IOWA DEPARTMENT OF EDUCATION
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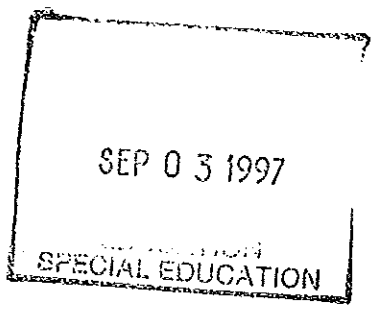

In RE: Theodor A.	)	
	)	
Harold and Terri A., Appellants	)	DECISION
	)	
v.	)	
	)	
Fairfield Community School District and Southern Prairie Area Education Agency 15, Appellees	)	Doc. SE-192

The above entitled matter was heard by Administrative Law Judge, Daniel J. Reschly, pursuant to Iowa Code Section 256B.6 (1993), the rules of the Iowa Department of Education, Iowa Administrative Code (IAC). 281-41.112 to 281-41.125, and the U.S. Code and regulations of the U.S. Department of Education implementing the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Sections 1400-1485; 34 C.F.R. 300 (1996). The parties to this matter agreed to an evidentiary hearing as provided in IAC 281-41.117.

The hearing was conducted in response to an affidavit of appeal filed by the appellants on July 21, 1997 with the Iowa Department of Education. Theodore A. and the appellants were represented by his mother, an attorney at law. The Fairfield Community School District (hereafter, FCSD) and the Southern Prairie Area Education Agency 15 (hereafter, AEA) were represented by Ronald L. Peeler and Richard J. Gaumer, respectively. The hearing was conducted on August 21 at the headquarters offices of the AEA in Ottumwa, Iowa.

At issue in this proceeding was whether Theodor A., a student in the FCSD, was protected by the "stay put" provision of federal and state law in relation to an expulsion decision made by the FCSD Board of Education. The parents contend that Theodor A. is entitled to the protections afforded students with disabilities. The FCSD and AEA contend that Theodor A. was not a student with a disability at the time of the suspension and expulsion actions.

I. Findings of Fact

This Administrative Law Judge finds that he and the Iowa Department of Education have jurisdiction over the parties and the subject matter of this hearing.

Evidence in this proceeding consisted of Theodor A.'s ninth grade educational record, a comprehensive evaluation by Youth Homes, and the testimony of the following witnesses: Mr. and Mrs. A., parents of Theodor A., John M. Carr (AEA school psychologist), Robert S. Presley (AEA social worker), and Ralph D. Messerli (Principal

of FCSD High School). Pre-hearing briefs were submitted at the hearing and reply briefs were transmitted by facsimile to this administrative law judge on August 28, 1997. The filing of the post-hearing briefs and the formulation of the decision were placed on tight time lines so that a decision would be available as early in the 1997-1998 school year as possible.

Theodor A. is a 14-year old young man who is described in the record and in testimony as gifted. He comes from a loving family in which both parents are well educated and employed in professional careers.

Theodor A. was expelled from the FCSD in June, 1997 due to acts of vandalism committed at the FCSD Middle School Building. His parents contend that he should not be expelled because he is *potentially*, pending the outcome of an evaluation being conducted by the AEA and the FCSD, a student with a disability whose misconduct was disability-related. The FCSD and the AEA contend that no evidence existed to support the appellants' claims regarding disability status and that he was properly subjected to the normal disciplinary procedures in the FCSD.

Theodor A. admitted to illegally entering the FCSD Middle School Building on April 13, April 20, and one other occasion at his expulsion hearing. On April 20 he and other students caused damage estimated at $3600 involving computer equipment and software. On April 28, 1997 he was charged with burglary in the 3rd degree, computer damage in the 2nd degree, criminal mischief in the 3rd degree, and theft in the 4th degree. On that same date, the Jefferson County Juvenile Court assigned him to the Youth Home in Iowa City for a comprehensive diagnostic and evaluation assessment. He returned to his home in Fairfield on or about May 21, 1997.

On May 5, 1997 Mr. and Mrs. A. requested a comprehensive evaluation by the FCSD to determine if Theodor A. was properly classified in school and whether he had a behavior or learning disorder. The parents were then sent the standard consent form on May 8 which they signed and returned to the school on May 15. The AEA received the request for evaluation on May 16. The results of this AEA and FCSD evaluation were not available at the hearing. A multidisciplinary team staffing to make decisions about disability status and special education need is anticipated in mid-September. The appellants strongly asserted their preference for and, indeed, their right to, a resolution of the stay put issue as soon as possible without the results of the FCSD and AEA evaluation.

The parents were contacted regarding Theodor A.'s absences on April 27 and April 28. By April 29 the FCSD was aware of the charges against Theodor A. Mr. Messerli contacted the parents on that date to establish an appointment for an informal "hearing" to discuss the disciplinary consequences of the vandalism at the middle school. The parents rejected these overtures as not being in the best interests of Theodor A. Formal notice to the parents of an expulsion hearing was hand delivered by Mr. Messerli to the

parents on May 9, 1997. The initial hearing date of May 19 was changed at the parents' request to May 29 so that the expulsion hearing could be held after the juvenile court proceeding on May 28. On that date Theodor A. plead guilty to the charges of trespass, computer damage in the 3rd degree, and criminal mischief in the 3rd degree.

The May 29 hearing by the FCSD Board of Directors resulted in Theodor A.'s expulsion for two semesters, Spring 1997 and Fall 1997. When queried at the hearing about his motivation for the vandalism, he stated that it was not to get back at the school, but more of an "adrenaline rush." Under the Board's action Theodor A. can enroll again in the FCSD for Spring 1998. He was not given credit for his work during the Spring 1997.

In the request to the AEA for an evaluation of Theodor A.'s educational needs the parents' concerns were, "1) Theo's educational needs are not being met. 2) Theo's behavior (i.e., lack of respect for school). 3) Theo's ability or lack to foster good interpersonal relationships with other students and school personnel." In the developmental history, the patents wrote, "Since moving to Fairfield from California in 1993, Theo has been repeatedly harassed by other students and has been the victim of at least five assaults." No symptoms were checked in a list of nine social development characteristics such as over active and gives up easily.

In testimony Mrs. A. asserted that Theodor A. suffered a severe emotional breakdown in April 1997 due to the cumulative effects of inappropriate educational programming, insensitivity to his religious heritage, and rejection of his family's lifestyle (association with the meditating community in Fairfield). Evidence for the religious insensitivity and cultural rejection claims came entirely from Mrs. A.'s testimony. She described incidents of name calling by other students, occasional fights with peers outside of the school grounds due to incidents in school, and school insensitivity. The latter involved two incidents. The first was an unexcused absence for a day on which Theodor A. was observing a religious holiday with his family and the singing of Christian hymns at a school event.

Mr. Messerli strongly rejected her claims regarding the insensitivity of the FCSD to cultural differences, categorically denying any split between students who are and who are not associated with the meditating community. Moreover, he noted that the absence was changed from unexcused to excused when the parents explained that Theodor A. was participating in a religious observance. Finally, he related that the school event where Christian hymns were sung was voluntary, not required. Finally, he had no knowledge of any fights between Theodor A. and other students.

Mrs. A. also asserted that Theodor A.'s emotional stability was deteriorating during Spring Semester 1997 and that the school should have been aware of this deterioration. As evidence of the deterioration she cited the vandalism incident which she, as well as Mr. Messerli, described as inconsistent with his long-standing patterns of behavior. Mrs. A. also noted his lower grades, more frequent squabbles with a

younger brother, and greater disobedience at home during Spring 1997 as further evidence of Theodor A.'s deteriorating emotional condition. She did, however, concede that he was not a behavior problem at school.

There is, at best, slight evidence for Mrs. A.'s claim of declining academic performance. Theodor A.'s 1996-1997 grades during the first two nine week periods were all As except for Bs in English. During the third period his grades were: English=B+, French=B, Speech=C, Geometry=A, and Physical Science=A. His grades during the fourth period as of April 28 when he was transferred by the juvenile court to the Iowa City Youth Home were English=B, French=B-, Speech=A+, Geometry=A, and Physical Science=A. Although there are little data for determining a trend, it appears that the third period grades were lower than the grades in the first and second periods; however, the grades in the fourth period showed some improvement over the third period and were, overall, consistent with his first and second period grades.

Mr. Messerli testified that Theodor A. was not regarded as a behavior or emotional problem in the school. No teacher, student, or other school official ever mentioned any problems with Theodor A. He noted that in his considerable experience as a school counselor and school principal, the identity of students who might be eligible for a disability diagnosis are nearly always well known to teachers, counselors, and school administrators before they are referred. Likewise, Mr. Carr and Mr. Presley testified that in their many years of experience with students with learning, behavior, or emotional disabilities, the identity of students suspected of having disabilities usually is revealed to them before formal referrals by teachers and others in the school setting. All testified that there was no indication that Theodor A. was a student with a disability.

Evaluations were conducted at the Youth Home by a clinical psychologist and child psychiatrist. The psychiatric diagnostic impression was "adjustment disorder of adolescence with some mixed features." The psychological diagnosis was nearly identical, "adjustment disorder with disturbance of conduct." Recommendations focused on the development of a school program that was more challenging in view of Theodor A.'s high abilities and, "... it may be advisable for Theo, and perhaps his family, to have some counseling concerning the issues that he finds troubling." Significantly, there was no mention in the Youth Home comprehensive evaluation of special education need or educational disability diagnosis

Adjustment disorder is a category of mental disorder described as a temporary condition marked by the "... development of clinically significant emotional or behavioral symptoms in response to an identifiable psychosocial stressor or stressors" (*Diagnostic and Statistic Manual of Mental Disorders (4th Ed.)* (DSM IV), American Psychiatric Association, 1994, p. 623). Adjustment disorder is temporary by definition, lasting no more than six months. Adjustment disorder with disturbance of conduct is further described as, "... the predominant manifestation is a disturbance in conduct in which there is violation of the rights of others or of major age-appropriate societal norms and

rules (e.g., truancy, vandalism, reckless driving, fighting, defaulting on legal responsibilities)" (DSM IV, 1994, p. 624).

The diagnostic criteria and conceptual definition for adjustment disorder do not conform closely to the conception of disability adopted in the *Individuals with Disabilities Education Act*, 34 CFR 300 (IDEA). IDEA disabilities generally involve learning deficits or patterns of behavior that interfere significantly with educational performance, thereby, necessitating specially designed instruction or related services in order for the student to receive an appropriate education. The discontinuity between American Psychiatric Association (1994) disorders and forensic conceptions of mental disorder or mental disability was anticipated in DSM IV. Specifically, the use of DSM IV for forensic purposes was described as having significant risks due to the

> "... imperfect fit between questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability," 'mental disease,' or 'mental defect'" (DSM IV, 1994, p. xxiii).

In IDEA, 13 disability categories are described. The category of serious emotional disturbance appears to be closest to the symptoms described by Mrs. A. and the DSM IV diagnosis of adjustment disorder. Serious emotional disturbance is described as a condition requiring certain behavioral or emotional characteristics that occur, "... over a long period of time and to a marked degree that adversely affect a child's educational performance" (34 CFR 300.7). The category of behavior disorder in the Iowa Rules of Special Education requires, among other things, that the, "... behavior of concern shall be observed in the school setting for school-aged individuals ..." (*Iowa Administrative Code 281-41.5*).

II. Conclusions of Law

Students with disabilities are guaranteed in the *IDEA* extensive procedural protections including, "During the pendency of any proceedings conducted pursuant to this section, unless the State or local agency and the parents agree, the child shall remain in the then current educational placement" [20 USC sec. 1415(e)(3)(A)]. The "stay put" clause as this provision is known protects students and parents from changes in the educational placement of students with disabilities until the dispute is resolved through a due process hearing or other proceeding.

Appellants urge the application of the stay put clause to this case which would result in, according to their view, vacating the FCSD Board of Directors expulsion of Theodor A. in the Spring Semester, 1997. Further, the expulsion for Fall 1997 also would be changed if Theodor A. is determined by the AEA and FCSD multidisciplinary team to be

a student with a disability and the vandalism incident in April 1997 is judged by the team to be disability-related.

Prior case law is inconsistent in allowing the application of the stay put provision to students who are referred by their parents or guardians for consideration of disability status and special education needs *after* disciplinary proceedings have been initiated by an educational agency. Early cases, notably *Hacienda La Puente Unified School District v. Honig*, 22 IDELR 563 (9th Cir. 1992) and *M.P. v. Governing Board of Grossmont Union*, 22 IDELR 639 (S.D. CA 1994) applied the stay put provision to parentally-referred students who were referred for a disability determination evaluation and special education consideration *after* students had committed serious violations of school codes of conduct. The effect of applying the stay put provision in these cases was to delay and, depending on the outcome of the special education evaluation, prevent expulsion of the students from school.

In *Hacienda* there was substantial evidence in the prior educational record that the student had long-standing and significant learning and behavior problems, although he was not diagnosed as a student with a disability in a school evaluation conducted several months before the incident leading to expulsion. In contrast, in *Grossmont* there was scant evidence of a disability or need for special education in the educational record. The evaluation conducted pursuant to the referral during the disciplinary proceedings, did not identify a disability or special education need. Nevertheless, the *Grossmont* court reluctantly followed the *Hacienda* ruling and extended the stay put protection to the student. The practical effect of this ruling was to permit the student to avoid the normal disciplinary procedures used in the school.

The *Grossmont* court indicated strong disagreement with the wisdom of using the stay put protection in this way. Specifically, "I find the present fact pattern very disturbing. There is no indication that the plaintiff has ever required special education or even failed a course" (p. 641). Later, he opined, "The intent of IDEA's "stay put" is clear: the child shall remain in the then current educational placement. The potential for misuse of this language, however, may have been unanticipated by Congress" (p. 642).

In 1995 a policy clarification was issued by the federal agency responsible for the implementation of the IDEA (Office of Special Education Programs Memorandum 95-16). Note four to the memorandum provided clarification on the application of stay put to previously undiagnosed students who sought its protection during disciplinary proceedings.

> For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due process hearing or other appeal after a disciplinary suspension or expulsion has commenced does not obligate the school district to reinstitute

> the student's prior in-school status. This is because in accordance with the "stay-put" provision of IDEA, the student's "then current placement" is the out-of-school placement. After the disciplinary sanction is completed, if the resolution of the due process hearing is still pending, the student must be returned to school as would a nondisabled student in similar circumstances. It should be noted that, pending the resolution of the due process hearing or other appeal, a court could enjoin the suspension or expulsion and direct the school district to reinstate the student if the court determines that the school district knew or reasonably should have known that the student is a student in need of special education.

The critical principle from the recent cases that is applicable to this case is whether the "school district knew or reasonably should have known that the student is a student in need of special education." In recent cases this standard has been used to determine the applicability of the stay put provision to parentally-referred students involved in school disciplinary proceedings. Courts have allowed the use of stay put in cases where there was substantive evidence of a disability about which the school knew or should have known [*Davis v. Independent School District, NO. 196*, 23 IDELR 644 (D. MN 1996); *Magyar v. Tucson Unified School District*, 22 IDELR 608 (D. AZ 1997); *Steldt by Steldt v. School Board of Riverdale School District*, 885 F.Supp. 1192 (W.D. WI 1995)]. In these cases there was clear evidence of an educationally disabling condition prior to the disciplinary proceeding and the parental referral.

In sharp contrast to these cases are *Hill v. School Board of Pinellas County*, 954 F.Supp. 251 (MD FL 1997) and *Rodiriecus L. v. Waukegan School District No. 60*, 24 IDELR 563 (7th Cir. 1996). Both dealt with cases of parentally-referred students involved in disciplinary proceedings for whom there was no prior evidence of disability status or special education need. In such circumstances, the *Rodiriecus* court admonished,

> If the stay put provision is automatically applied to every student who files an application for special education, than an avenue will be open for disruptive, non-disabled students to forestall any attempts at routine discipline by simply requesting a disability evaluation and demanding to "stay put," thus disrupting the educational goals of an already over-burdened and of times classified as a chaotic public school system (*Rodiriecus*, p. 566).

Based on the prior case law and the OSEP 1995 memorandum, Theodor A. is not eligible for the stay put protection for students with disabilities. There is no substantive evidence that any school official suspected or should have been aware that he was disabled in obtaining an education, nor any evidence that he is in fact eligible for IDEA protections as a student with a disability.

III. Decision[1]

The Fairfield Community School District and the Southern Prairie AEA 15 prevail on all substantive issues in this proceeding. Theodor A. is not entitled to the IDEA protections as a student with a disability or as a student who school officials should have suspected as being eligible for disability status and in need of special education.

Daniel J. Reschly

9/2/97
Date

[1] The decision is effective as of the date signed above. Any party wishing to seek judicial review of this decision may file a petition in an appropriate state or federal district court within 30 days after the issuance of this decision. See Iowa Code Section 17A.19(3) and 281-41.124 Iowa Administrative Code, and 20 U.S.C. Section 1415(e) and 34 C.F.R. 300.511 for details.