

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05431-16

AGENCY DKT. NO. 2016 24275

L.T. ON BEHALF OF D.T.,

Petitioner,

v.

OCEAN TOWNSHIP BOARD OF EDUCATION,

Respondent.

L.T. and P.T.,¹ pro se

Danielle Pantaleo, Esq., for respondent (Cleary Giacobbe Alfieri Jacobs, attorneys)

Record Closed: April 20, 2016

Decided: May 4, 2016

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioners, L.T. and P.T., on behalf of their son D.T., filed for an expedited due process hearing against respondent, the Ocean Township Board of Education (District), alleging that the actions of their son for which discipline was imposed by the District were a manifestation of his disability.

¹ The petition was signed only by L.T., but both parents appeared for the hearing.

PROCEDURAL HISTORY

On April 7, 2016, petitioners filed for an expedited due process hearing for a disciplinary matter. The Office of Special Education Programs (OSEP) of the Department of Education (Department) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 11, 2016. A hearing was held on April 20, 2016.

FACTUAL DISCUSSION

Background

Certain preliminary background facts are not disputed. Accordingly, I **FIND** the following **FACTS**:

D.T. is fifteen years old and in ninth grade at Ocean Township High School (OTHS). He had been attending public school in Ocean Township, but for the 2014–2015 school year, he attended school in Long Branch to repeat eighth grade.

Karen Dunn is a school social worker, employed by the District at OTHS. She is a case manager on the Child Study Team (CST), a position she has held for eleven years. She conducts Individualized Education Plan (IEP) meetings for classified students, maintains IEPs and records, collaborates with teachers to insure that IEPs are implemented, and works with and advocates for students.

Denise Ricciardi has been the assistant superintendent of Special Education Services for Ocean Township for nine years. In that capacity, she oversees special education services district-wide for students preschool through age twenty-one. She has a bachelor's degree in psychology and sociology, and a master's of education in educational administration. She also has a doctorate in psychology. She completed a two-year clinical fellowship in pediatric psychology. She is licensed in New Jersey as a psychologist and holds a certification from the New Jersey Department of Education as a school psychologist. She also holds a supervisor certificate, a director of pupil personnel

certificate, a chief school administrator certificate, and a certificate of eligibility with the principal certificate.

Per a Pediatric Neurological Examination dated December 10, 2012, D.T. was diagnosed with attention deficit hyperactivity disorder (ADHD), primarily inattentive type. (R-3.) Per the Pediatric Neurological Examination, D.T. had been referred for a neurologic examination “because of concerns about inattentive, distractible behaviors and difficulty staying on task and finishing his work, and this has impacted on him academically.” The Pediatric Neurological Examination further reflects:

According to his mother and looking at the features of ADD/ADHD, he will often fail to give attention to details, has difficulty sustaining attention, does not seem to listen when spoken to, does not follow through on instructions, has problems with organizational skills, can be easily distracted and forgetful, and will lose things needed for tasks. He also at times can be fidgety and leave his seat, but he is not a disruptive or hyperactive child. Primarily, the inattentive features are the concern.

In 2012, D.T. was first determined eligible for special education services under the designation “other health impaired,” due to his diagnosis of ADHD.

March 23, 2016, Incident

An Incident Report prepared by OTHS assistant principal Gina Hagerman reflects that on March 23, 2016, at approximately 10:00 a.m., there was an incident involving “Student A,” D.T. and “Student B” as follows:

[Student A], [D.T.] and [Student B] are 9th grade students. On March 23, 2016, security was called to room [---], [Teacher’s] Spanish I class. [Teacher] states that the boys were lighting a paper plate on fire and stamped it out. [Teacher] saw [Student A] with an Old Spice can and asked him to put it away and return to his seat. She saw the Old Spice can again and confiscated it from [Student A]. Numerous students in the class saw this and two students provided Mrs. Hagerman with video recordings of the incident and provided a chronological list of what they witnessed.

Students reported witnessing the following:

- First, [Student A] was standing alone in the back of the room and had a lighter and can of body spray that he sprayed to make a flame.
- [D.T.] went to the back of the room and [Student A] and [D.T.] began looking for things to burn, [D.T.] picked up a pencil, wrapped paper around the end and held the pencil so [Student A] could set it on fire. The paper caught flame and [D.T.] dropped it and stepped on the paper.
- [Student B] then approached [D.T.] and [Student A] and held up a worksheet packet that [Teacher] had [Student B] hand out to class. He held it so [Student A] could set it on fire. As the paper caught fire [Student B] tried to pass it to another student, it dropped and he stomped out the flames. [D.T.] videotaped this happening.
- [Student A], [D.T.] and [Student B] placed a chromebook on the desk with a paper ball in front of it and [Student A] tried to light the paper ball on fire with the body spray and lighter. [D.T.] videotaped this happening.
- [D.T.] and [Student B] asked [“Student C”] to come and hold a piece of paper and as he picked up the paper [Student A] tried to set it on fire. [Student C] stated to a student in class his finger got warm and he was seen by [Nurse]. He stated that he just felt the warmth of the flame but was not burned.
- When [Teacher] called for security [Student A] took a kitchen knife out of his pocket and hid it behind the television.
- Initially, [D.T.] and [Student A] were brought to the attendance office and asked to give a statement, they would not cooperate. Mrs. Hagerman brought [Student B] to the attendance office and he would not give a statement. [Student B] and [D.T.] continued to laugh and were uncooperative. Later, [Student A] did cooperate, wrote a statement and was remorseful. [D.T.] and [Student B] also wrote statements at that time.
- At that time Mike Lambusta and Cip Apicelli searched their backpacks and the students. Mr. Lambusta found that [D.T.] had 5 cans of aerosol spray in his backpack. [D.T.] admitted that the 5 cans of spray belonged to him. Jeff Siciliano searched all three boys’ lockers and nothing was found. [Student B’s] backpack remained in the Spanish classroom and was not searched.

Ocean Township Police were called and they took [Student A], [D.T.] and [Student B] into custody. All three of the boy’s parents were called by Mrs. Hagerman and were told to meet their child at the Ocean Township Police department. Mrs. Hagerman spoke with Detective Brian Morgan on March

24, 2016 via telephone, he stated the boys are being charged with the following:

- Disorderly Conduct

[Student A] is also being charged with:

- Unlawful possession of a weapon.

[R-5.]

By letter dated March 24, 2015, the District notified D.T.'s parents that D.T. was charged with violations of the Student Code of Conduct; that the CST had determined to remove D.T. to an interim alternative educational setting (home instruction) for a period of forty-five calendar days, beginning on March 23, 2016; that the forty-five-day removal period was irrespective of any disciplinary action imposed by the District Administration and/or Board of Education and would run concurrently with any disciplinary suspension; and that the CST scheduled a manifestation determination and change-in-placement meeting for April 6, 2016, at 9:30 a.m. (R-4.)

D.T.'s Discipline Log reflects twenty-three incidents, beginning on October 15, 2015, and ending on March 23, 2016. (R-7.) The March 23, 2016, entry reflects:

Hagerman, Gina – Hagerman – [D.T.] and two other students put themselves and other students in the classroom and school in danger. [D.T.] wrapped a pencil in paper and held for another student to light it on fire with Old Spice aerosol and a lighter. [D.T.] also participated in lighting, stomping and video-taping a paper plate and paper objects being lit. Police, parent and case manager notified. [D.T.] was taken from OTHS to police station. Parent notified to meet [D.T.] at OTPD. OSS assigned.

Individualized Educational Plan

D.T.'s Annual Review was on March 22, 2016. (R-1.) The IEP reflects that the initial or most recent evaluations/reports were the Pediatric Neurological Examination, a Psychological Evaluation, dated November 28, 2012, an Education Evaluation dated November 20, 2012, and a Social Assessment, dated October 26, 2012. He was due for his triennial reevaluation, which was held on September 22, 2015. (R-2.) Per the Written

Notice of Evaluation/Consent to Evaluate, evaluation data, parent information, current classroom-based assessments and observations, and classroom work samples and observations and/or reports of teachers were considered, and it was determined that an evaluation to determine eligibility for special education and related services was not warranted at that time. (R-2.) P.T. signed the consent/acknowledgment noting his agreement that an evaluation was not warranted at that time. (R-2.)

D.T.'s IEP reflects parent concerns as parents "continue to be concerned about [D.T.'s] attitude about school and his withdrawn behaviors. [They] believe that [D.T.'s] current placement is appropriate, however [D.T.'s] motivation appears to be deteriorating." The IEP also reflects that at the Annual Review it was determined that his program and placement needed to change since he was not finding success academically and his teachers reported that "he is refusing to complete assignments in class as well as homework assignments," and "they are redirecting, reinforcing, encouraging, offering close supervision and individualized instruction, however, [D.T.] consistently refuses to engage in the learning experience." (R-1.) To address his behaviors, it was determined that D.T. would be instructed in the Special Class Behavioral Disabilities for Environmental Science for the duration of the 2015–2016 school year and remain in his current English setting for the duration of the 2015–2016 school year, and a Behavior Intervention Plan (BIP) was included in the IEP to assist with addressing his behavioral needs. (R-1.) The IEP further reflects that he would also be educated in the Special Class Behavioral Disabilities for History, Math, English and Science for the 2016–2017 school year. (R-1.)

The IEP reflects that behavioral interventions were appropriate, as follows:

Target Behavior

- [D.T.] will complete assigned classwork during class time (English, Science, History, Math, Electives, and Health) as well as related homework, if any.

Documentation of prior interventions and student response

- Positive reinforcement, teacher attention, individual assistance and encouragement has been employed, however with limited or no response.

Description of the positive supports/interventions, including the conditions under which the supports/interventions will be implemented

- A reward system including but not limited to praise to encourage work completion when resistance to assignment completion is apparent.

Procedures for data collection to evaluate the effectiveness of the interventions

- [P]oint system and teacher feedback.

Conditions under which the supports/interventions are changed

- When teacher, guidance counselor and case manager observe the token system is no longer effective.

Conditions under which the supports/interventions will be terminated

- When [D.T.] completes his assignments on a regular basis for 2 consecutive marking periods.

Parental Involvement

- [L.T. and P.T.] will support [D.T.] with his homework completion and encourage motivation in educational performance.

Additionally, per the IEP, D.T.'s general education and special education classroom modifications are as follows: Give D.T. modified tests when determined needed by the teacher; Consider seating arrangements. In close proximity to the teacher. Away from distractions; Provide opportunities for movement; Provide techniques to help develop skills (i.e., highlighting key works, verbalizing a question when confused) and test-taking strategies (i.e., teaching how to eliminate incorrect multiple-choice answers); Encourage D.T. to ask questions when confused; Provide study guides prior to tests; Provide visuals to accompany auditory input in the classroom; Provide verbal cues to have D.T. start classroom tasks; Break long-term projects into clearly defined subtasks and attach deadlines to each subtask; Daily supervision overseeing D.T.'s system for organizing schoolwork and backpack; Provide verbal cues and ensure D.T. writes down assignments in agenda book; and Provide [skeleton] copy of notes for D.T. to complete. Check for accuracy. (R-1.) D.T.'s IEP also provides for the following additional general education

modifications: Extra time for writing assignments; Extra time for in-class assignments and projects; and Reading and explaining directions on tests.

Change-of-Placement Evaluation and Manifestation Determination

The Change-of-Placement Evaluation reflects that the behavior resulting in removal of more than ten school days was that “[D.T.] participated in lighting explosives in the classroom [at] the high school. He was accused of jeopardizing the safety, security.” It further reflects that there were no previous removals. A Manifestation Determination (MD) meeting was scheduled for April 6, 2016.

The Manifestation Determination Form (MD Form) reflects that “[D.T.] violated the Student Code of Conduct by lighting explosives [and] possessing a weapon in the classroom and unlawful possession of a weapon at Ocean Township High School.” The MD Form reflects that the CST had considered assessment/evaluation, the IEP, interviews, teacher observations and information provided by the parent. Ultimately, the IEP team determined: 1) that the conduct in question was not caused by D.T.’s disability; 2) that the conduct in question did not have a direct and substantial relationship to the child’s disability; and 3) that the conduct in question was not the direct result of the school’s failure to implement D.T.’s IEP. The MD Form also notes that P.T. left the meeting and refused to further participate or sign any documents. (R-6.)

Testimony

Karen Dunn

Karen Dunn, the school social worker, explained that D.T.’s struggles were staying focused on assignments, work completion, and lack of motivation to complete any classwork or homework. During the first semester there were many meetings with D.T. and his teacher about getting assignments completed. D.T. was never a behavior problem except with getting work done. He was never disrespectful. He was well mannered and polite and had a good rapport with peers and teachers. He would often have earbuds in or be distracted by looking at the student phone books or other things.

D.T. was originally placed in the general education setting with in-class resource, consisting of two teachers—a general education teacher and a special education teacher to meet his accommodations and modifications. This placement was not working well. At the beginning of the school year, his Algebra I setting was changed from general education with in-class resource to pull-out replacement. D.T. was having difficulty getting work completed and the IEP team agreed that he needed a smaller class size with closer supervision.

At the March 22, 2016, Annual Review, the IEP team discussed D.T.'s progress and what had happened since the prior September and October meetings. His teachers reported that he was not working to expectation, and not completing class or homework assignments. The IEP team discussed the accommodations already in place and how they were not necessarily helping D.T., particularly in Biology. Dunn had personally observed D.T. in Biology, which was an in-class resource setting. D.T. walked into class about thirty seconds late, sat down at his desk, and put his headphones in his ears. The teacher went over a study guide that the students were to complete at home because there was going to be a test the following day. D.T. did not have his study guide. The teacher gave him the study guide so that he could fill in the answers as they were going along, but he said he had completed the study guide already at home with his mother. The teacher again encouraged him to take a blank copy and fill it in, but he did not. Dunn testified that D.T. was distractible, unable to focus, and wandering, but she did not find him to have impulsive behaviors. Dunn recommended behavioral disabilities (BD) classes for all his classes. Due to his behaviors of work refusal and non-completion BD classes were recommended by teachers to help him be more successful academically. Students who refuse to work or pay attention or have difficulty focusing may be placed in a BD class.

Additionally, for the first time, a behavior interventional plan (BIP) was implemented to address non-completion of work. Dunn explained that in D.T.'s new classroom, the teacher would offer points where students would either not have to do homework (homework passes) or some other type of reward. The plan was to put him

in the special behavioral disabilities classroom. L.T. did not want a BD class and asked Dunn how BD could help. Dunn explained it to L.T. and L.T. agreed to the IEP. In D.T.'s case this was not to address disruptive behavior, but rather was to address his refusal to complete work, as there would be close supervision to complete work and homework. The proposed class did not have disruptive students.

Finally, at the March 22, 2016, Annual Review there was a discussion because D.T.'s parents felt that D.T. has post-traumatic stress disorder (PTSD) and wanted to address it. They talked about a psychiatric evaluation, and Dunn stated to the parents that a psychiatric evaluation could be done, but it was already March and it could not be completed this year because of the appointment times. It would likely be done in the summer. Dunn asked if the parents would be okay with addressing it again in September. Dunn did not receive a written request to conduct a psychiatric evaluation, and she did not receive a diagnosis of PTSD from any expert.

To Dunn's knowledge, D.T. did not demonstrate poor impulse control and was not diagnosed with any impulse-control disorder. He did not receive counseling or treatment at school for such.

Dunn became aware that D.T. was involved in an incident on March 23, 2016, because she had been standing in the hall when she observed D.T., another student, assistant principal Gina Hagerman, and a member of security walking down the hall. Because she has a good rapport with him, Dunn asked D.T. what was going on. D.T. told her he did not know what was going on and started laughing. She followed him to find out what was going on because he is her student and she advocates for him. D.T. told her that they were in the classroom and there was fire and he did not do anything. He told her that he had five aerosol spray cans in his book bag, one for every day of the week. She thought one was Axe. Dunn remained with D.T. and Hagerman for the duration of the time D.T. was in the office. During that time she learned what had happened and was told that D.T. would be suspended for ten days. Dunn contacted Ricciardi to let her know that there was a suspension and that a manifestation determination would be required because of the suspension.

D.T.'s parents were invited by Dunn to participate at a Change-of-Placement Evaluation and MD. The parents indicated that they would be participating. P.T. attended. Dunn wrote on the MD Form, "Parent walked out of the meeting stating, 'I know what this is going back to.'" She did not know what P.T. meant by that, but he refused to stay and sign the documents. Dunn also wrote on the MD Form, "Parent stated that this is about the current lawsuit against the District. He stated, 'my lawyer told me not to come to this meeting.'"

Initially, the team went through the Change-of-Placement Evaluation Form, and based on the determination at the end of that, they went through the MD Form questions. They reviewed the Discipline Log, and looked at any assessments and evaluations, the IEP, interviews, teacher observations, and information provided by the parent. Dunn heard testimony of what occurred from Hagerman, but she did not see the Incident Report or any video.

Hagerman was at the MD and reported the incident to the CST. The CST determined that the conduct was not a manifestation of D.T.'s disability. His disability is that he is classified as "other health impaired" due to ADHD, predominantly inattentive type, meaning that he is distracted and unable to focus and complete work. The CST also reviewed D.T.'s IEP and BIP and determined that both the IEP and BIP were followed. The CST reviewed the Discipline Log during the MD. D.T. did not have prior serious offenses like damaging school property or setting things on fire. Generally, the discipline in the Discipline Log was for being late to class, not cleaning up, and violating the attendance contract. D.T. was never previously charged with a serious code-of-conduct violation.

Denise Ricciardi

Denise Ricciardi, assistant superintendent of Special Education Services, testified that disciplinary actions and incidents are addressed by building administration. However, if a disciplinary incident is unique or sufficiently significant she is notified by the case manager or building principal. She typically attends meeting for suspensions beyond ten days.

With respect to the March 23, 2016, incident, the spray can and lighter are considered weapons, as a lighter and aerosol together are considered an explosive. It is her understanding that backpacks were searched. Five aerosol cans were found in D.T.'s backpack and he admitted that they were his. The way it was described to her, wrapping paper around the end of a pencil and lighting it is essentially a torch. The incident is being taken very seriously, and the safety of the school and the students is of significant concern and importance to her.

When a student is carrying or in possession of a weapon, that warrants removal to an interim alternative placement, regardless of whether it is a manifestation of the student's disability. The CST may unilaterally remove a student under special circumstances, including possession of a dangerous weapon. Due to D.T.'s involvement with explosives stemming from the aerosol cans and also the paper around the pencil, unilateral removal is allowed regardless of whether the conduct was a manifestation of his disability.

The incident occurred two days before spring break. The day after the incident occurred, Ricciardi determined that an MD meeting was required because D.T. was being suspended for ten days with a recommendation to the Board of Education that the suspension extend beyond ten days.

When D.T. was diagnosed with ADHD in 2012 it was under the Diagnostic and Statistical Manual of Mental Disorders 4th Edition (DSM-4). At that time, there were three ADHD diagnosis options: ADHD predominantly inattentive type, ADHD predominantly hyperactive-impulsive type, and ADHD combined type. Since then, the DSM-5 has come out, but Ricciardi had no documentation of D.T.'s diagnosis since that edition was published. D.T. was diagnosed with predominantly inattentive type. To be diagnosed with inattentive type, he would have to exhibit six criteria under that category, such as difficulties with sustained attention, attention to detail, follow through and completion of activities, organization, and distractibility. Predominantly hyperactive-impulsive type would involve calling out in class, frequent interruptions in class, fidgeting, and over-activity. D.T. was not considered predominantly hyperactive-impulsive type or combined type.

Ricciardi supervises the CST and the case manager reports to her. She is familiar with D.T.'s IEP and his struggles. Based on his records and conferring with Dunn, she identified the primary concerns reported in this school year to be completion of classwork and homework, and tardiness. She did not see evidence that his behaviors are necessarily impulsive behaviors. No impulsive-type behavior was reported this year. She did not recall reports of him interrupting others during class, or calling out in class, or excessive talking, or inability to engage with students. He had good peer relationships this school year. His IEP reflects limited alertness and inattentiveness.

Ricciardi testified that wrapping a pencil with paper and attempting to light it on fire is not impulsive. In her professional opinion, it takes forethought to take time to wrap paper around a pencil and engage the other person with the pencil.

Ricciardi received emails from L.T. after the return from spring break, wherein L.T. requested that the meeting be held at 6:00 a.m. or 3:00 p.m. so that she could attend. By contract, Ricciardi cannot have staff appear at those times, which L.T. acknowledged. On the date of the hearing, Ricciardi received a subsequent email requesting a 1:00 p.m. hearing. However, by the time she saw the email she could not guarantee that necessary personnel could be available at 1:00 p.m. She stated in both emails she sent to L.T. that L.T. could participate by telephone conference via speakerphone in the main office. She did not recall getting a response.

At around 10:00 a.m. the CST started with the Change-of-Placement Evaluation to determine if the reported incident reflected a pattern of behavior, if there were prior suspensions for the same infraction, or if a BIP were needed to address that type of behavior. The CST found this incident to be an isolated incident without previous related incidents.

With respect to the MD, the CST reviewed the documentation noted in the MD Form, including the IEP, evaluation reports, teacher observations, and input from parents and the investigator of the incident. Per review of D.T.'s documents and data, the CST determined that the conduct was not a manifestation of D.T.'s disability. The

documentation and reports, both verbal and written, were that he has ADHD inattentive type, and the behaviors he had exhibited could not be described as this type of infraction. The CST did not feel that inattention contributed to the forethought required to wrap paper around a pencil to have it lit and leaning into a person with a lighter, and it was reported to Ricciardi that it was lit. Ricciardi could find no expert opinion within the past year's documents in the CST file that D.T. suffered from impulsivity. Likewise, there was no diagnosis of PTSD or obsessive-compulsive disorder (OCD). Wrapping pencils in paper or lighting things on fire is not impulsive, and it is different to quickly light something versus taking the time to wrap paper around a pencil. There was also some question also as to why D.T. had five aerosol cans, when this incident involved an aerosol can as an explosive.

The CST followed his BIP and IEP. The teacher present during the incident was present at the MD and attested that the IEP was in fact being followed. The other teacher that was there and the case manager all reported that the IEP was being followed. This had never happened before, so there was no pattern, and there is no behavioral intervention for an isolated, unique incident. D.T.'s target behaviors were to complete assigned classwork during class time and homework. She did not see evidence that his behaviors are necessarily impulsive behaviors. The CST determined that work refusal was not the cause of the March 23, 2016, incident. There was no substantial nexus between his behavior and lighting fires.

Ricciardi testified that she saw video of the incident. She did not see D.T. hold the pencil or see the pencil on fire. She did not see D.T. with a lighter or aerosol can. Her understanding was that a videotape was not obtained from D.T.'s phone. She spoke with the principal and the assistant principal, who told her that there were at least two eyewitnesses to the pencil incident. On the video, she saw a student with a lit piece of paper who was reported as not being D.T., and she also saw a student stomp on a lit piece of paper on the ground.

Ricciardi and the principal and building administration agree with the description of D.T.'s violation of the code of conduct on the MD Form.

There was no submission of written documentation or documentation by P.T. on April 6, 2016.

L.T. and P.T.

The parents testified that the proceedings and the MD were not properly conducted by the District, that the outcome was predetermined, and that D.T. was inadequately represented as a result. L.T. was administering the PARCC test that day, and the District refused to reschedule the proceedings so that L.T. could attend, and P.T. was in no condition to adequately represent D.T. because he had left his dying mother's bedside. The parents had to go into the April 6, 2016, meeting blind, because they had no ability to review video and were left in the dark and unable to advocate for their son. When he walked into the meeting, P.T. told the CST that his mother was in hospice care and that he had to leave his phone on. He did not stay because the outcome was already determined. Ricciardi said she was recommending a forty-five-day removal period, and that was all P.T. needed to hear because it was determined by the CST irrespective of the manifestation determination.

The parents testified that D.T.'s conduct was definitely a manifestation of his disability. He has ADHD. He is extremely impulsive and engages in impulsive behavior. L.T. brought this to the CST's attention on March 22, 2016, and adequate measures should have been taken to insure that something like the March 23, 2016, incident did not occur. ADHD causes D.T. to do a lot of things impulsively that he does not mean to do. He needs behavioral intervention so that these behaviors do not occur.

D.T.'s parents testified that his modifications were not implemented because he needed to be under close supervision of and in close proximity to the teacher. The boys were in the back of the classroom for almost forty-five minutes, fooling around while the teacher was in the front of the room cutting cake. D.T. should have been monitored and in close proximity to the teacher as per the modifications in his IEP.

The video of the incident very clearly shows five boys surrounding the flame. One student had a lighter and an aerosol can, and another student had a paper. D.T. and two

other boys were watching. When all of the boys were standing in the back of the room playing with fire, D.T. got excited and he was allowed to go to the back of the room, but all he was doing was standing there watching. It was evident in the video that D.T. was only standing there watching. That was a manifestation of his disability. All the teacher had to do was call him back to his seat and he would have sat there, but she did not. D.T. had the five cans of Axe spray in his backpack since last school year because he has three brothers who like to use his body spray. D.T. did not wrap a pencil in paper and attempt to light it on fire. Many witnesses said D.T. did not do that, and D.T. said he did not do that. The video shows everything that occurred, and D.T. did not do what was alleged. The parents testified that D.T. was a bystander. He was not participating, joking around or videotaping despite what the Incident Report states. Hagerman took the statement of one student, and D.T.'s phone was not taken. If certain students were holding the objects, some spraying, some participating, and some watching, they did not all share the same level of culpability. The child holding the aerosol can and lighter is at the highest level, and the child holding the paper at the next level. The children standing and watching were at the third level. D.T. should have been in trouble, and was in trouble at home, for watching and not reporting the incident to the teacher.

D.T. was diagnosed with PTSD. Due to behaviors in school and lack of progress in school L.T. wanted a complete evaluation because she was concerned with other behaviors she noticed, like symptoms of OCD and anxiety. At the March 22, 2016, annual review meeting, L.T. had been asked to provide the 2015 Psychiatric Evaluation. L.T. was going to provide it the following day, but then the incident occurred and she did not have any opportunity to do so. Thereafter, she was going to present it on April 6, 2016, but she was unable to attend. L.T. testified that the District did not have a written diagnosis of PTSD from an expert. She purposely did not give it to the District because she was hoping that it was not true and she wanted the District to evaluate D.T. She asked Dunn at the March 22, 2016, meeting about an evaluation and told Dunn about other behaviors, and she wanted the school to evaluate D.T. as quickly as possible to see if the school came to the same determination as Dr. Zaidi. L.T. is aware that she must share diagnoses and information with the CST. She did not request a psychiatric evaluation in writing. She verbally requested an entire evaluation, including educational, social, and psychiatric. L.T. testified that D.T. was also diagnosed with OCD, depression and anxiety,

and that Long Branch was aware of those diagnoses last year. D.T. grew a lot in Long Branch, and she had hoped that his growth would continue in Ocean Township, but his behavior has regressed.

L.T. was concerned about D.T.'s negativity and lack of motivation. She was at the annual review trying to come up with alternatives because she was not in agreement with the program. The school wanted to try BD classes in order to help D.T. She verbally requested a full evaluation. She does not know why that was not put in there. She did not receive the current IEP until April 6, 2016. L.T. alleged that references to impulsivity were purposely removed from the current IEP, which was not finalized until April 4, 2016, after the incident occurred. The parents were not presented with the current IEP at the annual review. L.T. just signed the page agreeing to the terms that were discussed, which involved trying the BD placement for science class. Dunn advised that D.T. would benefit from a BD placement, and L.T. consented. The current IEP reflects that for September 2016 through March 2017 D.T. would be in BD classes for all subjects. L.T. was surprised when she saw the IEP that said all BD classes next year. She still wanted to see how BD science worked out before agreeing to other BD classes.

P.T. was present at the reevaluation planning meeting on September 22, 2015, but he did not request any assessments. D.T. had just come from Long Branch and had been doing much better there.

The parents object to the Discipline Log because they were not notified of the incidents contained therein.

With respect to the behavioral interventions in the IEP, the parents testified that those were their concerns, but in addition to other things, including impulsivity. They verbally told the CST that D.T. was impulsive. He roamed the hallways, was late for class, and was out of seat all the time. Some examples of impulsivity they have observed in D.T. are cutting his nails and putting the scissors in the wall and realizing later that he did something wrong; throwing something on the floor that could potentially be dangerous and having to be told to go back and pick it up; opening up his screen and forgetting to close it; and constantly grabbing things and touching things. Additionally, they have received

many emails and phone calls about impulsive behaviors like walking around in Biology class, touching materials, and getting up and going to the bathroom without permission. He does not think. He just gets up and goes, and then later says that he should have asked the teacher. The parents contend that some of the behaviors in the Discipline Log are impulsive, like touching another student's project, leaving class without an escort, and listening to music in class. Cutting class or refusing to listen to the teacher may be impulsive depending on the circumstance, as he may get caught up in the hallway because he is impulsive and then be late to class.

D.T. was not previously charged with a serious incident like this. His parents were surprised, and never expected anything like this.

Parents' Evidence

D.T.'s parents rely upon an Ocean Township IEP dated May 14, 2014 (2014 IEP). Specifically, the parents point to a portion of the 2014 IEP that reflects information from a previous IEP meeting on June 6, 2013, and states, "[D.T.] has increasingly exhibited significant symptomatology consistent with this diagnosis. [D.T.] has continued to struggle with impulsivity and emotion factors that have impeded upon his academic performance in the resource room. Despite many interventions and extra modifications within this setting, [D.T.] has struggled to make progress. He completes homework inconsistently and has displayed increased off-task behavior." (P-1.) Said IEP was followed by a Long Branch IEP, and then his current IEP.

The parents also point to the current IEP, which reflects a report from his Biology teacher.

D.T. is consistently off task and social during class and lab experiments; repeatedly has to be reminded to stay with his lab group and complete the lab write up. In class, [D.T.] has had destructive behavioral issues such as vandalizing the desk, touching chemicals without instruction and he took the project of the AP Environmental Science class off the bench and started playing with it.

D.T.'s parents additionally rely upon an email from D.T.'s Biology teacher dated March 11, 2016, wherein she stated, in part:

This week [D.T.] has not been able to focus in class. On Wednesday, I stayed and completed the entire lab with [D.T.] and his partner because [D.T.] kept wandering away from his group. Yesterday, [D.T.] came to class late. Then, instead of taking his seat, he walked up and down the aisles to shake hands with his friends while the lecture was going on. After the lecture when the experiment started, [D.T.] was walking around the room refusing to join his group. After repeated prompting [D.T.] joined the group and grabbed the chemicals on the table and without instructions, started pouring the chemicals into a graduated cylinder. At that point, security was called and he was removed from the class to do a modified assignment.

[P-2.²]

Finally, the parents rely upon a Psychiatric Evaluation, dated January 23, 2015. (P-4.) The chief complaint noted therein is, “[D.T.] is presenting for this initial evaluation due to symptoms of possible depression.” The diagnostic impression was, “[D.T.] presented with a combination of Posttraumatic [sic] Stress Disorder, Oppositional Defiant Disorder, History of Attention Deficit Hyperactivity Disorder, Status Post Left Arm Trauma, and R/O Depressive Disorder NOS.” (P-4.)

Discussion

Review of the teacher evaluations in the IEP reveals that most teachers cited the same behaviors, to wit: that D.T. does not participate, he is late to class, he does not complete homework or classwork, he is unprepared, he is off task, and he is distractible. His Biology teacher additionally noted that he has “destructive behavioral issues such as vandalizing the desk, touching chemicals without instruction and he took the project of the AP Environmental Science class off the bench and started playing with it.” (R-1.) Several teachers recommended a behavioral disabilities classroom.

Per the IEP, a reevaluation determination meeting was held on November 18, 2015. It reflects that D.T. “has difficulty following through with instructions/directions and

² It is observed that this does not appear in the Discipline Log.

displays significant inattentive behaviors [which] negatively impact his educational performance in all of his academic classes.”

Although the parents presented a 2015 Psychiatric Evaluation at the hearing, and subsequent to the hearing submitted a letter arguing that the District was in receipt of the 2015 Psychiatric Evaluation from Long Branch, L.T.’s testimony was that she had specifically not provided the 2015 Psychiatric Evaluation to the District because she wanted the District to conduct its own psychiatric evaluation. Further, P.T. attended the September 22, 2015, reevaluation planning meeting and signed to acknowledge that no evaluations were warranted at that time, and the IEP does not reference the 2015 Psychiatric Evaluation in its list of more recent evaluations.

Additionally, at the hearing, the parents testified that D.T. was only a bystander during the incident. However, the petition states:

My son was charged by Ocean School Officials with starting a fire and possessing a weapon on school grounds. Another student told my son to hold up a pencil and the boy attempted (to no avail) to light the pencil on fire. The pencil is being considered to be a weapon in this case by Ocean staff members. My son impulsively held up the pencil, as per the boy’s request. Impulsivity is a major symptom of ADHD. School officials do not agree with me that my son’s behavior was a manifestation of my son’s disability.

...

Ocean officials can enter an agreement that my son’s actions were a direct result of his disability, in that impulsivity is a symptom of my son’s brain condition. Therefore, it should be determined that [D.T.’s] actions were a manifestation of his disability.

LEGAL ANALYSIS AND CONCLUSION

20 U.S.C.A. § 1415 sets forth the procedural safeguards for children with disabilities, which safeguards are codified at 34 C.F.R. § 300.530 (2015). Pursuant to 20 U.S.C.A. § 1415(a), any State educational agency, State agency, or local educational agency that receives assistance under this part (20 U.S.C.A. §§ 1411 et seq.) must establish and maintain procedures in accordance with this section to ensure that children

with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies. Among those procedural safeguards, 20 U.S.C.A. § 1415(k) governs placement of a student in an alternative educational setting. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. 20 U.S.C.A. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a) (2015). School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten school days (to the extent such alternatives are applied to children without disabilities). 20 U.S.C.A. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) (2015). If school personnel seek to order a change in placement that would exceed ten school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) (20 U.S.C.A. § 1412(a)(1)), although it may be provided in an interim alternative educational setting. 20 U.S.C.A. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c) (2015).

Pursuant to 20 U.S.C.A. § 1415(k)(1)(D), a child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall--

- (i) continue to receive educational services, as provided in section 612(a)(1) [20 U.S.C.A. § 1412(a)(1)], so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
- (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Except as provided in 20 U.S.C.A. § 1415(k)(1)(B), within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine: (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 20 U.S.C.A. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e) (2015). If the local educational agency, the parent, and relevant members of the IEP Team determine that either sub-clause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C.A. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(f)(1)(i) and (ii) (2015).

School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--

- (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
- (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

[20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2015).]

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section. 20 U.S.C.A. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h) (2015). The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team. 20 U.S.C.A. § 1415(k)(2).

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing. 20 U.S.C.A. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2015); N.J.A.C. 6A:14-2.7(m).

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A). 20 U.S.C.A. § 1415(k)(3)(B)(i); 34 C.F.R. § 300.532(b)(1) (2015); N.J.A.C. 6A:14-2.7(p). In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may--

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

[20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2015).]

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

[20 U.S.C.A. § 1415(k)(4); 34 C.F.R. § 300.532(c) (2015).]

Here, the petition of appeal reflects that the parents disagree with the manifestation determination and seek a determination that D.T.'s conduct was caused by his disability. The District's determinations on April 6, 2016, were based upon conduct alleged in the Incident Report. It is noted that the parents dispute the underlying conduct, though their testimony at the hearing about what occurred differed significantly from their petition, which stated that D.T. "impulsively held up the pencil." No witnesses were presented to establish what had occurred. Further, the District argued that the issue of what occurred on March 23, 2016, was outside the scope of the hearing and had been determined at another proceeding. That said, the parents did not present any expert testimony at the hearing to refute the testimony of Ricciardi, a licensed psychologist, who testified that D.T.'s conduct on March 23, 2016, was not the result of his ADHD, which was predominantly inattentive type, as substantiated by the documents and reports. Ricciardi further testified that even if D.T.'s ADHD had been predominantly hyperactive-impulsive type, D.T.'s conduct on March 23, 2016, still would not have been the result of his ADHD.

There likewise was no evidence to contradict the testimony of the District's witnesses that D.T.'s IEP was being implemented. The parents argue that D.T. was allowed to remain at the back of the room for an extended period of time, and that he was not being closely supervised, in violation of his IEP. In particular, the modifications they point to are seating arrangements in close proximity to the teacher away from distractions and opportunities for movement. However, a review of the documents in the record reveals that the intent of these modifications is to insure that he is on task and completing his work, not to insure that he does not engage in behaviors that might threaten the safety of the students or the school. Further, given the parents' testimony that the teacher was cutting a cake at the front of the room, it would not appear that primarily academic modifications to keep D.T. on task with an assignment would have been implicated at that time.

While D.T. does have a lengthy disciplinary history in a short amount of time, the discipline was primarily for lateness, refusal to complete work or participate in class, and refusal to comply with directions. None of the prior discipline is for any incident even remotely resembling that alleged to have occurred in the Incident Report, and D.T.'s parents testified that they were surprised and never expected anything like this.

In light of the foregoing, I **CONCLUDE** that the alleged conduct was not caused by D.T.'s disability and did not have a direct and substantial relationship to his disability. Although the parents presented a 2015 Psychiatric Evaluation, and they contend that the entirety of D.T.'s file was transferred from Long Branch, there is no evidence that the District received the 2015 Psychiatric Evaluation. To the contrary, at the hearing L.T. testified that she had specifically not provided it to the CST because she wanted another opinion, and it is not referenced in the IEP she submitted subsequent to the hearing or in D.T.'s current IEP. Further, the parents placed significant emphasis on impulsive behaviors, but it is noted that the 2015 Psychiatric Evaluation ostensibly reflects that it was performed due to symptoms of possible depression and there are no specific references to hyperactive-impulsive behaviors. Thus, I also **CONCLUDE** that the alleged conduct was not the direct result of the school's failure to implement D.T.'s IEP.

In sum, I **CONCLUDE** that the alleged conduct was not a manifestation of D.T.'s disability of ADHD, predominantly inattentive type.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the relief sought by petitioner is **DENIED**, and that petitioner's appeal is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

May 4, 2016
DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:

APPENDIX

LIST OF WITNESSES

For Petitioner:

L.T.

P.T.

For Respondent:

Karen Dunn

Denise Ricciardi

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 May 14, 2014, IEP

P-2 Email from Alanna Yonalunas, dated March 11, 2016

P-3 Emails between parents and Denise Ricciardi

P-4 Psychiatric Evaluation, dated January 23, 2015

For Respondent:

R-1 March 22, 2016, IEP

R-2 Written Notice of Evaluation/Consent to Evaluate, dated September 22, 2015

R-3 Pediatric Neurological Examination, dated December 10, 2012

R-4 Letter from District to parents, dated March 24, 2016

R-5 Incident Report

R-6 Memorandum and enclosures, dated April 8, 2016

R-7 Discipline Log