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IN RE: Damian S.

Eric & Susan S, Appellants

DECISION

(Admin. Docs. SE-259 & 262)

134

vs.

Mason City CSD and Northern Trails AEA
2, Appellees

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on January 7, 2003 in Mason City, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rule 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 follows the granting of a motion to consolidate SE-259 and 262 which was granted at the request of the Mason City School District and Northern Trails AEA2 on December 19, 2002. At that time this ALJ had determined that the intent of these two hearing requests were of sufficient similarity as to grant a motion to consolidate.

Mr. and Ms. S. originally requested this hearing on October 9, 2002 with a particular concern being what they considered to be 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. Subsequent events between this initial filing for a due process hearing (SE-259) and the hearing which was held on November 11, 2002 led to a refocusing of the issue to be dealt with in that hearing to the question of whether Damian was presenting behavior that could be considered as dangerous and requiring an interim educational setting. The specific chronology related to the initial narrowing of the scope of the initial appeal is delineated in the Decision of this ALJ on November 18, 2002. A separate chronology of what has transpired in this case between November 18, 2002 and the hearing on January 7, 2003 is provided in the Motion to Dismiss/Consolidate decision provided by this ALJ on December 19, 2002.

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 has been assigned to the Alternative Placement School in Mason City, Iowa since October 23, 2002. The initial assignment to this setting was a result of a temporary injunction in the Iowa District Court of Cerro Gordo County and was confirmed in an initial hearing before this ALJ on November 11, 2002. Damian has been described in documentation as a student with Attention Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder. Currently Damian attends the Alternative Placement School for three hours per day. He also is receiving the support services of Mr. Finn, the school social worker, at a frequency of one session per week.

This hearing focused on two primary issues regarding Damian's program. First, this ALJ was asked to review the initial contention of Damian's parents that he had been subjected to a pattern of suspensions in dealing with his behaviors for an extended period of time. In a letter dated December 27, 2002 and sent to the parties this ALJ requested the following:

In regard to the issue of whether a pattern of exclusions has been used with Damian I would request that any additional file information that was not shared as part of our hearing on November 11, 2002 be sent as soon as possible and shared with all parties. I would also specifically request a listing of all the days that Damian has been suspended or otherwise excluded for disciplinary reasons from school for the 2000-2001, 2001-2002 and 2002-2003 school years.

The second primary focus of this hearing is in response to the proposal from the Mason City Community Schools and Northern Trails AEA 2 to extend the current interim alternative educational setting for Damian. In requesting such an action the District and AEA assert:

Based on the facts in this case, the interim alternative placement needs to be continued until the necessary psychiatric and psychological testing has been completed along with any other tests that may be required by the treating health care providers.

In this request the District and AEA note that the original psychiatric evaluation ordered in the decision of November 18, 2002 has not been completed because of the parents refusal to cooperate and that this evaluation is:

. . . imperative information to develop an appropriate IEP, which would include necessary related services sufficient to address Damian's social and emotional needs.

In the ALJ letter of December 27, 2002 it was also requested that information related to Damian's progress within his current IEP be shared across the parties. This included the academic and non-academic parts of Damian's IEP. The letter goes on to state:

I also need to review the status of the services and modifications that are being provided for Damian that are "designed to prevent the behavior from recurring" (Iowa Rules, 2002, 41.71(4)(2)). In this case we are dealing with interventions focusing on preventing any reoccurrence of the physically aggressive behavior that first led the district and AEA to seek an interim alternative educational setting.

In the opening statements at this Hearing Mr. S. stated his strong desire that Damian return to Mason City High School. He stated that he and his wife had originally filed a request for hearing because of their concern regarding the use of pattern of suspensions with their son and the physical altercation that had taken place at Mason City High School had led to Damian being excluded from the High School since October 8, 2002. He stated that he had filed a complaint with the Office of Civil Rights in Kansas City and will continue to pursue all possible actions to get Damian back in school. Mr. McManigal, representing the AEA and LEA stated that they did not believe there had been an excessive number of suspensions in dealing with Damian and that the interim setting continues to be needed for Damian, particularly until there is more psychological and psychiatric information available to help in planning for Damian's needs.

Similar to the earlier hearing held, the parties mutually agreed to have the school call their witnesses first with an opportunity for Mr. S. to cross-examine each witness. Any witnesses for the parents would then be called with a similar format. The parties also agreed to address the pattern of suspension question first with each witness followed by questions related to the need to continue the interim alternative educational setting.

The Appellees' called the following witnesses during the hearing:

1. Mr. Gary VanHemert – Coordinator of Special Education for the Mason City School District.
2. Mr. Bob Weaton – Associate Principal in the High School and Activities Director
3. Ms. Amanda Sadler – Teacher in the Alternative Placement Setting
4. Mr. Mike Finn – School Social Worker from AEA #2

Mr. and Ms. S. called two witnesses on their behalf: Damian S. and Gabe S., Damian's brother.

The following summarizes the testimony of these witnesses:

Mr. VanHemert responded to several questions regarding the number of suspensions used with Damian. He stated that during the 2001-2002 school year that Damian had been suspended for 10.5 days prior to the holding of a manifestation determination meeting and the development of a behavioral intervention program. Mr. VanHemert testified that the record for the 2000-2001 school year had been reviewed in an earlier due process hearing by Dr. Etscheidt (SE-244) and determined to be within acceptable limits. He testified that, according to his analysis, Damian had been suspended for a total of four days during the 2002-2003 school year prior to the incident leading to placement in the interim alternative educational setting.

Mr. VanHemert was cross-examined regarding the way in which in-school suspensions are counted in determining what constitutes a suspension. He testified that they used the guidance provided through the earlier decision of Dr. Etscheidt (SE-244) specifying that the nature of what takes place during the in-school suspension in relation to the general curriculum, access to benefits of the IEP and participation with general education peers.

When questioned as to the need for continued placement in the current alternative setting Mr. VanHemert indicated that school personnel still need additional information (psychological and psychiatric) to plan Damian's program that are necessary for him to be served in the general education setting. He also cited ongoing safety concerns as evidenced by incidents that occurred on November 25, 2002, November 26, 2002 and December 2, 2002 and that Damian is having his behavioral and academic needs met within the alternative setting. Ongoing concerns regarding safety if Damian returns to the High School were also expressed by Mr. Weaton, associate principal and Mr. Finn, the school social worker.

Mr. Finn testified regarding the ongoing work he is doing with Damian and described the general nature of the sessions he is conducting with Damian. He indicated that they were discussing issues of relationships and addressing specific behaviors such as feelings toward others and resistance Damian may feel toward others. Mr. Finn also testified that he was quite concerned about the possibility of Damian returning to the High School and "being pushed" by others in the school and subsequently engaging in dangerous behavior. He felt that Damian should remain at the alternative setting or another more structured setting.

Ms. Amanda Sadler testified to Damian's progress in the current alternative setting. She indicated that Damian has done an excellent job in and that although he occasionally has to be redirected that his behavior has been excellent. When asked by the ALJ to explain the components of the program addressing Damian's behavior Ms. Sadler indicated that she was able to redirect him when his behavior was inappropriate. When questioned regarding the extent to which her goals with Damian were coordinated with those of other staff working with Damian such as Mr. Finn, she indicated that this was not a part of their ongoing schedule.

The testimony of Mr. Weaton was directed largely at a reported incident that occurred at a local movie theatre during the holidays at which Damian was reported as yelling on

obscurity at Mr. Weaton in the lobby of the movie and fleeing. In subsequent testimony of Damian and his younger brother Gabe, it was asserted that Gabe rather than Damian was the person yelling the obscenity.

At the conclusion of the hearing there was a discussion involving the ALJ and both parties regarding the status of the independent psychiatric evaluation that had been ordered in the earlier due process hearing. Mr. S. asked several questions as to why such an evaluation was necessary. This ALJ tried to clarify the intent of this evaluation as needing to look at several questions related to planning Damian's program as well as providing related information regarding other medical and/or educational supports needed by Damian in order to progress in his program behaviorally. Mr. S. indicated that they would consider having such an evaluation but would not absolutely commit to do so. The LEA and AEA indicated their continuing commitment to pay for such an evaluation and their perceptions regarding the need for such.

II. Conclusions of Law

As indicated above this Hearing dealt with two primary questions; the extent to which Damian has been subjected to a pattern of suspensions in dealing with his behavior and whether Damian continues to require an interim alternative educational program.

Patterns of Suspensions

As noted in the regulations implementing the amendments to the Individuals with Disabilities Act (1997) school districts are permitted to use the disciplinary option of school suspension as long as such suspensions do not lead to a change in placement for the student involved. As noted in the *Federal Register* (March 12, 1999, 12412):

As was the case in the past, school personnel have the ability to remove a child for short periods of time as long as the removal does not constitute a change of placement

The change of placement criteria has been defined (34 C.F.R. 300.519(b)) as coming into place when any removals constitute a pattern because they accumulated to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the child was removed and the proximity of the removals to one another.

Based on the testimony in these proceedings (Mr. VanHemert) and the records submitted by the Mason City Schools, it does not appear that the suspensions that have been applied with Damian reach the threshold of a change of placement or constitute a pattern of suspension that have impacted the provision of a free, appropriate, public education for Damian.

Interim Alternative Educational 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 by school personnel who have consulted with the eligible individual's special education teacher meets the requirement of subrule 41.71(4).

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.

This ALJ made the decision following the November 11, 2002 Hearing that Damian should be placed into an interim alternative based on the criteria cited above.

The decision regarding Damian's placement in the interim alternative setting was shared with the parties in a conference call on the morning of November 13, 2002 and was provided in written form on November 18, 2002. The grounds for Damian being served

in the 45 day interim alternative setting was affirmed by the ALJ with the placement going into effect as of October 23, 2002 (the date of the original District Court order). The decision also directed that an independent psychiatric evaluation be paid for by the AEA and completed during the time of Damian's inclusion in the Alternative Setting.

On November 26, 2002 this ALJ received from the Mason City Community Schools and Northern Trails AEA 2 an application to extend Damian's inclusion in the interim alternative setting beyond the initial 45 day period. According to this request:

The forty five (45) day period is about to expire and the Mason City Community School District and Northern Trails AEA 2 are requesting an extension of the Interim Alternative Educational Placement Setting until the psychological and psychiatric reports have been received and for the further reason that Damian S. is a continuing threat to himself and others.

On November 29, 2002 this ALJ granted the Motion to Extend the Interim Alternative Setting as submitted by the AEA and LEA. In the communication granting such I stated:

. . . This motion is granted based on the need to complete the independent psychological and psychiatric evaluations and continuing concerns regarding Damian's behavioral needs. In our conference call of last week there were also significant concerns expressed by all parties regarding the adequacy of the current Interim Setting. For this reason I would request that any information regarding other potential settings be forwarded to this ALJ along with the parents and that a conference call be established to be held prior to December 10, 2002 to review the progress that has been made regarding the independent evaluation and other alternative settings considerations that assure that Damian is continuing to receive the benefits of a free, appropriate public education.

According to the Code of Federal Regulations (34CFR300.526) the procedures for determining an interim educational setting may be repeated, if necessary and thus can extend beyond the original 45 day period. In this case, on the basis of the telephone conference call with all parties on November 26, 2002 and the written request received from the LEA, Damian's interim setting was extended into a second 45 day period. The original hope in granting this second interim period was that the needed information to plan for Damian's program needs, including information from the independent psychiatric evaluation, might be provided in a timely manner in which a full second, 45-day interim placement would not be necessary.

In recently reported due process hearing from Wisconsin (*Fond du Lac School District*, 35 IDELR 170) the ALJ stated:

At some point, it is incumbent that a full review of the appropriate placement for the student be considered, not just whether the previously ordered 45-day IAS is still appropriate.

This would seem to be such an appropriate time in relation to reviewing Damian's program and overall special education needs.

III. Decision

This ALJ is concerned over the number of behavioral incidents that have occurred over the past three years leading to Damian being excluded from the school environment. However, in this ALJ's opinion, these disciplinary actions do not rise to the level of a pattern of exclusions that would lead to a conclusion that the actions taken by the Mason City Schools have deprived Damian of a free, appropriate, public education.

Even with this finding there is a need for the careful reconsideration and revision of Damian's IEP in such a way as to reflect the intensity and comprehensiveness of his academic, social and behavioral needs. This includes both a careful consideration of the instructional program that needs to be provided for Damian and any additional support or related services that he may require in order to receive meaningful benefit from his special education program

The earlier decision written by this ALJ regarding Damian (November 18, 2002) cited examples of concerns this ALJ has regarding the IEP for Damian as it currently stands. The need for an independent psychiatric evaluation was also directed in the earlier decision in order to provide even further information regarding Damian's needs. As stated in the earlier decision, the purpose of such an evaluation is to provide input into designing a revised individualized educational program for Damian including any additional need for support and/or related services to meet his needs. The questions that were originally generated for this evaluation following the 11/18/02 Decision and amended on the basis of input from this ALJ on November 27, 2002 remain relevant in requesting this independent evaluation.

As discussed at the Hearing there has been a recent evaluation conducted by the Juvenile Court that may have addressed several of these questions. This evaluation should certainly be considered with the addition of a psychiatric evaluation that could assess Damian's needs across educational and medical domains. This seems particularly important in consideration of Damian's diagnoses of Attention Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder in addition to his identified special education needs. It was also expressed in this earlier decision that the intent of such an evaluation would be to help identify any support or related services needed by Damian's family required in order for them to meaningful participate in implementing a comprehensive special education program for Damian.

A new IEP meeting shall be convened to address the above considerations and other identified needs of Damian no later than February 10, 2003 to revise Damian's IEP based

on the considerations described above and other information that the IEP team may bring to the table. It is also hoped that the independent psychiatric and psychological information will be available to the team in order to build Damian's program in the most competent manner possible but the absence of such does not negate the need to move forward with planning. It is expected that the IEP team will consider all placement options including the instructional program options available at Mason City High School and other more specialized programs such as the Learning Center Day Program that may be required in order to meet Damian's needs. In reviewing the program options available it is also important to consider any programs available that are interagency in design and therefore provide for more intensive special education programs and services to Damian and his family.

Damian is to remain in the current Interim Alternative Educational Setting until this IEP meeting is held and ending no later than February 14, 2003 to allow for any planning associated with Damian's movement into a program option that would be determined as appropriate by the IEP team. It is the sincere desire of this ALJ that all the parties involved will approach this IEP planning with an open mind to the options available that will provide a program that meets the behavioral needs of Damian while providing the academic challenges that he deserves.

Despite the finding that Damian has not been subjected to a series of suspensions wrongfully imposed by school officials, it is apparent that he has missed a significant amount of school over the past three years because of disciplinary incidents. With this in mind it is also important that the IEP team give careful consideration to the need for extended year or extended day programming that may be required in order for Damian to continue to receive a free, appropriate public education.



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

1-13-03

Date (January 13, 2003)