

75 IDELR 22

119 LRP 31488

**Douglas County School District
Nevada State Educational Agency**

DO051719

July 15, 2019

Related Index Numbers

150.025 Relationship between Misconduct and Disability

27.010 Discipline

150.015 Expulsion

Judge / Administrative Officer

N/A

Ruling

A Nevada district violated the IDEA when it failed to conduct a compliant manifestation determination review before expelling a 10th-grader with a other health impairment from school. To remedy the violation, the Nevada Superintendent of Public Instruction ordered the district to conduct a new MDR and provide the student with compensatory education.

Meaning

The obligation under the IDEA to conduct an MDR doesn't depend on the type or severity of conduct at issue. Even when a student brings a potentially dangerous weapon to school, an MDR still must be conducted. Here, the district expelled the student for possessing an airsoft gun on school grounds. The district held a meeting that it reportedly called an "MDR," but failed to discuss how the student's ADHD manifested itself and whether the condition led the student to bring the gun to school.

Case Summary

While a Nevada district may have been anxious to remove a student with ADHD who brought an airsoft pistol to school, that didn't excuse its obligation to conduct an appropriate MDR. The Nevada Department of Education found that the district essentially admitted that its MDR was improper by supplying no information about how it

made its determination. After the student was found to possess an airsoft pistol on school grounds, the district scheduled an MDR, which the parent attended. Following the MDR, the district proceeded with its plans to expel the student. The parent filed a state complaint alleging that the district violated the IDEA because the MDR team failed to address whether the student's conduct was related to the student's ADHD. The Nevada ED pointed out that an MDR team must review all information relevant to the behavior at issue, including the student's IEP and parental input, to determine whether the conduct: 1) was caused by or directly and substantially related to the disability; or 2) the direct result of an implementation failure. The state ED first noted that the district failed to determine whether bringing the pistol to school was related to the student's ADHD or to a failure to implement the student's IEP. The state ED also observed that, according to the parent's allegations, while the district convened a meeting purportedly to conduct an MDR, the meeting participants primarily focused on the conduct at issue and the student's behavioral history. The team only minimally discussed the characteristics of the student's ADHD and whether they were related to the incident, the state ED found. Further, the state ED observed, when it requested documentation from the district in response to the parent's state complaint, the district provided no MDR form setting out its findings and conclusions, in violation of Nevada law. "In the absence of any documentation memorializing the discussion of the MDR team, the Parent's oral information is relied upon with regards to the MDR discussion," the state ED wrote. The state ED ordered the district to reconvene the MDR team, conduct a proper MDR, and supply the student with compensatory education.

Full Text

Complaint Investigation

Introduction

On May 17, 2019, the Nevada Superintendent of

Public Instruction received a Complaint from a Parent alleging violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 400 et seq. and the IDEA regulations, 34 C.F.R. Part 300; and Chapter 388 of the Nevada Revised Statutes and the Nevada Administrative Code (NAC) by the Douglas County School District (DCSD). The Parent alleged DCSD failed to conduct an appropriate manifestation determination review (MDR) following a disciplinary incident involving a Student with a disability and subsequently failed to provide appropriate educational services to the Student.

In a May 28, 2019 issue letter to the DCSD, the NDE provided an opportunity to respond to the allegations raised in the State Complaint and requested documents and information in order to timely investigate the Complaint. The DCSD was notified in that same communication that if the DCSD disputed the allegations of noncompliance in the Complaint, the documents and information submitted must include: "[A] denial of the alleged noncompliance; a brief statement of the factual basis for the denial; and must specifically reference the documentation provided to the NDE that factually supports the denial." The NDE correspondence further specified that failure to timely provide a denial of the alleged noncompliance and the related information would be deemed a concession of noncompliance for purposes of the investigation of the State Complaint. The DCSD requested a one-day extension for its Response to the State Complaint, which NDE granted, and subsequently provided its Response on June 17, 2019.

The DCSD Response contained documents which the DCSD indicated were responsive to the document request made by the May 28, 2019 NDE issue letter; however, the response failed to include a denial of the alleged noncompliance, any statement of the factual basis for the denial, and did not provide any specific reference as to how the documents submitted factually supported a denial.

Therefore, in accordance with the notice explicitly provided to the DCSD in the May 29, 2019

issue letter, the failure of the DCSD to dispute the allegations contained in the State Complaint are considered concessions of noncompliance with regard to Issues 1 and 2. These concessions of noncompliance are noted in the Conclusions of Law, when applicable.

All documents submitted by the Parent relevant to the issues in the Complaint, the documents submitted by the DCSD, information provided by the Parent in an interview with the Complaint investigation team and Parent's response to a follow up inquiry made by the Complaint investigation team, were reviewed in their entirety in this investigation. The Findings of Fact cite the source(s) of the information determined necessary to resolve the issues in this Complaint.

Complaint Issues

The allegations in the Complaint that are under the jurisdiction of the NDE to investigate through the special education complaint process raise the following issues for investigation:

Issue One: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the March 21, 2019 MDR.

Issue Two: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the provision of appropriate educational services to the Student following the March 21, 2019 MDR.

Findings of Fact

1. The Student is eligible for special education services pursuant to IDEA and NAC, Chapter 388, under the primary disability category of Health Impairment with a diagnosis of Attention Deficit Hyperactivity Disorder and was enrolled as a 10th grade student in DCSD in the 2018/2019 school year. (5/2/2019 Individualized Educational Program (IEP); 10/16/2018 IEP¹)

2. The 10/16/2018 IEP provided for the following Specially Designed Instruction: Communication instruction: time to complete

assignments, reteaching as needed, accommodations beyond the scope of general education, with beginning and ending dates of 10/17/2018-10/16/2019, a frequency of services of 60 minutes per week, and a location of services of special education; and [C]o-facilitated instruction setting/instructional support (core courses -- Math, English, History, and Science) to remain on task, assist with organization for completion of assignments, prompting for appropriate behaviors, concept understanding, with beginning and Ending Dates of 10/17/2018-10/16/2019, a frequency of services of 20 minutes per week, and a location of services of general education. (10/16/2018 IEP)

3. The 10/16/2018 IEP provided for Supplementary Aids, each to occur in the general education and/or special education classroom, and further provided for Occupational Therapy Related Services in the amount of 60 minutes per year. (10/16/2018 IEP)

4. On 3/18/2019 the Student was involved in a disciplinary incident where the Student was found to be in possession of an airsoft pistol on school grounds and subsequently suspended for 10 days. (Student Behavior Detail Report; High School Letter to Parent, dated 3/19/2019)

5. DCSD scheduled an MDR to be conducted on March 21, 2019. The Parent attended the MDR meeting and indicates that the Team discussion at that meeting focused on the disciplinary incident and the Student's past behavioral history without addressing whether the Student's behavior leading to the disciplinary action was a manifestation of their² disability. The Student's ADHD diagnosis and its characteristics were discussed minimally, despite the Parent's request that they be fully considered, and the Team did not address the questions of whether the conduct giving rise to the discipline was caused by, or had a direct relationship to, the Student's disability or whether the conduct was a result of the school district's failure to implement the Student's IEP. (DCSD Correspondence to Parent, dated March 20, 2019; Parent Special Education State Complaint;

Parent Interview)

6. DCSD held a disciplinary hearing alleging that the Student's 3/18/2019 possession of the airsoft pistol violated DCSD Board Policy 529, NRS 392.466, and NRS 202.265, and the Student was subsequently expelled until June of 2021. (DCSD Correspondence to Parents dated 4/5/2019; March 25, 2019 Disciplinary Hearing Findings and Decision)

7. The last day of DCSD student attendance for 2018/2019 was June 6, 2019. (DCSD 2018/2019 School Calendar)

8. Subsequent to the expulsion, the Parent was notified that the Student would not be allowed to access any educational services on district grounds or in an alternative setting, and that the Student's education would be the Parent's responsibility moving forward through the period of expulsion. (DCSD Correspondence to Parents dated 4/5/2019; Parent Interview)

9. An IEP team meeting was later conducted and a revised IEP was developed on 5/2/2019. The 5/2/2019 IEP provided for the following Specially Designed Instruction: Organizational strategies, work completion, with beginning and ending dates of 5/2/2019-10/16/2019, a frequency of services of 60 minutes per week, and a location of services of community; and, Instructional support, with beginning and ending dates of 5/2/2019-10/16/2019, a frequency of services of 0 minutes per week, and a location of services of community. (5/2/2019 IEP)

10. The 5/2/2019 IEP provided for Supplementary Aids, each to occur in the general education and/or special education classroom, and further provided for Occupational Therapy Related Services in the amount of 60 minutes per year, which were substantially similar to the 10/16/2018 IEP. (5/2/2019 IEP; 10/16/2018 IEP)

11. DCSD provided Parent a Prior Written Notice (PWN) document indicating the district's intent to provide 8 hours of Specially Designed Instruction in a one-on-one format with the DCSD Executive Director of Special Education on or before

6/30/2019. (PWN, dated 5/24/2019)

12. DCSD provided 1 1/2 hours of notetaking strategies and 2 hours of transition services through 6/15/2019. (DCSD Director of Special Education email, dated 6/15/2019 and attached Summary of Services and Supports for [Student]; Parent Interview)

Conclusions of Law

Issue One: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the March 21, 2019 MDR.

Consistent with IDEA, the NAC requires, in relevant part, that no student with a disability may be subject to any suspension, expulsion or exclusion which will result in a change in the student's placement, except upon compliance with requirements as set out by law. NAC § 388.265(1). Prior to initiating discipline that will result in a change of placement, a public agency must convene a meeting of the relevant members of the IEP committee to conduct a MDR. NAC § 388.265(2). A change of placement is deemed to occur, in relevant part, when a student is removed from the student's current placement for more than 10 consecutive days. 34 C.F.R. § 300.536.

This convened team must consider all information relevant to the behavior which is the subject of the disciplinary action, including, without limitation, the student's IEP, observations of the student, and evaluations and diagnostic results and any information supplied by the parent, and must reach a determination as to whether the student's behavior, which is the subject of the disciplinary action, is conduct which was "(1) Caused by or directly and substantially related to the student's disability; or, (2) The direct result of the public agency's failure to implement the student's individualized educational program." § 388.265(3)(a)(b). A team finding that either (1) or (2), above, apply to the student, must deem that the misconduct was a manifestation of the student's disability. NAC § 388.265(3)(b), 34 C.F.R. §

300.530(e). The NAC further requires that a report be prepared setting out the team's findings and conclusions. NAC § 388.265(3)(c).

Nevada public agencies are required to establish a system of records for the purpose of verifying, in relevant part, that each special education student is identified, evaluated and served in a manner appropriate to the student's disability. NAC § 388.215.

The undisputed facts relevant to this matter establish that the Student was in possession of an airsoft pistol on school grounds on March 18, 2019. (Findings of Fact (FOF) #4) Following this conduct, the Student was to be subject to a disciplinary action that would constitute a change in placement, and the DCSD, as required under law, convened an MDR on or about March 21, 2019. (FOF #5) Consistent with applicable law, the MDR committee was required to review, at minimum: the Student's evaluations and diagnostic results, including information supplied by the parent; observations of the Student; and the Student's IEP, and determine whether the Student's actions in bringing the airsoft pistol to school were caused by, or directly and substantially related to, the Student's disability which in this case included a diagnosis of ADHD, or the direct result of DCSD's failure to implement the 10/16/2018 IEP.

Parent's Complaint, and the credible information provided during Parent's interview, allege that these required factors were not addressed at the March 21, 2019 MDR, despite Parent's request, and, as set out in the Introduction to this Report, DCSD is determined to have conceded this allegation by its failure to deny the alleged noncompliance. (FOF #5).

Furthermore, despite an explicit request to DCSD for documentation regarding the March 21, 2019 MDR, no MDR report was provided to the NDE setting out the findings and conclusions reached at that meeting, in violation of both the explicit requirement that such a report be completed, and the requirement that a Nevada public agency establish and maintain a system of records demonstrating its provision of appropriate services to students with

disabilities. NAC § 388.265(3)(c), NAC § 388.215. In the absence of any documentation memorializing the discussion of the MDR team, the Parent's oral information is relied upon with regards to the MDR discussion.

Therefore, DCSD failed to comply with the requirements of the IDEA and the NAC, Chapter 388, in the consideration of factors required by the IDEA in conducting the March 21, 2019 MDR.

Issue Two: Whether DCSD complied with the requirements of the IDEA and the NAC, Chapter 388, in the provision of appropriate educational services to the Student following the March 21, 2019 MDR.

Subsequent to an MDR, if the conduct giving rise to the disciplinary action is found to be a manifestation of the student's disability, a functional behavior analysis (FBA) must be conducted and a behavioral intervention plan (BIP) completed, or modified if one is already in place, and the student must be returned to their current placement. 34 C.F.R. § 300.530(f). If the conduct is determined not to be a manifestation of the student's disability, the student may be disciplined according to the same policies and procedures as a student who is not a student with a disability; however, that student must receive educational services commencing with the 11th school day of exclusion in a school year so as to enable them to continue participating in the general curriculum, though it might be in another setting, and enable them to make progress toward meeting IEP goals, and receive, where appropriate an FBA and/or behavioral intervention services and modifications that address and attempt to prevent the conduct giving rise to the discipline. 34 C.F.R. § 300.530(c)(d).

Relevant law provides for special circumstances, where a public agency may remove a student to an Interim Alternative Educational Setting (IAES), regardless of whether or not the behavior is a manifestation of the student's disability, for a period of not more than 45 school days for certain types of conduct, including carrying or possessing a weapon on school grounds. 34 C.F.R. § 300.530(g). As with a student whose behavior is found not to be a

manifestation of their disability, a student who is removed to an IAES must continue to receive educational services as described above. 34 C.F.R. § 300.530(d).

These well-established provisions of law serve to create a condition precedent, such that in order for a student with a disability to be subject to a disciplinary removal that constitutes a change in placement based on a violation of the code of student conduct, an appropriate MDR must be completed before the public agency's disciplinary policies and procedures are applied. As articulated in Issue One, above, DCSD failed to appropriately conduct an MDR in this matter, thus the condition precedent was not satisfied and the disciplinary change in placement should not have been effectuated for this Student.

The undisputed facts in this matter indicate that the Student was removed from school, for a period exceeding 10-days, following the March 18, 2019 disciplinary incident, and remained out of school through the end of the 2018/2019 school year. (FOF #6, #7)

Parent's State Complaint and supporting documentation allege that appropriate educational services were not provided to the Student during this removal, and, by failing to respond as explicitly noticed by the NDE, DCSD concedes this allegation. (FOF #8)

In addition to this procedural concession, the facts further establish that, more than a month after that change in placement, the Student's IEP Team did convene and revise the Student's IEP; and, DCSD evidenced its intent to provide the Specially Designed Instruction by establishing an amount of 60 minutes per week of services, providing a PWN for delivery of these services and communicating with the Parent regarding scheduling the services. (FOF #8, #9, #11, #12) However, the revision of the Student's IEP was predicated on the disciplinary removal that did not comply with the IDEA, 20 U.S.C. §§ 1400 et seq., given the lack of a legally sufficient MDR, as set out above, and was, therefore, not appropriate. Furthermore, even if the MDR had been appropriately

conducted, no provisions were made for the Student to access the general education curriculum and no behavioral interventions were developed and/or implemented to prevent future behavioral incidents. (FOF #8, #9) Additionally, no provision was made for the implementation of the Supplemental Aids or Related Services identified in the Student's IEP. (FOF #10)

Therefore, DCSD failed to comply with the requirements of the IDEA and the NAC, Chapter 388, in the provision of appropriate educational services to the Student following the March 21, 2019 MDR.

Order of Corrective Action

DCSD is required to take corrective action to address the violations found in this Complaint, specifically DCSD failed to conduct an appropriate MDR on March 21, 2019 and failed to provide required educational services to the Student following the disciplinary incident on March 18, 2019.

In accordance with NRS § 385.175(6), the NDE requests a plan of corrective action (CAP) from DCSD within 20 days of the receipt of this Report. The CAP must indicate the timeline within which it will be implemented and provide for the following:

MDR

- No later than the start of the 2019/2020 school year, DCSD will schedule an MDR, at which time the team, including the Parent, will consider the Student's 3/18/2019 misconduct; explicitly address each of the factors as required by law; and make a determination whether the identified misconduct was a manifestation of the disability of the Student.³ The team will further complete the required report detailing the findings and conclusions of this MDR. If this MDR is not completed prior to the start of the 2019/2020 school year, the Student must be returned to a placement consistent with the Student's 10/16/2018 IEP in effect at the time the disciplinary incident occurred; or, in the alternative and consistent with IDEA and NAC, the Student may be placed in an IAES for no more than 45 school days and with all requisite educational services. The CAP must also

include a plan of action describing how the DCSD will comply with the IDEA, 20 U.S.C. §§ 1400 et seq., and NAC 388.265 if the 3/18/2019 misconduct is determined to be a manifestation of the Student's disability and, alternatively, if the misconduct is determined not to be a manifestation of the Student's disability.⁴

Compensatory Educational Services⁵

- DCSD will provide: for participation in the general curriculum by providing make-up work for each of the subjects in which the Student was enrolled for work completed in those subjects from the 11th day of the Student's exclusion following the March 18, 2019 disciplinary incident through the end of the 2018/2019 school year; no less than 80 minutes per week of Specially Designed Instruction for each week from the 11th day of the Student's exclusion following the March 18, 2019 disciplinary incident through the end of the 2018/2019 school year consistent with the 10/16/2018 IEP; and any outstanding balance of minutes due from the Student's 60 minutes per year of the Related Service of Occupational Therapy. The DCSD will consult with the Student's Parent in the determination of the appropriate scheduling and method of delivery of these compensatory educational services, and all services shall be delivered by no later than the conclusion of the first semester of the 2019/2020 school year and be in addition to the Specially Designed Instruction in the Student's 10/16/2018 IEP, or any subsequently revised Student IEP in effect at the time of the delivery of the compensatory Specially Designed Instruction.

In consideration of the 1 1/2 hours of notetaking strategies provided by the Director of Special Education to the Student, and confirmed by the Parent, which are services consistent with the Student's 10/26/2018 IEP, upon calculation of the total service minutes to be provided consistent with the above paragraph, 90 minutes may be deducted from the total.⁶

The CAP must be approved by the NDE prior to

implementation. Following the DCSD's implementation of the approved CAP, the DCSD must submit a report to the NDE documenting the implementation of the approved CAP no later than 30 calendar days after implementation.

¹Both the DCSD and Parent submitted a copy of the Student's IEP dated 10/16/2018. Neither 10/16/2018 IEP copy submitted was signed. The DCSD copy was missing at least one page and appeared to have some edits made after the 10/16/2018 (e.g., dates in Supplementary Aids chart); therefore, Parent's copy of the 10/16/2018, which Parent confirmed was a final copy of what was to be implemented after the 10/16/2018 meeting, was relied upon in determining these Findings of Facts.

²Throughout the document the plural pronouns their/them will be used in place of he/she or his/her to further preserve Student's confidentiality.

³Nothing in this Report and Order of Corrective Plan shall be interpreted to constitute a limitation on the Parent or DCSD's rights under IDEA for appeal/review of the MDR determination.

⁴It should be noted that subsequent to the 3/18/19 incident of misconduct, NRS Chapter 392 was revised and the revised statute went into effect July 1, 2019. AB168, Chapter 559, Statutes of 2019.

⁵The compensatory educational services award in this matter is made consistent with the requirement, recognized by Courts of competent jurisdiction, that a student with a disability is entitled to the compensatory education time as is required to provide him with an appropriate education. *Parents of Student W. v. Puyallup Sch. Dist.*, 21 IDELR 723 (9th Cir. 1994)

⁶Documentation submitted by DCSD indicated an additional 2 hours of "Transition" services provided which are not credited because they do not clearly correlate to the services identified in the 10/16/2018 IEP. No further documentation was submitted during the course of the investigation evidencing that additional hours were provided by DCSD to the Student after 6/15/2019. (FOF #12)

Cases Cited

31 F.3d 1489 I 21 IDELR 723 -- Followed, as to Secondary Issues