunal is not aware of any expedited hearing request having been filed related to the November 14, 2002 meeting and therefore will not addresses that manifestation determination meeting in this Order.

expedited hearing under Section 504 since the expedited due process hearing is limited to providing an avenue of appeal for parents who disagree with the manifestation determination decision made by the School or with the placement of their student in an alternative education setting. Ga DOE Rule 160-4-7-.18(2)(a). [4] Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT since the School System did not make a placement decision in the manifestation committee held on October 31, 2002, [redacted]'s appeal of any decision resulting from that meeting is **DISMISSED.**

IT IS FURTHER ORDERED THAT the "stay put" as of the November 13, 2002 expedited due process hearing was proper and is **AFFIRMED.**

SO ORDERED THIS 23rd day of **December, 2002.**

John B. Gatto

JOHN B. GATTO
Administrative Law Judge

[4] Ms. B[redacted] is entitled to raise issues related to her requests an evaluation and or the appropriateness of any educational services in a separate complaint for a due process hearing. In addition, Ms. [redacted] was entitled to appeal the determination of the disciplinary tribunal to the local school board .

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