

BEFORE THE IOWA DEPARTMENT OF EDUCATION

(Cite as 22 D.o.E. App. Dec 156)

In re Joshua F.)	
)	
Sally F., Mother,)	
Appellant)	DECISION
)	
v.)	
)	
Iowa Valley Community School)	SE # 278
District and Grant Wood Area)	
Education Agency,)	
Appellees)	
)	

#137

The above entitled matter came on for hearing on November 19, 2003, at the City Hall in Marengo, Iowa. Larry Bartlett served as the appointed Administrative Law Judge (ALJ), the Appellant was represented by Attorney Stephen N. Greenleaf, and Attorney Brett Nitzschke represented the Iowa Valley Community School District (District) and Grant Wood Area Education Agency (AEA). The hearing was held pursuant to Iowa Code Section 256B.6 and 20 U.S.C. § 1415, and was conducted pursuant to 34 C.F.R. Part 300 and Chapter 281-41 Iowa Administrative Code. This was an expedited due process proceeding as a result of the Appellant's request. The hearing was held in closed session and the witnesses were sequestered pursuant to the Appellant's request.

The Appellant alleged that eight errors in law were made by the District and AEA subsequent to the discovery of her son's alleged involvement in the possession and sale of marijuana on school grounds. She specifically challenges the legality and appropriateness of her son's suspension from school, manifestation determination procedure, placement in two interim alternative educational settings (AES) and a change of educational placement to a disability segregated facility.

Findings of Fact

The ALJ hereby finds that he and the Department have jurisdiction over the parties and subject matter involved in this proceeding.

The facts are largely uncontested and many were contained in a joint stipulation of facts submitted at the hearing's outset. Joshua is a fourteen-year-old freshman (9th grade) in the District's High School. He resides in the District with his mother. He has been identified as a child in need of special education as that phrase is defined in Section 256B.2 of the Iowa Code and is provided special education and services under an individualized education program (IEP).

Joshua has been a student in the District since January, 2003. In the previous school district of attendance, Josh had been placed in a program for students with behavior disorders (BD). Partially because the District did not have a BD program locally, it was determined that a multicategorical special class with integration (SCI) would be an appropriate placement to meet his needs. His special education teacher and mother had recently discussed placing Josh in more general education classes to better challenge his academic abilities. Josh has been noted to have characteristics of attention deficit hyperactivity disorder and anger management concerns. His identified level of instruction and services prior to September 26, 2003 had been "level II."

Prior to September 26, 2003, Joshua had not been subject to any in-school or out-of-school suspensions or expulsions from the District's schools. He had previously been given four after-school detentions, three for tardiness, and one for failing to serve one of the previously assigned detentions.

On September 26, 2003, as a result of information provided by other students, the High School Principal conducted an investigation of an alleged student possession and sale of marijuana in the school building. He determined through investigation that Student B had brought a small bag of marijuana to school and had given the bag to Joshua. The two boys rolled one cigarette using the marijuana, and Josh later sold the remaining marijuana to Student A for \$1.50. Student A admitted having the marijuana when asked, and gave the bag to the Principal. All three students admitted their actions when confronted by the Principal. The Principal later found the marijuana cigarette in Josh's locker. There was no evidence of "use" on the part of the three boys. All three students were suspended by the Principal from school for ten days, the maximum allowed under school rules. Josh was expressly suspended from school for ten days for "possessing and selling marijuana at the Iowa Valley Junior-Senior High School on Friday, September 26, 2003." While the Principal's actions were limited by school rules, those same rules authorized the District Board of Directors to expel students for a time determined by the Board. District rules also provide that for students identified as needing special education, the student's individualized education program (IEP) and placement team must become involved. District rules treat the possession or sale of illegal drugs as a very serious matter of concern. The presence of illegal drugs is considered highly disruptive of the school's educational environment.

The parents of all three students involved were immediately informed of the situation on September 26, and parents of all three, including Ms. F., went to the school and discussed the situation with the Principal the same day. The Principal testified that all the parents were cooperative and that Ms. F. appeared to be "appreciative" of the school's handling of the situation. Law enforcement authorities were informed of the situation, and criminal charges were pending at the time of hearing regarding Josh's possession and sale of marijuana.

Following the ten day suspension of Student B, a student not identified as needing special education, he was provided tutorial instruction two days a week at the local public library by District staff. He had been offered the option of attending an alternative program which serves both special education and regular education students in a nearby school district, but his parents declined. As a result, Student B remains in a "home bound" tutorial type program. Following his

ten days of suspension, Student A, who is identified as needing special education and having health concerns, was placed in the above described neighboring district's alternative school program, where he remains. All three of the students are provided an education program by the District, but none of the three are currently attending the District's High School. The District, particularly the Principal, was concerned with the effect that an early return to school after suspension might have on Josh and the other high school students. He believed that Josh and the other students in the school would discount the school's effort to be free of drugs if the suspended students returned to school after only ten days of suspension.

Josh's mother arranged for him to be evaluated for drug usage, and the results came back negative.

During Josh's ten day suspension, the Principal conferred with the District's Superintendent and staff and various AEA staff members. One day before the end of Josh's ten day suspension, on October 9, Josh's IEP Team, including his mother and her Attorney, met to consider IEP changes, conduct a manifestation determination, consider a functional behavioral assessment (FBA) plan, and review placement options. The general consensus of the team members, except perhaps his mother, was that Josh's actions were related to his disability and that his involvement with illegal drugs was an indication that he needed a more intensified and structured approach on a planned short-term basis to meet his behavioral needs. The Team generally concluded that his impulsive behavioral and social patterns needed more intensive attention than he could receive in the District High School.

While the manifestation determination review form completed by the Team indicates that Josh's behavior "WAS NOT" considered a manifestation of his disability, hearing testimony and inconsistent responses to two of the form's other questions indicate that the team's intent was to find that Josh's disability was related to the marijuana incident at school. The last specific question on the manifestation determination form leading up to the conclusion question reads as follows: "Did the child's disability impair the ability of the child to control the behavior subject to disciplinary action?" The Team response was "yes," and was followed by a hand-written notation that said: "the response of yes was based on the information provided by Joshua's mother and teacher." In testimony presented at hearing, Josh's special education teacher reconfirmed her position that Josh's possession and sale were related to his disability.

As will be discussed later, a "yes" response to the preceding question automatically means that a relationship between the misconduct and disability has been determined. Yet, this was contrary to the concluding manifestation determination form question which stated that there "WAS NOT" a manifestation found between Josh's disability and Josh's marijuana incident. Testimony at hearing indicated that the inconsistent response on the last question may have been at the insistence of Josh's mother and her Attorney due to a misunderstanding of the form's meaning. As will be discussed later, the process of making a determination of manifestation is more than a little confusing. Testimony of District and AEA staff indicated that although they yielded to Josh's mother and her Attorney on the issue of a "WAS NOT" response to the final

manifestation determination question, the Team continued to act as if a manifestation (relationship) was determined to be present.

Due to the District's desire to not immediately return any of the three boys to school after a ten day suspension, it was determined at the October 9 meeting that Josh would be placed in an interim alternative education setting (AES) for 45 days immediately following his ten day suspension from school.

It was determined by the Team that the District had no appropriate local program available to meet Josh's needs, but several other school districts in the area had programs that might meet Josh's individual needs. Those programs needed to be consulted for availability and verification of their ability to meet Josh's needs. The Team agreed to what was effectively an "interim" to the interim AES while a functional behavioral assessment was conducted, a behavior intervention plan was developed, and alternative AES placements were investigated. The Team agreed to temporarily place Josh on a "home bound" placement whereby he would be "instructed" for two hours twice a week (total four hours weekly) at the public library by his SCI teacher and a paraeducator from that class, who coincidentally holds licensure as a teacher. The teacher and paraeducator consulted with Josh's regular class teachers, borrowed textbooks and materials and attempted to maintain Josh's educational progress while in the "home bound" setting. Due to the nature of the "home bound" program without other students present, it was not immediately feasible to implement a program which addressed Josh's impulsivity, self-esteem concerns, and his being taken advantage of by other students. Testimony indicated that Joshua worked diligently and successfully on his academic class work during his time in the "home bound" program.

It is clear from the record that the "home bound" placement was considered a temporary AES interim by all members of the Team. The written document developed and agreed to by the Team on October 9 directs AEA staff to investigate alternatives for placement for Josh in an appropriate AES. The Team was to meet again during the week of October 20th to finalize plans.

In the meantime, Josh was placed in the "home bound" AES program. School officials considered the time frame for this placement to be approximately 12 school days. During that time period the IEP/Placement Team worked with the District's administration in determining an appropriate AES in which Joshua would serve out the remainder of his 45 day AES placement. They looked for a program that would be able to provide a low teacher/pupil ratio and skilled staff experienced in behavior change. While academics were to be maintained, that was not considered Josh's most important area of need at that time.

On October 21, the IEP/Placement Team gathered together to review Josh's then current IEP, which was about eleven months old at the time and in need of an annual review, make amendments to the IEP, and to discuss an appropriate placement in which Josh would complete the remaining days of his 45 days of AES placement. The Team which met on October 21 included Josh, his mother and her Attorney, four District staff members, four AEA staff members, and a teacher from the Behavior Learning Center (BLC). The meeting was held at the

BLC facility in Iowa City, Iowa. The BLC is an AEA managed program housing special education students with behavior concerns. The BLC has four adult staff members to meet the needs of eight or fewer students. Staff at the BLC consisted of one licensed special education teacher, one licensed school social worker and two paraeducators. The BLC staff specialize in assisting students to make positive changes in their behavior. The BLC was one of three locations considered by the IEP/Placement Team, and was considered an appropriate placement in which Josh could complete the remainder of his 45 day AES placement. The BLC was considered an appropriate placement for meeting both Josh's academic and behavioral needs. Textbooks, materials and District academic standards were provided BLC staff.

The IEP developed on October 21 included, in addition to academic goals, behavior goals directly relevant to this proceeding. They included Joshua's taking responsibility for his actions with a minimum of pouting, complaining, and making excuses, and his learning appropriate peer social skills. The "current functioning" statement on one behavior goal read in part that:

Josh is currently struggling with some self-esteem issues and has trouble identifying true friends. He is easily taken advantage of by others and does inappropriate actions in order to impress peers.

The Team's documented explanation justifying Josh's placement in the segregated BLC setting included the following:

Josh would be better served in an environment that is more restrictive and structured to ensure success in his academics, teach him specific social, behavior, and decision making skills to ensure independence for his post high school life.

Josh needs a very structured day and a program that monitors and teaches Josh positive behaviors, assists him in making more thoughtful decisions that will instill maturity in his actions.

Josh needs more structure and one on one guidance that will teach him the above skills. He has the inability to make clear choices in the presence of his peers. This placement will also provide a very small group of peers in a highly controlled environment. This in-depth program is not offered at Iowa Valley. Josh would be better served in the BLC program that specializes in the skills Josh is deficient in.

Josh may attend Behavior Learning Center or continue receiving 4 hours of tutoring weekly.

On October 21 the Team also considered a report resulting from a functional behavioral assessment (FBA) conducted by an AEA social worker with input from Josh, his mother, his special education teacher and others. The FBA report indicated the following conclusions regarding Josh's school behavior:

1. When at school and with peers, Josh will make decisions to do something risky in order to impress others without considering right from wrong, or potential consequences to himself or others.
2. When given an instruction by an adult that Josh doesn't agree with or doesn't want to do, Josh becomes frustrated and persistent to convince teachers to change their mind and requires assistance to regain composure.

The FBA report recommended:

. . . a structured setting which includes more 1:1 instructional assistance, close coordination between home and school, social/life skills instruction may include training in areas such as problem-solving/clear thinking, assertiveness training, building self-esteem, leadership skills, and anger management, . . .

The FBA report and team discussion resulted in the development of a Behavior Support Plan dated October 24, with modification on October 27 resulting from input from Josh, his mother, and BLC staff.

As a result of Josh's placement at BLC, his determined level of need of services was changed from a Level II to a Level III. That change recognized a greater level of need to meet Josh's behavior concerns and generated additional revenues to the District to assist in funding the new intensive BLC provided program.

At the conclusion of the meeting on October 21, it was agreed that Ms. F. would visit the BLC program and make a determination regarding her support for Josh's placement there. The visit occurred on October 27, and as a result, Josh's mother agreed on an immediate BLC placement, minor modifications on the Behavior Support Plan, the FBA report, and the previously proposed IEP. On October 27 Ms. F. signed a consent form allowing for the immediate placement of Josh at BLC for the remainder of his AES placement.

Josh's attendance at BLC began on November 3. The District provided transportation for Josh to the BLC program in Iowa City, about one hour travel time in each direction. Recognizing that Josh's 45 day AES placement would soon end, the IEP/Placement Team next met on November 18 to review the situation. Present at that meeting were various District and AEA staff members, a BLC teacher, Josh's mother, and her Attorney.

The Team determined on November 18 that Josh's IEP was appropriate and working well, and that the BLC program was meeting Josh's needs. The BLC teacher explained that Josh had been working in small groups on "social skills, anger management, how to choose friends, and controlling impulsivity." The Team generally considered the BLC program as well suited to meet Josh's needs due to its structured, intense, and closely supervised setting. It was further determined that Josh's academic programming needed some adjustment to better parallel the District's curriculum standards. It was determined by the Team on that date that Josh would remain at BLC after his forty-five day AES expired and would work toward transitioning back to

his own high school. Ms. F. testified that she did not feel that the Team offered any other choice for her and Josh.

From the beginning of school and AEA consideration of an AES program for Josh, it was clear that all concerned felt Josh would eventually return to his high school and continue his IEP program in the District. No one on the Team expressed any desire to remove Josh from the District High School on a long-term basis. One of the components of the BLC program especially important for Josh is a planned gradual transitioning back to a student's school of residence. Josh's IEP Team was advised that a normal minimal amount of time in the BLC program was three months, and when it is determined that it will be appropriate for Josh to return to his home high school, it will be accomplished through a gradual return.

Testimony of IEP/Placement Team members indicated that the BLC placement was considered an appropriate program in which Josh functioned well, was provided appropriate services, was designed to enable Josh to progress in the District's general curriculum, make progress on his IEP goals, and especially, to address the behavior problems that resulted in the AES placement for 45 days.

In comparison to the BLC program, Josh's previous program in the District was in a SCI which currently serves 17 students and has one licensed teacher who shares several paraeducators with two other special education classes. Josh's special education teacher testified that his IEP and Behavior Service Plan would not be implemented as well in the District's SCI classroom, and that the BLC program would provide Josh the close structured attention he needed.

For the purposes of reviewing the meeting of legally mandated dates, the following summary of events will be helpful:

September 26, 2003 – Incident investigated; Ms. F. talked with Principal; Josh suspended.

September 29 – Josh's ten school day suspension began; written notice of the suspension is received by Ms. F.

October 9 – IEP/Placement Team meeting, FBA plan and Manifestation Determination review was conducted; AES setting was approved.

October 10 – Last day of ten day out-of-school suspension.

October 13 – Temporary "home bound" instruction begins. (School believes AES will end in 45 days on November 26. But, AES day counts include calendar days and October 11 may be the actual date of beginning AES in the "home bound" program. Because the school and AEA did not wait until the last minute to determine the post-AES placement on November 18, the specific counting of days is not as important as it might have been.

October 21 – IEP/Placement Team meeting; FBA report received, IEP approved.

October 27 – IEP/Placement planning completed; Ms. F. approves placement at BLC.

November 3 – Josh begins AES at BLC (23 days completed in “home bound” AES, including 15 school days).

November 18 – IEP/Placement Team meeting decides to continue BLC placement following 45 day AES, with the intent to work toward eventual transfer of Josh back to home school.

November 19 – This hearing conducted.

November 24 – Date that ALJ considers to be the end of 45 day AES. This may not be relevant because IEP review and Placement Change to BLC was effective after November 18 meeting.

November 26 – Last date of AES as calculated by IEP/Placement Team.

Throughout the various proceedings involving education staff members and Ms. F. from September 26 through November 18 the educators considered Ms. F. to be very cooperative and interested in helping her son through his current educational crisis. Ms. F. signed a formal consent of immediate placement form on October 27 which activated Team decisions made tentatively on October 21 to place Josh in the BLC program as the second part of his 45 day AES setting. Between October 9 and October 21 the FBA was conducted and at the October 21 meeting the Behavior Support Plan was reviewed and amended. Both Ms. F. and her Attorney participated in meetings and decisions and advocated for Josh’s return to the District High School, but raised no noticeably strong opposition to Team actions.

The Principal’s testimony noted some surprise that the decisions made regarding Josh were now the subject for due process hearing. He had not noted strong parental objection to previous school actions. On October 21, Ms. F.’s request for due process hearing was received by the Department in which she expressly challenged the decision to place Joshua in an interim AES following his ten day suspension from school. She complained that the October 9 decision was made “unilaterally by the school district.” Ms. F. and her Attorney had signed the October 9 manifestation determination report as acknowledging presence, but not acknowledging agreement. In her request for due process hearing, Ms. F. stated that her position at the October 9 meeting was that the AES placement agreed to by the Team on that date constituted additional punishment of Joshua without her consent and was a violation of statutory and constitutional rights. Yet, on October 21, the date her request for due process hearing was received by the Department, she and her Attorney fully participated in the FBA and BSP report reviews and the change of AES from the “home bound” program into the AES setting in the BLC. On October 27

(six days after the Department's receipt of the request for due process hearing), and after visiting the BLC program, Ms. F. signed a consent form for Josh's change of AES placement into the BLC program. That change in placement was implemented on November 3. On November 18, Ms. F. and her Attorney participated in a Team review of the AES placement at BLC and Josh's continued placement there following the expiration of his 45 day AES placement.

It is clear that Ms. F. and her Attorney participated in the proceedings in good faith in an effort to shape the team's decisions. However, it is somewhat curious that Ms. F. and her Attorney objected to decisions occurring at the October 9 IEP/Placement Team meeting enough to file a request for a due process hearing, and then participated in an extensive meeting on October 21 at the BLC which eventually resulted in Ms. F. giving formal written consent on October 27 for the BLC placement for the second part of Josh's AES setting. The confusion is compounded by Ms. F.'s participation in the November 18 IEP/Placement Team decision to continue Josh's BLC placement at the conclusion of the 45 day AES placement.

The reasons for the apparent inconsistency of Ms. F.'s positions regarding her son's current educational situation became clearer to this ALJ during her testimony. Josh's mother appears to be emotionally conflicted as to what is in Josh's best interest. On the one hand she trusts, and even compliments, the educators working with Josh in doing what is best for Josh's education. But, on the other hand she would prefer that Josh be back in his regular school setting with his peers and not having to take daily trips to a school setting located an hour from his home school. This is truly an understandable conflict of emotions.

At no time during the relevant time period did District officials make an effort to expel Joshua or have his educational placement changed to a location outside the District on a permanent basis. The District staff presumed throughout this period of time that Joshua would return to the District's High School when BLC determines that he has made appropriate progress on his IEP and a transition between the two programs has been completed.

Conclusions of Law

The Appellant's request for an expedited hearing contains eight allegations of unlawful acts committed by the Appellees. They will be considered in the order presented in the request for due process hearing.

- A. Joshua's 14th Amendment rights of due process have been violated.

It is not clear to this ALJ that he has subject matter jurisdiction over an issue of federal constitutional due process. Federal regulations found at 34 C.F.R. § 300.503 and § 300.507, and mirrored by Iowa regulations 281-41.107 and 281-41.73 I.A.C. establish authority for an ALJ to hear a parent request for hearing regarding decisions made concerning school discipline of students identified as needing special education and matters related to the identification,

evaluation, educational placement, or the provision of a free appropriate public education (FAPE). The issue of constitutional due process is not among the enumerated matters available to parents for review under the Individuals with Disabilities Education Act (IDEA) or parallel state laws.

However, in the event that jurisdiction over constitutional due process does lie in hearings of this nature, this ALJ finds that no violation of either procedural or substantive constitutional due process of law has occurred. Procedural due process claims by students and their parents have their basis in the United States Supreme Court ruling in Goss v. Lopez (419 U.S. 565, 95 S. Ct. 729, 1975). That ruling determined that public school students have both property and liberty interests involved in suspensions from school for ten days or less, and it implies that greater interests are present when longer suspensions or expulsions are at issue.

The record indicates that the District High School Principal investigated student provided information regarding potential possession and sale of marijuana on school grounds. He discussed the matter with the three students involved, including Josh, and all of the students admitted their involvement in the situation. Although not required by Goss, Josh's mother was notified, as well as the parents of the other two boys involved, and parents of all three boys arrived at school on the afternoon of September 26 and discussed the matter with the Principal. The minimum procedural due process safeguards of notice of alleged misconduct and its basis, and an opportunity for the student to present his version of the situation outlined in Goss were met and exceeded in the decision of the District's Principal to suspend Josh from school for ten school days. It should be noted that procedural due process requirements are less stringent when the students admit to violation of school rules (See, McClain v. Lafayette County Board of Education, 673 F. 2d 106 (5th Cir, 1982).)

The issue of substantive due process under the 14th Amendment involves a basic sense of fair treatment when Fourteenth Amendment property and liberty interests are involved. Under state law the concept is similar to issues of arbitrary and capricious actions by government officials. The undersigned ALJ finds that the Principal's handling of the suspension of Josh for ten school days for possession and sale of marijuana does not violate the concept of constitutional substantive due process of law.

Issues of due process of law regarding suspension of students with disabilities from school for more than ten school days have been largely dealt with under the 1997 Amendments to the IDEA. Once students are determined, through a manifestation determination (MD), to have violated school rules in a manner that is not related to their disability, they may be excluded from school in the same manner as nondisabled students. In those instances, students determined to be in need of special education who are being considered for long-term suspension or expulsion must be provided fourteenth amendment due process. When a student's misconduct at school is related to his or her disability, the IDEA provides for procedural and substantive requirements which greatly exceed constitutional due process requirements.

B. Joshua's 14th Amendment rights of equal protection of the law have been violated.

The issue of fourteenth amendment equal protection rights do have a legal basis in the treatment of children with disabilities. That was considered in the early court decisions in Mills v. Board of Education of District of Columbia (348 F. Supp. 866) (D.D.C. 1972) and Pennsylvania Association for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. (E.D. Pa. 1972). It is widely held that Congress had the Equal Protection Clause in mind when it enacted the Education for all Handicapped Children Act (EHCA) (P.L.94-142) in 1975. The EHCA has since been amended several times and since 1990 has been entitled the Individuals with Disabilities Education Act (IDEA).

Because the IDEA is based in equal protection legal history, this ALJ will presume that issues of equal protection which might be present in this hearing are now largely dealt with appropriately under the current procedural and substantive requirements of the IDEA.

C. Joshua's right to a "free appropriate public education" (FAPE) have [sic] been violated.

The record clearly establishes that Joshua was provided FAPE as required under the IDEA at all relevant times dealt with in this proceeding, including the ten school days of suspension immediately following the marijuana incident of September 26. Both federal and state law do not consider a suspension of ten days or less a deprivation of student's FAPE unless the suspension is one of a series of suspensions that "constitute a pattern." (34 C.F.R. 5300.519; 281-41.71(1).) This was Josh's first suspension at the District's High School and FAPE was not implicated.

FAPE is defined as special education and related services provided at public expense in conformity with an IEP (34 C.F.R. § 300.13; 281-41.3(3 I.A.C.)). IEP content, team members and process requirements are found at 34 C.F.R. 300.340-.350 and 281-41.59-.70 I.A.C.

Before the end of Josh's initial ten school-day suspension, his IEP Team, including his mother and her Attorney, met on October 9 to discuss Josh's placement in an interim alternative education setting (AES), plan a functional behavioral assessment (FBA), and a follow-up behavior intervention plan (BIP), and conduct a manifestation determination (MD).

All of these activities are mandated by the IDEA and Department rules to assure that students with disabilities are not improperly deprived of FAPE. The 1997 Amendments to the IDEA attempted to strike "a balance between the need for safe, disciplined, and drug free schools and the belief that misbehavior of students with disabilities is best addressed through appropriate services and behavior plans rather than through blanket exclusions from all educational services." Continuing educational programs and services, including behavioral interventions, is believed by the Office of Special Education Programs to offer the best opportunity for success of the student in adult life. (Letter to Senator Bob Graham, 34 IDELR π 180, p. 697, OSEP, 12-20-2000.)

A major portion of the October 9 IEP Team meeting was devoted to determining an AES to follow Josh's ten school days of suspension which was to expire the next day (10th), and a manifestation determination which must be conducted no later than ten days following a determination to place a student in an appropriate interim AES.

Authority to place Josh in an AES for possession and sale of illegal drugs for up to 45 calendar days lies with the Principal (34 C.F.R. 300.520(a).) but the IEP Team must determine the appropriateness of the planned AES setting. The October 9 meeting included three District staff members, including the Principal and Special Education teacher, three AEA staff members, Josh's mother and Attorney, and the District and AEA's Attorney. In determinations of appropriateness of AES settings, the IEP Team needs to review several specific criteria. An appropriate AES must be selected so as to enable the student to continue to progress in the general curriculum, continue to receive IEP services to enable him to meet IEP goals, and be provided services to address the behavior and prevent a reoccurrence of the behavior which resulted in his AES placement. The Office of Special Education Programs has recognized that appropriate AES settings will greatly depend on the circumstances of each individual student's situation. (Letter to Anonymous, 30 IDELR 710, OSEP, 7-11-98.)

The Team determined that an appropriate AES for Josh in the short term would include a meeting twice each week for two hours with his special education teacher, or a paraeducator, who holds a teaching license, or both at the community public library. Progress in the general curriculum was to be maintained through the teacher or paraeducator providing Josh's assignments, texts, materials, and instruction. According to hearing testimony, Josh successfully completed a considerable amount of school home work independently during this time period. He continued to receive IEP services and curriculum modifications as was provided in his IEP. Due to the circumstances of isolation in this setting, however, Josh received minimal services "to address his behavior" which had resulted in his being disciplined.

The IEP Team recognized that what effectively was a "home bound" placement of four hours of services per week was to be provided on a temporary basis only. Team members immediately sought after October 9 to complete an FBA and a BIP for Josh and to identify a more suitable placement in which Josh would complete the remainder of his 45 day AES placement. After investigating and considering several alternative locations, the Team met on October 21 at the Behavior Learning Center (BLC) in Iowa City, Iowa, to discuss that program as a possible AES in which Josh would complete the remainder of his 45 day AES placement. His mother later spent time visiting the BLC program and on October 27 gave her written consent to change the AES from the "home bound" program to the BLC program. Transportation arrangements had to be completed and Josh's first day in the BLC program was November 3. Josh's mother testified at hearing that on October 27 she felt that the BLC placement was the only option for placement that was being offered by the District and AEA.

Josh's ten school day suspension ended October 10th. His "home bound" AES setting started on either October 11 or October 13. Since AES settings are assigned for up to 45 calendar

days instead of 45 school days, it is likely that October 11 was technically the first day of the "home bound" AES setting, even though that date fell on a Saturday. That meant that Josh was in the "home bound" AES setting until November 3, 23 calendar days and in the BLC AES placement for 22 days.

A Team review of Josh's IEP and the BLC placement on November 18, two weeks after Josh first entered the BLC program, resulted in a consensus decision that the BLC placement was the least restrictive placement appropriate for Josh's IEP implementation. Compared to the previous District provided SCI classroom he had been in, the BLC was considered by the Team an appropriate placement to meet his intensive and structured behavioral program needs. The placement at BLC was called a "transitional program and the goal is return to his home school." Several academic adjustments were specified at the November 18 meeting so that BLC staff could better parallel the District's standards for academic achievement.

The record is clear that the BLC placement and his IEP implementation meet the criteria for both an appropriate AES setting and an appropriate special education setting for Josh. Somewhat troubling, however, is the initial AES setting for Josh in the "home bound" program with only four hours a week spent on general curriculum and IEP implementation, and minimal attention given to his behavior needs.

According to the testimony of several educators, Josh was in the "home bound" program for only 12 days. This ALJ's count, beginning on October 11 and ending on November 2, is 23 days. It is clear to this ALJ, that a 45 day AES placement in the "home bound" program only with actual instruction of only four hours per week and minimal attention given to his behavior needs would not meet the legal standards for an interim AES. Courts and administrative agencies generally do not find "home bound" programs, in themselves, to be desirable placements in the spectrum of the student disciplinary alternatives. (See EHLR 353:359 (OCR 1989); EHLR 352:253 (1986); Lamont v. Quisenberry, 606 F. Supp. 809 (S.D. Ohio 1984); Blue v. New Haven Bd. of Educ., 3 EHLR 552:401 (D. Conn. 1981); Chris D. v. Montgomery Cty. Bd. of Educ., 753 F. Supp 922 (N.D. Ala. 1990).) Temporary home bound placements are valid while re-evaluations are completed or alternative placements explored (School Bd. v. Witts, 16 EHLR 1109 (Va. Cir. Ct. 1989).) However, what actually occurred with regard to Josh does appear to be appropriate.

The District, as represented by the Principal, on October 9 was clearly opposed to an early return of Josh to school due to the impact on Josh and on his school mates resulting from a mere ten day suspension for what was considered by the Principal to be very serious violation of the school conduct rules. However, like many rural Iowa school districts, the District is limited in the range of programs it can offer students locally. It must seek the help of the AEA and other school districts to assist it in providing a "continuum of alternative placements in meeting the needs all students with disabilities." (34 C.F.R. 300.551; 281-41.83 I.A.C.) Taking the IEP Team actions and effort into account between October 9 and November 18, in light of the temporary nature of the "home bound" AES placement in a rural community with limited options, this ALJ hereby

finds that the overall AES placement in two settings for Josh meets the regulatory requirements for AES placement identified in 34 C.F.R. 300.522 and 281-41.71(4) I.A.C.

The October 9 IEP Team meeting also accomplished a main stated goal of planning a FBA and starting the development of a BIP. The assessment and plan development was to be led primarily by the AEA social worker on the Team, with input from several other persons.

The IEP Team conducted a MD on October 9 as required by state and federal law. A discussion of that as an issue in this hearing will take place under the next Appellant allegation of legal error.

D. The “manifestation determination” wrongly concluded that Joshua’s alleged actions were not a manifestation of his disability.

As stated earlier in the findings of fact, there was confusion among Team members regarding the documentation of the MD review. The record established that although the documented decision stated that Josh’s disability “WAS NOT” related to his misconduct, the Team proceeded as if the form were marked that his misconduct “WAS” related to his disability. Testimony of the educators indicated that the “WAS NOT” conclusion stated on the MD review form resulted from an attempt to placate the apparent wishes of Josh’s mother and her Attorney. Testimony of the rest of the IEP Team, and the responses to the other items on the form establish that the appropriate decision was that Josh’s actions on September 26 were related to his disability. Thus, although the form stated there was not a relationship between Josh’s disability and his misconduct, the Team acted as if a relationship had been determined.

Confusion on the issue of manifestation determination review is natural as a result of both the wording of the IDEA regulations and the infrequency in which IEP teams are called upon to make manifestation determinations.

The rules implementing the MD review requirement necessary when a child is placed in an AES on an interim basis establish that a presumption that a relationship must be found to exist unless the IEP team finds that all of specified review standards are satisfied in the situation. (34 C.F.R. 300.523(d); 281-41.72(1)(d) I.A.C.; See J. Walsh (2003), “Legally Compliant Manifestation Determinations: Avoiding the Most Common Mistakes.” Washington, D.C.; IDELR – Special Report No. 31, L.R.P.

Under 34 C.F.R. § 300.523(c) and 281-41.72(c), the IEP team must consider all relevant information known about the child, and then determine: (1) that the IEP provisions and placement were appropriate and were provided consistent with the IEP and placement decisions; (2) that the student’s disability did not impair the student’s understanding and consequences of the behavior (direct relationships); and (3) that the student’s disability did not impair the student’s ability to control the behavior at issue (indirect relationship). All three standards must

be answered in the positive, or the team must find that a relationship existed between the disability and the misconduct.

When a disability is found to be related to the misconduct, the student must continue to be provided special education with an appropriate IEP and appropriate placement. When there is a finding that no relationship exists, the school may treat the student the same as any other student for disciplinary purposes, such as expulsions.

In filling out the MD form, Josh's IEP Team found that his IEP and placement were not appropriate for his current needs; that although his disability did not impair his understanding of the consequences of his behavior, his control of his behavior was impaired as a result of his disability. Thus, the IEP Team responded to the manifestation determination review standards (1) and (3) in the negative, and there should have been a finding that a relationship existed between Josh's identified disability and his misconduct. The presumption that a relationship existed was not overcome by finding two of the standards had not been met.

The MD review document conclusionary statement stated incorrectly that Josh's misconduct "WAS NOT" a manifestation of his disability. However, the Team correctly proceeded as if the document had been marked "WAS" a manifestation of his disability. Previous documentation in Josh's education record indicated that Josh's disability resulted in his being "impressionable;" "impulsive ..., often processing his actions after the fact;" "known to be a follower;" "fails to take responsibility for his actions;" "struggling with self esteem issues and has trouble identifying true friends;" "he is easily taken advantage of by others and does inappropriate actions in order to impress his peers;" and "Josh will make decisions to do something risky in order to impress others without considering right from wrong, or potential consequences to himself or others." The ALJ concurs that Josh's misconduct on September 26 was related to his disability. (See, *School Bd. v. Malone*, 762 F. 2d 1210 (4 Cir. 1985), and *S-1 v. Tarlington*, 635 F. 2d 342 (5th Cir. 1981); cert. denied 454 U.S. 1030 (1981) for findings of "indirect relationships.")

- E. Joshua has been effectively suspended from school for greater than ten school days without benefit of a hearing or any procedure to guarantee due process.

Under discussion of the "A" Issue, this ALJ found that appropriate due process was provided for the ten day suspension. Following that, all decisions have been made by Josh's IEP/Placement Team with the full participation of Josh's mother and Attorney. The IDEA procedural and substantive processes have been followed as that law envisions.

- F. Joshua has been suspended from school as a special student with an IEP for a period of time greater than a non-special education student could be suspended in violation of R.41.71(2).

Under this allegation of illegal conduct, the Appellant depends on Department rule 281-41.71(2). That state rule is the mirror of the federal IDEA rule found at 34 C.F.R. § 300.520. In short, those rules authorize school personnel, in this case the Principal, to temporarily suspend students with disabilities for ten days or less, but only to the same extent that nondisabled students would be suspended. These rules provide local school officials with flexibility in dealing with minor infractions of school rules by students with disabilities, yet prevents children with disabilities from being cut off from educational services and the appropriate addressing of their behavior needs as a result of the ten day limitation (Analysis and Comment, 64 Fed. Reg. 12537, 12618 (March 12, 1999).) Those rules prohibit discrimination in the application of school-term suspensions.

In the facts at hand, Josh and his two school mates that were alleged to have been involved with marijuana on September 26 have been treated similarly for violating school rules that are taken very seriously by district officials. Josh was placed in an AES setting for 45 calendar days following his ten day suspension. That authority is expressly provided in both the federal and state rules. Josh's placement was changed from the AES setting in the "home bound" placement to an AES placement in BLC. The AES BLC placement was subsequently changed to an educational placement in BLC.

One of Josh's colleagues on September 26, Student A, was a student receiving special education. Following his ten day suspension, Student A was placed in a neighboring district's alternative school which provides programs and services to both special education and regular education students. Student B was a regular education student who, when given his choice between the alternative school attended by Student A or a "home bound" program similar to that in which Josh was originally placed for his AES, chose the latter. None of the three boys has returned to the District's High School since September 26, yet the District maintains its educational responsibility to all three, but in different settings.

There is no evidence in the record that Josh was treated in a discriminatory manner or in any way not authorized by the IDEA or state law.

- G. Joshua's effective suspension and possible placement in schools in Iowa City or Cedar Rapids is not the least restrictive placement (LRP) available or appropriate for him.

In Josh's situation, the IEP Team has also served as the placement team. The least restrictive environment concept is implemented in a very individualized manner and provides that to the maximum extent appropriate, students with disabilities will be educated with their nondisabled peers. The Team, including Josh's mother, must assure that separate schooling or "other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes . . . cannot be achieved satisfactorily." (34 C.F.R. 300.550(b); 281.41.37(2) I.A.C.) Clearly the IEP/Placement Team decisions of October 9, October 21, and November 18 involved careful and individualized

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In the facts at hand, Josh and his two school mates that were alleged to have been involved with marijuana on September 26 have been treated similarly for violating school rules that are taken very seriously by district officials. Josh was placed in an AES setting for 45 calendar days following his ten day suspension. That authority is expressly provided in both the federal and state rules. Josh's placement was changed from the AES setting in the "home bound" placement to an AES placement in BLC. The AES BLC placement was subsequently changed to an educational placement in BLC.

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consideration of Josh's educational and behavioral needs, both in the development of his IEP and in placement considerations. At all times relevant, Josh was placed in the least restrictive placement appropriate to meet his educational and behavioral needs. The IEP/Placement Team has from the beginning (October 9, 2003) had as its goal the return of Josh to the District's High School setting as soon as it is educationally appropriate to do so.

H. Joshua's treatment by the Iowa Valley Community School District and Grant Wood AEA is in violation of the provisions of 20 U.S.C. § 1415.

Federal law found at 20 U.S.C. § 1415 contains numerous parental procedural safeguards provided under the IDEA. Presumably this allegation is a shotgun approach calling into question most of the issues previously discussed, including short-term suspensions, placement in AES, criteria for AES settings, manifestation determinations, FBAs and BIPs, parental appeals, and student placement during appeals. That section of federal law also covers numerous other parental safeguards.

As stated previously through ALJ attention given to specific allegations of violation of substantive and procedural safeguards, this ALJ has not found any violation of the provisions of 20 U.S.C. § 1415 relevant to the factual situation presented by the treatment of Joshua between September 26, 2003 and the date of this due process hearing. (See, Letter to Anonymous, 30 I.D.E.L.R. 604 (OSEP, 2-23-09).)

Summary

The undersigned ALJ has determined that none of the previously discussed allegations, A through H, have been substantiated by the Appellant in fact or law. The most significant questionable District and AEA action was the temporary AES placement of Josh in a "home bound" setting. The problems associated with using a "home bound" placement as a disciplinary placement are numerous and full of pitfalls for schools. However, due to the good faith effort by District and AEA staff to use the "home bound" placement as a temporary AES setting only, and their actually identifying an appropriate AES setting at BLC and later securing Josh's mother's written consent for the BLC placement does not appear to have resulted in any harm to Josh. The record indicates that the "home bound" setting was especially successful for Josh's progressing in the regular curriculum.

Decision

This ALJ has determined that none of the Appellant's allegations of unlawful conduct on the part of the District and AEA contained in items A through H of the request for due process hearing are founded in fact or law. Therefore the Appellees prevail on all issues.

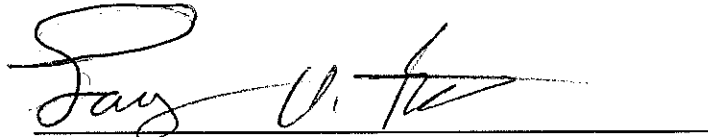
It is gratifying to note that while Josh's mother would like his educational placement to be nearer to home, she is cooperating with and respects the educators involved in his educational decisions. The educators involved have shown great respect for Josh's mother's opinions and wishes and have worked diligently to convince her that Josh is receiving an appropriate educational program, and that with progress he will return to his resident high school.

This hearing represents the honest differences of opinion between parents and educators for which the due process hearing and mediation provisions of the IDEA were created. It is gratifying to observe that the system works the way it was designed. It is hoped that all concerned, including Josh, will continue to work together, if not always in agreement, toward Josh's best educational and long-term interests.

Motions and objections not previously ruled upon, if any, are hereby over-ruled.

The Parties are advised that when aggrieved by this ruling they may bring civil action through an appeal into either a federal or state court under 34 C.F.R. 300.512 or 281-41.124 I.A.C. If this ruling is not challenged through civil action it will become the final decision in this matter.

Respectfully submitted.



Larry D. Bartlett, J.D., Ph.D.
Administrative Law Judge

December 3, 2003

Date