

Iowa Department of Education

(Cite as 21 D.O.E. App. Dec 232)

IN RE: Damian S.

Eric & Susan S, Appellants

Decision

(Admin. Doc. SE-259)

vs.

Mason City CSD and Northern Trails AEA
2, Appellees

#133

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on November 11, 2002 in Mason City, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education, the rules of the State Board of Education found in 281-41 Iowa Administrative Code as well as the applicable regulations found within the Individuals with Disabilities Act (IDEA). The appellants were not represented by legal counsel. The appellees were represented by Attorney C.W. McManigal.

This hearing is considered an Expedited Hearing as requested by both the parents and the Mason City School District. Mr. and Ms. S. originally requested this hearing on October 9, 2002 with a particular concern being what they perceived as a pattern of suspensions being used with Damian, an Individualized Educational Program (IEP) that they assert was not being followed and their belief that Damian was being disciplined without any consideration of his disability. In a later message on the same day Mr. and Ms. S. requested that this be an "expedited due process".

On October 14, 2002 the Mason City Community School District submitted a proposal to this ALJ that Damian be assigned to an Alternative Placement Building (three hours daily) as an Interim Alternative Educational Setting for 45 days or until the due process hearing was concluded. This motion was made following a threat and a serious altercation between Damian and another student. Although this ALJ was impressed with the seriousness of such behaviors the request was denied based on his understanding of the intent of the Expedited Hearing process based in 41.71(3) in the Iowa Administrative Rules of Special Education (2000) that defines the purpose of the hearing process itself as to determine "... that the public agency has demonstrated by substantial evidence that

maintaining the current placement of the eligible individual is substantially likely to result in injury to the individual or to others . . .”.

On October 22, 2002, and consistent with the options that LEAs have been advised as having by the U.S. Department of Education, the Mason City School District sought a temporary injunction in the Iowa District Court for Cerro Gordo County. This injunction was granted that prohibited Damian S. from returning to the Mason City Community School District and other Mason City School grounds and assigned him to the Alternative Placement School (three hours daily) as an Interim Alternative Setting for forty-five days or until the due process hearing was concluded. The Court reviewed this ruling on October 28, 2002 and stated:

The court concludes that the Mason City Community School District has a legitimate interest in providing for safety of its staff and students. The evidence presented at the time of hearing established that the safety of staff and students may be compromised by the return of Damian to the high school prior to the placement hearing scheduled on November 11. In addition, the court notes that the school has taken appropriate measures to provide for Damian's education pending the November 11 hearing and the administrative law judge's ruling. Therefore, the court concludes that the temporary injunction previously entered in this case should remain in full force and effect pending the ruling of the administrative law judge following the hearing on November 11, 2002.

On October 24, 2002 the parties to this matter held a conference call with the administrative law judge. At this time it was agreed that the focus on the expedited due process hearing would be the proposal by the LEA to place Damian in an interim alternative educational setting. During this call the primary questions to be reviewed in such a hearing as delineated in the Iowa Rules of Special Education (2000) were discussed. At this time the parents also requested that this hearing be closed.

I. Finding of Fact

The Administrative Law Judge finds that he and the State Board of Education have jurisdiction over the LEA and AEA and the subject matter involved in this Appeal. Damian S. is a seventeen year old student who is currently a junior attending Mason City Community High School. He has been determined to be eligible for special education and has been described in documentation as a student with Attention Deficit/Hyperactive Disorder and Oppositional Defiant Disorder. Currently Damian attends all regular education classes, has a behavioral intervention plan and receives counseling services from the school social worker on a weekly basis.

While the primary issues involved in these proceedings deal with the factors surrounding Damian's program during the Fall of 2002 and specifically the circumstances related to the LEA's proposal that Damian requires an interim alternative educational setting, a

brief review of Damian's school career would seem appropriate. This summary is based on an earlier due process hearing (SE-244, December, 2001).

Damian was first identified as having "behavioral problems" at the preschool level in 1988. In 1990 he was identified as a student with behavioral disorders and referred to a preschool program serving children with such needs but his parents requested that he remain in a readiness program and school personnel agreed to such. During Damian's early elementary years he did receive services in a self-contained with little integration program at Madison Elementary School in Mason City with goals in areas such as accepting authority, accepting consequences and increased self-control among several behaviorally related goal areas. Apparently during Damian's 3rd and 4th grade years he was integrated more fully into the general education program with support provided via a 504 plan. It appears, however, that there continued to be a number of concerns regarding Damian's behavior (Decision, SE-244, p. 4).

During Damian's middle school years he continued to receive a combination of special education programs and services including psychological counseling services to focus on problem solving and management of impulsive behavior and support services from the resource room teacher for organizational and study skills. During Damian's high school program, beginning in the Fall of 2000, Damian has continued to be considered a student with special education needs, yet his educational program has primarily been delivered in general education with a behavioral intervention program being designed to meet his needs and support services from the school social worker.

It should be noted that throughout these various programs and services spanning Damian's school career that there have been numerous concerns regarding his behavior and the best means by which his behavioral needs can be met. There is also considerable documentation regarding the points at which Damian's parents and school personnel from both Mason City and the Northern Trails AEA have not been able to reach consensus regarding how best to have his needs met.

On April 24, 2001 an independent educational evaluation of Damian was conducted by Dr. Michael Hopkins, who work specifically in the area of assessing and planning programs for students with Attention Deficit/Hyperactivity Disorders. Dr. Hopkins suggested that Damian should be considered a student with AD/HD and an Oppositional Defiant Disorder (ODD). Dr. Hopkins also made a number of recommendations to the school including: 1) clearly stating goals, accommodations, consequences and contingencies 2) exploring learning conditions and verbal patterns of teacher-student interactions, 3) modeling appropriate behavior and reinforcing appropriate behavior, 4) implementing a conflict resolution plan, 5) modeling of appropriate behavior by peers, 6) seating away from distractions, 6) providing assistance during unstructured passing time, 7) allowing Damian to use a self-imposed time out, 8) feeding him praise and positive comments, and 8) providing stress preparation and stress inoculation. Dr. Hopkins ended his report by also suggesting that Damian and his parents discuss possible medical interventions with a mental health professional.

The primary behavioral incident that is the focus of these proceedings occurred across the days of October 7 & 8, 2002. According to the 10/14/02 IEP record submitted by the school the following events transpired across these two days:

On Oct. 7, Damian hand delivered to a female student a note which was demeaning and threatening to her and another male student. On Oct. 8, 2002, following the Positive Behavior Support Plan, Mr. Weaton (Assistant Principal) interviewed Damian and allowed him to provide his version of the situation. Damian admitted that he meant what he said in the note about the threats, profanities and racial comments. Damian repeatedly declined to use conflict mediation which is routinely offered to all MCHS students. Damian agreed to wait a short time in ISS while Mr. Weaton contacted his parents, obtained assignments and made arrangements for Damian to attend the Alternative Placement Building while serving a 3 day out of school suspension. Damian agreed to the 3 day OSS, attending APB, and waiting in ISS. However, a short time later Damian left ISS without permission, proceeded to the cafeteria and assaulted the male student whom he had threatened in the note. The assault resulted in the victim being pushed through a large plate glass window, sustaining injuries requiring medical treatment. The victim's family filed charges of serious assault. Mason City School Administration requested an interim hearing with the Associate Superintendent. . .

The primary question before this ALJ was whether this event rises to the threshold of justifying a placement of up to 45 days in an interim alternative educational setting. A related issue brought forth by the Appellees' is whether Damian's behavior in the above cited incident is related to his disability. In an IEP meeting held on October 14, 2002 the IEP team, including Mr. and Mrs. S, were unable to reach consensus on the manifestation determination process with school personnel asserting that the behaviors involved in the incident were not a manifestation of Damian's disability while his parents asserted that there was a relationship.

The Appellees' called the following witnesses during our hearing on November 11, 2002:

1. Mr Gary Van Hemert – Coordinator of Special Education for the Mason City School District
2. Mr. Dan Delaney – Associate Principal in the High School and Activities Director
3. Mr. Mike Finn – School Social Worker for the Northern Trails AEA
4. Mr. Bob Weaton – Associate Principal at the High School
5. Mr. Lindsey Botkin – Student Liaison and Hall Monitor at the High School, and,
6. Ms. Joan Hodapp – Special Education Sector Coordinator for the Northern Trails AEA

Damian S. was the only witness called by Mr. S. . It should be noted that considerable latitude was afforded to Mr. S., who served as lead spokesperson for he and Mrs. S., in

entering what they considered to be important information into the record through their cross-examination of witnesses called by the schools.

Mr. Van Hemert provided the basic information regarding the reports of school personnel regarding the incidents that occurred across October 7 & 8, 2002. In addition, he testified that school personnel were proposing that there were two sites that could serve as interim alternative settings including the Alternative Placement Building but also the AEA Learning Center. Mr. Van Hemert also testified that he and others representing the schools felt that Damian would profit from an independent evaluation by a psychiatrist to help better plan for Damian's programming needs. Mr. Van Hemert also described the manifestation determination process that was followed by the IEP team on October 14, 2002 and reiterated his belief that the behaviors associated with the October 7th and 8th incidents were not associated with Damian's disability. Central to this proposal was the contention that the physical altercation that took place on the 8th was premeditated as described in the note passed by Damian on the day before.

Mr. S., in cross examining Mr. Van Hemert, questioned whether school personnel had acted appropriately in making reasonable efforts to prevent the incident on October 8th. He specifically questioned why he and Mrs. S. had not been notified on October 7th regarding the threatening note, why he and Mrs. S. had not been made aware of a meeting held at the school involving the parents of the students who had been threatened, why Damian was left alone on October 8th after admitting to the threats involved and why the ISS room was used when this facility was not listed within Damian's Behavioral Intervention Program.

Mr. Delaney, Associate Principal and Activities Director, testified as to his involvement in the October 8th incident. He testified that he had physically separated the boys during the fight and felt that Damian was "in control of his emotions". Mr. Delaney's testimony was supported by that given by Mr. Weaton who indicated that he had seen Damian shortly after the fight on the 8th and that Damian was "very much in control". Mr. Weaton also described Damian as a very good student whose grades and academics are quite strong. Mr. S., in cross-examining Mr. Weaton, questioned again why he and Mrs. S. had not been notified regarding the threats on October 7th and Mr. Weaton indicated that he needed to make sure the allegations were accurate prior to notifying Mr. and Mrs. S. He also suggested that there was a "chain of communication" within the district that needed to be followed in notifying the parents of this threat and that this had been complicated because Mr. Van Hemert was out-of-town at the time this occurred. Mr. Botkin, who serves as a student liaison and hall monitor also testified that he believes that Damian can control his temper if he wants to. Upon cross-examination from Mr. S. he confirmed that Damian does have a strong sense of justice and fairness in how students are treated. Mr. Botkin also expressed concern regarding Damian returning at this point to the high school because of the "persona he carries". The ALJ asked for a clarification of this concept and Mr. Botkin suggested that there are still others in the high school who are angry at Damian for the injury he inflicted on the other student involved.

Damian was called as a witness by Mr. S.. Damian indicated that we felt that he was being harassed both in school and out-of-school by Josh, the student with whom he had the fight on October 8th. He testified that Josh had made derogatory comments about both Damian and his parents. This is, according to Damian, what led him to write the note on October 7, 2002. In describing the day of October 8th Damian indicated that following his talk with Mr. Weaton that he "just wanted to leave" but was made to stay in school. When asked why he had gone to the cafeteria after leaving the ISS Damian indicated that he wanted to settle things with Josh. When asked how it would be if he returned to Mason City High School Damian indicated that issues were finished with Josh and that he was ready to move on.

In summary, it seems from the testimony of witnesses in these proceedings that there is not any substantial disagreement regarding the allegation that Damian wrote the threatening note which was done on October 7, 2002 or that he was involved in the fight on October 8th. There is some disagreement across the parties regarding the extent to which these events could have been prevented had the school notified Mr. & Mrs. S. earlier of what was going on and the extent to which Damian was the primary perpetrator in the serious physical fight that took place on October 8, 2002. There is also disagreement between the parents and school officials regarding the extent to which these behaviors are related to Damian's disability.

II. Conclusions of Law

The two major issues that need to be answered in this decision is whether the school has established the need for a 45 day interim alternative educational setting for Damian and the relationship between the events of October 7th and 8th and Damian's disability. Each of these matters will be discussed separately.

Need for 45 Day Interim Alternative Setting

According to the Iowa Rules of Special Education (2000) and consistent with the provisions of the Individuals with Disabilities Act (IDEA) the following criteria are to be considered in determining the need for an alternative educational setting in situations such as this:

41.71(3) Authority of administrative law judge.

An administrative law judge may order a change in the placement of an eligible individual to an appropriate interim alternative educational setting for not more than 45 calendar days if the administrative law judge, in an expedited due process hearing:

- a. Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the eligible individual is substantially likely to result in injury to the individual or to others;

- b. Considers the appropriateness of the eligible individual's current placement;
- c. Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the eligible individual's current placement, including the use of supplementary aids and services; and
- d. Determines that the interim alternative educational setting that is proposed b school personnel who have consulted with the eligible individual's special education teacher meets the requirement of subrule 41.71(4).

In these proceedings the dangerousness of the situation that occurred involving Damian S. and another student on October 8th is convincing. According to testimony presented, and consistent with the proceedings that have taken place in District Court, there was a reasonable likelihood that this incident could have been even more serious in regard to the safety of both Damian and Josh, the other student involved and thus must be taken quite seriously (Horry County School District, U.S. District Court, S.C., 1998, 29 IDELR 354). The reports of the seriousness of this incident are compelling to this ALJ in concluding that Damian requires an interim alternative setting for his safety and that of others.. While it may be possible to find flaws in the manner in which school officials handled this particular situation, the standard we must apply here is whether school officials made "reasonable efforts" to minimize the likelihood of injury (Light v. Parkway, Eighth Circuit, 1994, IDELR 933).

In relation to determining the appropriateness of the proposed alternative setting it is expected under 41.71(4) that such a setting:

- (1) Be selected so as to enable the eligible individual to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the individual's current IEP, that will enable the individual to meet the goals set out in that IEP; and
- (2) Include services and modifications to address the behavior described . . . that are designed to prevent the behavior from recurring.

It is critical that the alternative setting address directly the behaviors that led for the need for such a setting of in such a way as to reduce the chances of such behaviors reoccurring. (Hemphill School District, 1997, 27 IDELR 406). School personnel in these proceedings have testified that Damian will continue to receive the support services provided by the school social worker while he is served in the alternative educational setting. It would also seem critical that an independent psychiatric evaluation, as suggested by the Appellees' also take place during this time.

Manifestation Determination

According to the Iowa Rules of Special Education (2000) (281-41.72) and consistent with IDEA requirement, the IEP team is expected to review all relevant information such as evaluation and diagnostic results, including information supplied by the parents, observations of the student and the current IEP and program and determine that:

1. In relationship to the behavior subject to disciplinary action, the eligible individual's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the eligible individual's IEP and placement;
2. The eligible individual's disability did not impair the ability of the individual to understand the impact and consequences of the behavior subject to disciplinary action; and
3. The eligible individual's disability did not impair the ability of the individual to control the behavior subject to disciplinary action.

In regard to the manifestation determination process in Damian's circumstances there are several points this ALJ would like to express. In considering the appropriateness of Damian's IEP there is a question regarding the adequacy of the one goal area stated for Damian ((IEP 8/29/02) which states:

In 36 weeks Damian will manage his own behavior by using appropriate social skills and applying anger reduction/replacement strategies to resolve conflicts 100% of the time and not requiring escort and/or administrative interventions. (emphasis added).

In addition, the following milestones or short term objectives are listed for Damian:

1. Damian will follow directions of authority figures 100% of the time as expected of all students at MCHS.
2. Damian will use anger reduction strategies for conflict resolution 100% of the time.
3. Damian will use appropriate language 100% of the time as expected of all students at MCHS.
4. Damian will be prepared and remaining(sic) current on classwork 100% of the time as expected of all students at MCHS.
5. Damian will remain on task 100% of the time as expected of all students at MCHS. (emphasis added)

With the history of Damian's behavioral needs such an absolute standard in the one goal area identified in his IEP seems, to this ALJ, to be unrealistic and would suggest that the IEP team needs to revisit Damian's IEP. While the IEP does list a

number of strategies to be used within the behavioral intervention plan section this does not, in this ALJ's opinion, negate the need for carefully and realistically formulated IEP goal and milestone/objective development, particularly for a student who has significant needs in the behavioral area. The IEP team may also need to seriously consider whether Damian's needs can be met with the current level of support services or whether more intensive special education instructional and support services may be required.

In addition, this ALJ does see the critical need for an independent psychiatric evaluation to help answer the other questions posed in the manifestation determination process. Such an evaluation may also help determine other essential elements in providing the program Damian needs in order to successfully complete his secondary education.

The careful reconsideration of Damian's IEP using the input of the independent psychiatric evaluation would seem necessary in order to adequately address the manifestation determination process in any subsequent situations. The absence of these elements leads this ALJ to not support the "no manifestation" decision that was asserted by the majority of the IEP team at its October 14, 2002 meeting.

III. Decision

This ALJ rules in favor of the Appellees' regarding the need for an interim alternative educational setting in this matter and directs that Damian S continue placement in the Alternative Placement School for up to 45 days as an interim alternative educational setting. This placement went into effect October 23, 2002, as ordered in the District Court of Cerro Gordo County and will be in effect up through November 29, 2002 unless otherwise specified by the ALJ. It is understood that this setting meets the required criteria of such settings as defined in 41.71(4) of the Iowa Rules of Special Education (2000) as asserted in the testimony of Mr. VanHemert in these proceedings.

It is also expected that an independent psychiatric evaluation, to be paid for by the Northern Trails AEA, will to be completed during the time Damian is served in the Interim Alternative Setting. The purpose of such an evaluation is to provide input into designing a revised individualized educational program for Damian including any need for support and/or related services to meet his needs. It is also hoped that this evaluation will help identify any therapeutic elements that are needed in order for Damian's needs to be met in the school setting and any needs of the family in relation to being able to meaningfully participate in Damian's program.

This ALJ has also been asked to review the appropriateness of the manifestation determination process which took place on Monday, October 14, 2002. The team was

unable to reach consensus at that time regarding the relationship of Damian's behavior in the October 8, 2002 incident to his disability. Based on the testimony within these proceedings and the records provided to this ALJ, including the current IEP, it is my opinion that there are significant concerns regarding the extent to which Damian's individualized educational program is sufficiently addressing his behavioral needs and other important elements that need to incorporate the information to be provided by the independent psychiatric evaluation. For these reasons at this time this ALJ is not convinced that there was not a relationship between the events of October 8, 2002 and Damian's disability.

Carl R. Smith
Carl R. Smith, Ph.D.
Administrative Law Judge

11-18-02
Date