

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. Groton Board of Education

Appearing on behalf of the Parents: Mother, *Pro Se*

Appearing on behalf of the Board of Education: Attorney Marsha Belman Moses  
Berchem, Moses & Devlin, P.C.  
75 Broad Street  
Milford, CT 06460

Appearing before: Attorney Stacy M. Owens, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES**

1. Whether the Student was appropriately evaluated by the Board on June 30, 2005.
2. Whether the Student should be identified as a child with serious emotional disturbance (“SED”).
3. Whether the Student’s misconduct on September 29, 2005 was a manifestation of his learning disability and/or SED.<sup>1</sup>

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<sup>1</sup> During the prehearing conference on October 31, 2005, Attorney Gregory P. Carnese, on behalf of the Parent, tailored the original issues as written in the Request for Impartial Special Education Hearing (H.O. Exh. 1) to the issues specifically stated above. Such issues, as written in this Decision, were the issues prescribed for mediation between the parties on November 28, 2005, and again were expressly outlined by the Hearing Officer for the Parent during the first day of hearing on December 7, 2005, without objection.

Subsequent to mediation, the Parent terminated the representation of Attorney Carnese.

By e-mail addressed solely to the Hearing Officer, dated December 30, 2005, the Parent provided a written claim for administrative error regarding the issues as fully adjudicated, citing the original written Request for Impartial Special Education Hearing as the basis for her filing of due process. After forwarding such claim to Attorney Moses, and in consideration of both parties’ position relative to the Parent’s claim, the Hearing Officer ruled that the Parent was provided adequate notice of the issues for adjudication, to which she failed to express any objection. Thus, no administrative error was found and the issues were adequately presented during the prehearing conference, mediation, and at the commencement of the hearing.

## **PROCEDURAL HISTORY**

On October 19, 2005, the undersigned was appointed as Hearing Officer to preside over the hearing, rule on all motions, determine findings of fact and conclusions of law, and issue an order in the above-stated matter. A prehearing conference was scheduled for October 31, 2005. During the prehearing conference, Attorney Marsha Belman Moses appeared for the Board and Attorney Gregory Carnese appeared for the Parent. The dates for hearing and the issues were discussed.

The Parties engaged in mediation on November 28, 2005, but negotiations failed. Prior to the commencement of the hearing, the Parent terminated the services of Attorney Carnese. The hearing convened on December 7, 12 and 21, 2005.

At the close of the hearing on December 21, 2005, dates for the submission of briefs and reply briefs were selected. Briefs from both parties were due on January 9, 2006. Reply briefs were due on January 16, 2006.<sup>2</sup>

## **SUMMARY**

On September 29, 2005, the Student was suspended from school for being in possession of fireworks and a facsimile of a gun. The Board concluded that the Student's conduct was not a manifestation of his disability. The Parent disagrees and believes the Student's conduct was the result of his disabilities. The Parent argues the Student should be identified as SED and has not been properly evaluated by the Board.

## **FINDINGS OF FACT**

1. The Student entered the Board's school district in September 2002, where he attended Fitch Middle School. Having been identified with a learning disability by his previous school district, the Board determined that the Student should continue to be identified as learning disabled based on evaluations conducted and determinations made by the Planning and Placement Team ("PPT"). The Student had learning disabilities in the area of reading and was diagnosed with ADHD. (Exh. B-1 – B-13; 12/21/05, p. 58).
2. In June 2005, Joyce Schmenk, school psychologist, completed the Student's triennial evaluation, inclusive of a Behavioral Assessment for Children ("BASC"). The BASC rating scale was provided to the Student, the Student's teachers, and the Parent for completion. The Parent failed to complete the BASC. (Exh. B-28; Tr. 12/21/05, pp. 30-45, 59).
3. Ms. Schmenk released a Report of Re-evaluation on June 30, 2005. The triennial psycho-educational evaluation revealed that the Student:

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<sup>2</sup> Despite the parties' failure to specifically request an extension of the deadline, the Hearing Officer applied a 30-day extension for the release of the decision, as the scheduling of the hearing dates and the release of the decision were inherently delayed by virtue of the parties exercising their right to mediation on November 28, 2005.

- a. had an overall IQ in the upper end of low average;
  - b. demonstrated significant strength in perceptual reasoning;
  - c. demonstrated difficulties processing, concentrating and sustaining attention;
  - d. was below average in reading, pseudo words, reading comprehension and spelling; and,
  - e. made significant gains in numerical operation, math reasoning, and written expression. (Exh. B-28; Tr. 12/21/05, pp. 35-38).
4. Despite the Student's deficits in reading, the evaluations revealed that the Student made "1 ½ years of growth in the area of reading within the last two years." (Exh. B-28; Tr. 12/12/05, pp. 152, 153).
  5. The BASCs submitted by the Student's teachers revealed that the Student was in the "clinically significant" range in the area of Learning Problems and in the "at risk" range for Attention Problems and Study Skills. None of the Student's teachers found the Student to present social, emotional or behavioral problems in school. (Exh. B-28; Tr. 12/12/05, pp. 33-36, 143-145; Tr. 12/21/05, pp. 38-41).
  6. The BASC submitted by the Student revealed that the Student was in the "clinically significant" range for Sense of Inadequacy, Locus of Control, Depression and Relations with Parents; and in the "at risk" range for Anxiety, Attention Problems and Self Esteem. (Exh. B-28; Tr. 12/12/05, pp. 33-36; Tr. 12/21/05, pp. 38-41, 44, 45).
  7. A PPT meeting convened on August 5, 2005, at which the triennial evaluation was reviewed and the Student's IEP for the 2005-2006 school year was developed. The IEP incorporated the conclusions of the triennial evaluation and included goals and objectives to address the Student's academic needs. (Exh. B-28A; Tr. 12/21/05, pp. 46-48)
  8. The Parent expressed her satisfaction with the IEP developed on August 5, 2005 to address the Student's academic needs, but at no time during the August 5, 2005 PPT meeting did she express any concerns relating to the Student's emotional or behavioral needs as she now claims were not appropriately addressed. (Exh. B-28A; Tr. 12/12/05, pp. 153-157).
  9. In September 2005, the Student began attending Fitch High School for his ninth grade year. As testified by the Student, and also acknowledged by his signature, the Student received the Fitch High School Student Handbook during freshman orientation and the first day of school. The Fitch High School Handbook is a compilation of the school's rules and disciplinary policies. (Exh. B-39, 40, 41; Tr. 12/12/05, pp. 43-46, 90-93; 12/21/05; pp. 104-108).
  10. In accordance with the Fitch High School Handbook it is a violation of the suspension/expulsion policy to have fireworks or weapons on school grounds. (Exh. 39, 40, 41)

11. The Student understood that it was against school policy to bring firecrackers or weapons to school. (Tr. 12/12/05, pp. 88-92, 97).
12. On September 29, 2005, a student lit fireworks in a math classroom that he obtained from the Student. The Student obtained the fireworks earlier that day from another student while on school grounds. On the same day and upon inspection, Paul Esposito, Assistant Principal, discovered a “facsimile” gun in the Student’s book bag that looked like a “real gun.” (Exh. B-30; Tr. 12/12/05, pp. 83-90, 96-98; 12/21/05, pp. 108-113).
13. On September 29, 2005, the Student was suspended for 10 days for possession of fireworks and a facsimile gun. (Exh. B-30; Tr. 12/12/05, pp. 83-90; 12/21/05, p. 114).
14. The Board sought to convene a PPT for a manifestation determination on October 5, 2005, but the Parent wanted to convene a PPT meeting on October 5, 2005 to review the Student’s program in accordance with the August 5, 2005 PPT recommendations. The manifestation determination was scheduled for October 12, 2005 by Parent’s request. (Exh. B-32; Tr. 12/12/05, pp. 30, 38, 39; 12/21/05, pp. 115).
15. At the October 5, 2005 PPT meeting, the Student’s teachers reported that the Student transitioned well into the high school, was successful in some classes, and missed a few assignments in other classes. The Student’s failure to turn in assignments in some of his classes resulted in lower to failing grades in those classes.(Exh. B-32; (Tr. 12/12/05, pp. 30, 38, 39, 171, 172; 12/21/05, pp. 116-123).
16. At the October 5, 2005 PPT meeting, pursuant to the Parent’s request, the PPT agreed to place the Student in a higher level math class the next semester and to provide the Student with an assignment pad to write down his assignments. The Parent did not raise any issues regarding the Student’s IEP, program, special education identification, social or emotional issues, progress, or additional services. (Exh. B-32; Tr. 12/12/05, pp. 29, 30, 38, 39, 162, 163, 169, 170, 180; 12/21/05, pp. 120-123, 127, 128, 161).
17. On October 12, 2005, a PPT meeting convened to conduct a manifestation determination regarding the Student’s misconduct on September 29, 2005. In attendance at the October 12, 2005 meeting were, Paul Esposito, Assistant Principal, Adam Diskin, special education teacher, the Parent, Marguerite Mitchell, Guidance Counselor, the Student, Attorney Gregory Carnese for the Parent, and Attorney Marsha Belman Moses for the Board. (Exh. B-34; Tr. 12/21/05, pp. 129-136, 175).
18. At the manifestation determination meeting held on October 12, 2005, the PPT discussed the results of the October 5, 2005 PPT review of the Student’s program, the Student’s progress, teachers’ observations of the Student’s behavior in classes, and the June 30, 2005 triennial evaluation, Parent concerns and observations and the Student’s statements. (Exh. B-34; Tr. 12/12/05, pp. 58, 59, 63-68; Tr. 12/21/05, pp. 129-137).

19. The Student's behavior was reported by his teachers to be consistently positive and compliant. He was respectful in class and stayed on task with redirection. There were no reported problems or disciplinary issues. (Exh. B-34; Tr. 12/12/05, pp. 58, 59).
20. On October 12, 2005, the PPT completed the Worksheet to Determine Eligibility for SED. The PPT unanimously agreed that the Student did not satisfy anyone of the five criteria to a marked degree or for a long period of time adversely impacting the Student's education for SED eligibility. The Parent disagreed. (Exh. B-34; Tr. 12/12/05, pp. 40, 41; Tr. 12/21/05, pp. 42, 43; Tr. 12/21/05, pp. 133-136, 138, 153, 175-177).
21. On October 12, 2005, the PPT determined the Student's misconduct on September 29, 2005 was not a manifestation of his learning disability. The Parent disagreed. (Exh. B-34; Tr. 12/12/05, pp. 56; 12/21/05, pp. 177, 178).
22. On November 2, 2005, a 45-day interim alternative placement for the Student was recommended at Project Learn. The Board also offered a psychiatric evaluation of the Student, at Board expense. The Parent refused both. (Exh. B-36, 38, P-2; Tr. 12/7/05, pp. 37-40, 51, 52; Tr. 12/12/05, pp. 61, 62, 174-177; 12/21/05, pp. 77-82, 87-93, 144, 145).

### **CONCLUSIONS OF LAW**

In accordance with §§ 300.321 and 300.356 of the Federal Regulations, a school district shall ensure that a reevaluation of each child with a disability is conducted at least once every three years, and the results of any reevaluations are addressed by the child's IEP team in reviewing and, as appropriate, revising the child's IEP.

Section 34 C.F.R. 300.532 provides that each school district shall ensure, at a minimum, that the tests and other evaluation materials used to assess a child are selected and administered so as not to be discriminatory on a racial or cultural basis, are provided and administered in the child's native language or other mode of communication, and materials and procedures are used to measure the extent to which the child has a disability and special education needs, not their English proficiency.

Section 300.532(b) of the Federal Regulations provides that "a variety of assessment tools and strategies" must be used by a school district "to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum."

In this particular case, Joyce Schmenk, the school psychologist, conducted a triennial evaluation of the Student in June 2005, the results of which, were reviewed and incorporated in

the Student's IEP. Ms. Schmenk reviewed the Student's academic history, observations, interviews, and past evaluations, and administered well-established, culturally neutral, standardized tests in the Student's native language to assess his cognitive and behavioral needs.

In compliance with 34 C.F.R. 300.532(f), no single procedure was used as the sole criterion for determining the appropriate educational program for the Student. Specifically, the results of the Otis-Lennon, Wechsler Intelligence Scale for Children (third and fourth editions), Behavior Assessment for Children, Woodcock Johnson III, and Wechsler Achievement Test II, administered by Ms. Schmenk or throughout the Student's academic history were reviewed and considered in developing the final Re-Evaluation Report. These assessment tools and strategies produced "relevant functional and developmental information," as well as provided for the inclusion of parental observations and input, and the Student's own characterization of personal accounts and information.

Though, Ms. Schmenk's credentials are not in question, it is noted that she possesses over 20 years of experience as a school psychologist and conducting evaluations and possesses a Masters of Education in school psychology, thereby qualifying her as trained and knowledgeable personnel for purpose of administering the applicable tests in accordance with 34 C.F.R. 300.532(c)(ii).

Section 34 C.F.R. 300.532(g) provides that a school district shall ensure that a child "is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities."

The Parent, in this matter, claims the Student was not appropriately evaluated and that the Board failed to assess the Student's emotional and behavioral issues and needs. The record reveals otherwise. A component of the June 2005 triennial evaluation was the BASC. The BASC was specifically designed to assess the Student's behavioral and social emotional issues. Yet, when the Parent was presented the opportunity to shed light on her concerns, she refused to submit her documentation for consideration in the assessment and evaluation.

A preponderance of the evidence establishes that the Student's educational record was not only void of any significant behavioral or emotional concerns prior to the June 30, 2005 triennial evaluation, but the Parent also remained consistently silent in this regard. Given the information Ms. Schmenk had to work with, it is unreasonable to expect her to randomly conduct

additional evaluations for a social emotional disability without a foundation upon which to base the need for such. There simply were insufficient grounds to “suspect” the Student had a social emotional disability. The Parent’s claim lacks credibility in that she failed to aide Ms. Schmenk in the acquisition of pertinent information through the BASC and she refused the Board’s offer of a psychiatric evaluation at the Board’s expense. The evidence further establishes that the only issue rendered “suspect” in this case is the Parent’s belatedly expressed concern that the Board did not properly evaluate the Student for social emotional disabilities.

In accordance with the IDEA, a “child with a disability” means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 34 C.F.R. 300.7(a)(1). It is undisputed that the Student in this case is a child with a disability based on his learning disabilities. However, at issue is also whether the Student also should be identified with a serious emotional disturbance (“SED”).

As defined by the federal regulations, Emotional Disturbance means:

- (i) . . . a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:
  - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
  - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
  - (C) Inappropriate types of behavior or feelings under normal circumstances.
  - (D) A general pervasive mood of unhappiness or depression.
  - (E) A tendency to develop physical symptoms of fears associated with personal or school problems. 34 C.F.R. 300.7(c)(4).
- (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted unless it is determined that they have an emotional disturbance.

To specifically address these factors: the Student has not exhibited an inability to learn. His academic record reveals that although he is below grade level in reading and writing resulting from his learning disability, the Student has shown progress; the Student has maintained interpersonal relationships with peers and teachers, as evidenced by teacher reports and

observations, as well as the Student's acknowledgment of peer relations; and the Student has not developed physical symptoms or fears associated with personal or school problems.

The evidence and testimony does reveal in contrast, that the Student has engaged in inappropriate types of behavior under normal circumstances,<sup>3</sup> and, though not pervasive, has provided responses in the BASC "to suggest feelings of depression." This evidence, however, is less than preponderant in finding that such characteristics have occurred over a long period of time, to a marked degree, and have adversely affected his educational performance. Furthermore, schools have been cautioned by the Connecticut State Department of Education to recognize the distinction between serious emotional disturbance and social maladjustment. State of Connecticut Department of Education, *Guidelines for Identifying and Educating Students with Serious Emotional Disturbance* (1997)

Social maladjustment is an exception to coverage under the IDEA and is characterized by deviant behavior with conscious control. Individuals with Disabilities Education Act, §601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; 34 C.F.R. §300.7 (a)(1), (b)(9) In such instances:

- a. signs of depression are not pervasive;
  - b. problem behaviors are goal directed, self-serving, and manipulative;
  - c. actions are based on perceived self-interest;
  - d. general social standards are understood, but not accepted;
  - e. countercultural standards of peers are accepted and followed; and
  - f. problem behaviors have escalated during pre-adolescence and adolescence.
- (See *State Guidelines* at 13)

Courts have routinely declined to equate social maladjustment with serious emotional disturbance. A.E. v. Independent Sch. Dist. No. 25, 936 F.2d 472, 476 (10 Cir.1991); Doe v. Board of Educ., 753 F.Supp. 65, 71 n. 8 (D.Conn.1990).

A preponderance of the evidence establishes that the Student engaged in deviant behavior with conscious control. The Student does not exhibit any pervasive signs of depression. His actions were goal directed, self-serving, and manipulative in that he sought inclusion by his peers by accepting their countercultural standards and following them. In his responses on the BASC, the Student responded that he almost always "[likes] who [he] is," "[likes] to take chances," and

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<sup>3</sup> During the hearing the Parent highlighted the fact that the Student had engaged in sporadic misconduct in previous grades that warranted disciplinary action by the school district. Such misconduct included bringing a laser light to school, bringing a CD player to school, drawing a picture of a face with a gun pointing to it, and ripping up his math work. Tr. 12/12/05, pp. 26, 79.



“likes to ride in a car that is going fast.” These responses reveal the Student’s comprehension of general social standards, but his conscious choice to not always accept them. The Student’s problem behaviors have escalated precisely during his adolescence. Ultimately, the evidence is insufficient to establish the Student is seriously emotionally disturbed, but instead is socially maladjusted.

Section 615(k)(1)(E) of the IDEA Improvement Act of 2004 provides:

- (i) . . . within 10 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 . . . 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.
- (ii) Manifestation. – If the local educational agency, the parent and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (ii) is applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability.

On September 29, 2005, the Student was suspended for being in possession of fireworks and a facsimile gun. The Board sought to convene a manifestation determination meeting on October 5, 2005, within the statutorily mandated timeframe, however, upon request of the Parent, the manifestation determination meeting convened on October 12, 2005.

During the October 12, 2005 manifestation determination meeting, the PPT reviewed all relevant information in the Student’s file and considered the Student’s current IEP, the June 30, 2005 triennial evaluation, teacher observations, Parent observations and Student statements. The PPT also completed a checklist to determine whether the Student qualified as SED. Being that the Student appropriately was not found to be eligible for SED identification, the PPT concluded that the Student’s learning disability did not cause or have a direct and substantial relationship to the Student’s misconduct on September 29, 2005, nor did the Board fail to implement the Student’s IEP.

The Board’s findings relative to the manifestation determination are fully supported by the record. The Parent contends that as a result of the Student’s reading disability, he was unable to comprehend the provisions of the Student Handbook that applied to his misconduct and

resultant disciplinary action. A preponderance of the evidence establishes, however, that not only was the Student fully aware that his actions constituted a violation of the Student Handbook, but that he also, was put on notice of the consequences.

Despite his reading deficiencies, the Student acknowledged that the handbook was reviewed with students during freshman orientation and during the first day of school. The Student's signature acknowledges receipt of the handbook and a review with his Parent, and the Student personally testified that he knew it was against school policy to possess fireworks or weapons on school grounds. Although, he testified that he did not know his actions could result in expulsion, he did know and understand that a violation of a school policy results in some form of discipline; in this case that discipline was expulsion. Furthermore, one area of strength, as noted in the triennial evaluation was perceptual reasoning, lending additional weight to the finding that the Student was fully aware of the consequences of his action.

Hearing Officer Comments: In accordance with §10-76h-16(b) of the Regulations of Connecticut State Agencies, the undersigned hereby exercises her right to provide comment on the conduct of the proceedings in this matter.

This hearing posed many unnecessary challenges as a result of the Parent's erratic and uncooperative behavior. Such behavior was exhibited through the Parent's outbursts and impromptu exits from the hearing, inappropriate and disrespectful side comments during testimony, unpreparedness, failure to produce information for which the hearing was granted a postponement, attempts to change the issues, and the untimely expressed intent to withdraw after resting her case.

Great lengths were taken to insure the Parent understood the process. The Parent was granted substantial latitude, despite her obstinacy. Understanding the Parent's passion to preserve her child's rights, it is recognized that this process would have been more expeditious and productive had the Parent maintained her composure, actively listened to hearing officer instructions and rulings, and exercised respect for the process.

### **FINAL DECISION AND ORDER**

1. The Board appropriately evaluated the Student on June 30, 2005.
2. The Student is properly not identified as a child with serious emotional disturbance ("SED").
3. The Student's misconduct on September 29, 2005 was not a manifestation of his learning disability and/or SED.