



The New York City Department of Education

Impartial Hearing Office

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DECISION OF IMPARTIAL HEARING

July 3, 2006

MARGARITA GOMEZ

NEW YORK, NY 10026

RE: JONATHAN GOMEZ

Case # 104778

Decision Findings of Fact and Decision

Enclosed please find the hearing officer's decision in the above referenced matter.

Please refer to the enclosed information if you have any questions regarding the implementation of the decision or the appeal process.

Thank you.

FINDINGS OF FACT AND DECISION

Case Number:	104778
Student's Name:	Jonathan Gomez
Date of Birth:	May 16, 1993
District:	3
Hearing Requested By:	Parent
Dates of Hearing:	June 14, 2006 June 28, 2006
Hearing Officer:	Morton A. Cohen, Esq.

Hearing Officer's Findings of Fact and Decision

Case No. 104778

NAMES AND TITLES OF PERSONS WHO APPEARED JUNE 14, 2006

Betsy Combier	Advocate	Parent
Margarita Gomez	Mother	
Jonathan Gomez	Student	
Barbara Advocate	Chairperson Designee, CSE, Region 10	Department of Education
Aris Peguero (via telephone)	Psychologist	Department of Education
Shauna Thigpen (via telephone)	Guidance Counselor	Department of Education

NAMES AND TITLES OF PERSONS WHO APPEARED JUNE 28, 2006

Betsy Combier	Advocate	Parent
Margarita Gomez	Mother	
Barbara Advocate	Chairperson Designee, CSE, Region 10	Department of Education
Rose Haferd	Psychologist	Department of Education
Bertha McGhee	Assistant Principal	Department of Education
Elana Elster	Principal	Department of Education

Case No. 104778

On June 14, 2006, I held a hearing as an Impartial Hearing Officer pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f)(3). Parent initiated the hearing by submission of a request for an expedited impartial hearing by letter on May 25, 2006, to challenge the decision, by the Board of Education (Department), made at a Manifestation Determination hearing that found Parent's child (Jonathan) had physically attacked another child and that this attack was not due to Jonathan G.'s disability.

A hearing was scheduled for June 14, 2006, at 12:30 p.m. at the Impartial Hearing Office, 131 Livingston Street, Brooklyn, New York. Prior to the hearing, Parent presented four subpoenas for four employees of the Department to appear. I issued the four subpoenas commanding these four individuals to appear in person, or in the alternative, to appear by telephone, provided that each telephone Melissa Machado, the case manager for this matter, at the Impartial Hearing Office, by 12:30 p.m. on June 14, 2006, to advise Ms. Machado of a telephone number where they could be reached. I have been advised by Ms. Machado that the subpoenas were served on the Department. However, not one of the subpoenaed persons appeared in person or called as ordered. In addition, at the hearing, the Department representative, Barbara Advocate (Advocate) stated that Department employees are not available to testify after 3:00 p.m.

One of the subpoenaed persons was reached by telephone and did testify. The other three did not testify and the matter was continued to June 28, 2006, at 9:30 a.m. On June 28, 2006, the hearing was concluded. All transcript references are from the June 14, 2006 hearing. The transcript for June 28, 2006, was not ready in time for the preparation of this decision.

THE INTERIM ORDER

Following the June 14, 2006 hearing date, an Interim Order was issued. I found the delays precipitated by the Department due to the reluctance of the Department employees to respond to the subpoenas and to testify at the June 14, 2006 hearing prevented Jonathan from obtaining an expedited hearing. In addition, I found the Interim Alternative Education Setting (IAES) was not providing Jonathan with the services recommended in his Individualized Education Program (IEP) dated March 16, 2006. As

Case No. 104778

a result of the above, an Interim Order was issued on June 15, 2006, to have Jonathan returned immediately to MS 54, where he had been attending and receiving his services. The Interim Order was to remain in effect until the issuance of this decision.

Although it was not mentioned in the Interim Order, upon information obtained during the June 28, 2006 hearing, Jonathan was suspended from MS 54 on April 11, 2006 and transferred to Choir Academy of Harlem (Choir), aka the Alternative Learning Center, 2005 Madison Avenue, N.Y., N.Y. As of June 14, 2006, Jonathan was still assigned to Choir. The Department was in violation of 8 NYCRR 201.11(d) that limits the suspension period to 45 days.

BACKGROUND

Jonathan is a thirteen-year-old boy who was attending MS 54, 103 W. 108th St., N.Y., N.Y., a public school, in the 6th grade for the 2005-2006 school year. On an IEP dated March 16, 2006, Jonathan was classified as "Emotional Disturbance." Placement in a 12:1:1 class with related services of 2 weekly counseling periods, 40 minute sessions, in 1:1 and 1:3 settings was recommended. Classification and placement at MS 54 are not contested.

On April 7, 2006, Jonathan and another student were involved in a physical altercation (Exh. 1, p. 1). The Department suspended Jonathan on April 11, 2006, at which time Jonathan was transferred to Choir. A subsequent Superintendent's hearing on May 4, 2006, conducted in accordance with 8 NYCRR 201.9(c)(1)(2), established Jonathan's guilt for misconduct.

At a Manifestation Determination Review (MDR) on May 19, 2006, conducted pursuant to 8 NYCRR 201.4(a)(3), it was determined that Jonathan's actions in the altercation were not a manifestation of his disability (Exh. 5, p. 4). The hearing officer, by order dated May 23, 2006, placed Jonathan at Choir for an additional 26 school days, effective May 23, 2006 to June 28, 2006. Reinstatement to MS 54 was ordered for September 5, 2006.

THE DEPARTMENT OF EDUCATION'S POSITION

The Department contends that it is in full compliance with procedural and substantive requirements of federal and state regulations in the conduct of the MDR.

Case No. 104778

All available evaluations and diagnostic results, including family history, observations of the student, and the student's IEP and placement were considered.

Prior to the MDR, Rose Haferd (Haferd), who made the final determination at the MDR, interviewed Shauna Thigpen (Thigpen), Bertha McGhee (McGhee), Elana Elster (Elster), and Stephanie Aronoff (Aronoff), Jonathan's teacher.

Thigpen, Jonathan's guidance counselor, was also at the MDR. She believes that Jonathan gets along with some of his classmates (Tr. At 85), but has issues with teachers (Tr. At 86). It is her opinion that since Jonathan's behavior this year is greatly improved, the conduct he exhibited on April 7, 2006, is completely out of character for him and, therefore, is not a manifestation of his disability. Thigpen states Jonathan is not a "violent student" (Tr. At 85).

McGhee did not testify at the MDR but did provide information to Haferd. She believes Jonathan knows the difference between right and wrong and is capable of controlling his behavior. She states Jonathan has "no history of difficulties with other children." There was an incident with a teacher, but Jonathan has issues with authority figures. She has spoken to Jonathan's teachers and they report there are no problems with Jonathan in the classroom. In addition, she is unaware of any inappropriate behavior or threats Jonathan may have demonstrated in the school yard (yard). This spring, Jonathan has had to report to her office only once for discipline reasons.

Elster did not testify at the MDR but provided information to Haferd. She recalls that prior to April 7, 2006, there were no incidents of physical aggression toward another child. She feels Jonathan knows right from wrong and his disability does not impair his knowing the consequences of his actions. Prior to April 7, 2006, there was only one occasion to meet with Parent. At that meeting, Elster and Parent discussed Jonathan's absences from class, leaving his seat when in the auditorium, and Jonathan following people in the yard.

Thigpen, McGhee, and Elster all agree that the incident of April 7, 2006 was out of character for Jonathan and is not a manifestation of his disability.

Case No. 104778

Haferd passed the information obtained during her investigation to Dr. Chris Peguero (Peguero). At the MDR, Peguero expressed his opinion that the incident of April 7, 2006 was not a manifestation of Jonathan's disability.

A thorough investigation was conducted by Haferd, all pertinent documents were presented to her, all anecdotal observations were relayed to her, and she made a decision.

After considering the information provided by Thigpen, McGhee, Elster, Aronoff, Peguero, and the Parent, Haferd made a decision that Jonathan's altercation was not a result of his disability.

PARENT'S POSITION

Parent contends that the MDR was not in compliance with federal and state law. The MDR was not conducted in compliance with the standards set forth in 8 NYCRR 201.4(c)(1)(2).

Not all evaluation and diagnostic results were considered. As far back as May 22, 2001, a "social history report" prepared by Samuel M. Daniel (Daniel) shows Jonathan has a history of a "lot of fights" (Exh. E).

A "counseling report" by Stephanie McGary (McGary), dated April 14, 2004, indicates Jonathan's proclivity for "physical fights have decreased markedly over the last year" but "he is impulsive and when left unsupervised, he is likely to get into trouble. Jonathan needs a tremendous amount of supervision" (Exh. C, p. 1).

An "attendance sheet" prepared by Thigpen for her counseling sessions with Jonathan indicates Jonathan was suspended twice this year prior to the April 7, 2006 altercation (Exh. 5, p. 5).

A "Records Cover Sheet" (Exh. G, p. 4), prepared by McGhee, notes the two prior suspensions were for "tripping a student on steps" and "pushing a teacher." His "Disciplinary Record" on the same document indicates "harassment/students." Under "Teacher Comments," it is noted that Jonathan "is abusive toward his peers" and requires "constant supervision."

The Behavior Intervention Plan (BIP) of January 21, 2006, incorporated into the IEP of March 16, 2006, indicates "behaviors that are of high priority as they affect the safety of peers and teachers (emphasis added): "pushing," "throwing objects at peers,"

Case No. 104778

etc. The section of the BIP dated March 16, 2006 mentions "aggression"(sic) towards peers and teachers, but no one from the Department can explain if this means verbal or physical aggression.

Parent did have one formal meeting with Elster about Jonathan's behavior. However, she had approximately 10 chance meetings with Elster in and about the school at which time Parent discussed Jonathan's problems in the yard, particularly in relation to the availability of balls used for play. McGhee and Elster frequently advised Parent that there were problems in the yard about balls.

Due to misconduct, Jonathan was required to report to McGhee's office as often as 3-4 times per week. Parent was called all these times and came to the school. She would find Jonathan at McGhee's office. Most often, this was after the lunch period and the discipline arose from Jonathan's actions in the yard.

One week prior to the April 7, 2006 incident, Parent was called to school when Jonathan was accused of ripping a chair out of the auditorium. He had destroyed the chair. Elster spoke to Parent about this incident. Following this incident, Elster stated that Jonathan was a "danger" to others.

The content and/or meaning of all these documents were not given to Haferd nor was she informed of the frequent anecdotal evidence of Jonathan's behavior that connected Jonathan's disability to the altercation. Haferd did not have this evidence and relied on the misrepresentations of others in making her decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department must demonstrate that the student's behavior subject to disciplinary action was not a manifestation of the student's disability (20 U.S.C. § 1415[k][6][B][i]; 34 C.F.R. § 300.525[b]; 8 NYCRR 201.11[a][3]). A student's behavior may be found not to be a manifestation of the student's disability only if the IEP team, in this case the subcommittee,

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

Case No. 104778

- (II) observations of the child;
 - (III) the child's IEP and placement; and
- (ii) then determines that –
- (I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
 - (II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
 - (III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(20 U.S.C. § 1415[k][4][C]; 34 C.F.R. § 300.523[c]; 8 NYCRR 201.4[c]. Further, if the IEP team and other qualified personnel determine that any of the above three criteria are not met, the student's behavior shall be considered a manifestation of the student's disability (34 C.F.R. § 300.523[d]; 8 NYCRR 201.4[d]).

When undertaking a manifestation determination, the relevant question is not limited to the relationship between the specific educational deficits listed in the IEP and the conduct that resulted in the disciplinary action, but takes into account the broader relationship between the student's disability (including associated conduct) and the behavior subject to discipline (See 20 U.S.C. § 1415[k][4][A][ii]; 34 C.F.R. § 300.523[a][2]; 8 NYCRR 201.4[a]). The manifestation determination must consider needs that currently exist but which have not been previously identified (Waynesboro Area Sch. Dist., 34 IDELR 167 [SEA Pa. 2001]), and disabilities that the student may have but have not yet been identified (Richland School District v. Thomas P., 32 IDELR 233 [W.D. Wis. 2000]). (See Application of a Child with a Disability, Appeal No. 02-064).

With respect to the obligation to consider all relevant information, I find that Haferd did not consider relevant evaluations, observations, and other information with respect to Jonathan. Haferd admits she never saw the "Records Cover Sheet" prepared by

Case No. 104778

McGhee. Nowhere in the record does she state she was given or shown the McGarry "counseling report," or the Thigpen "attendance sheet."

When questioned about the BIP, she was unaware as to whether the "aggression" referred to in the BIP was verbal or physical. She at first dismisses the "pushing" of peers to be playful, but later concedes this type of interaction would not be considered "aggression."

She admits to having learned of the problems in the yard but did not believe it was serious misconduct although she later concedes that threats of physical harm may have been made.

The information she received from the Department witnesses that Jonathan was not violent are inconsistent with Jonathan's history and record of behavior.

Thigpen's statement that Jonathan only has issues with authority figures is knowingly not accurate. The entire documentary record supports the position that Jonathan not only has issues with his peers and that these issues may end in a violent act. Her admission that Jonathan "lunges with his hands" at other students, and her own attendance sheet which notes Jonathan's suspensions prior to the April 7, 2006 incident clearly show the information she provided to Haferd was not complete.

The information provided to Haferd by Elster and McGhee is also incomplete. I credit the testimony by Parent and Jonathan as to the frequency he has been sent to McGhee's office for discipline and that the cause of these visits is his behavior in the yard, as well as their testimony regarding conversations with McGhee and Elster.

McGhee's testimony that Jonathan has no history of difficulties with other children directly contradicts her very own document, the "Records Cover Sheet," that clearly indicates Jonathan has a history of abusive behavior toward his peers and specifically mentions a physical attack on another student. This is the document Haferd states she never saw.

Likewise, Elster's claim that there were no prior incidents of physical aggression towards other children is directly contradicted by the "Records Cover Sheet." I also credit Jonathan's statement that Elster called him a "danger" to others prior to the April 7, 2006 incident. If McGhee and Elster placed their statements, that there were no prior

Case No. 104778

difficulties or physical attacks, on the record in these proceedings, it is improbable they stated anything different to Haferd or supplied her with any of the documents that Haferd needed to make an educated ruling at the MDR.

The testimony of Peguero at the MDR is also of little use. He has had little contact with Jonathan. Since 2001, he has not provided any services to Jonathan and has not been in contact with him (Tr. At 51). He did not interview anyone prior to his appearance at the MDR. He based his opinions on the information supplied to him by Haferd from her investigation, including that Jonathan has no recent history of violent behavior (Tr. At 55). Peguero states that he formed his opinions that Jonathan had no difficulties with his peers "according to what teachers have observed, and the counselor also."

Peguero goes on to state "yes, yes, he needs supervision because he cannot control his behavior in very unstructured settings, and that seems to be a recent development" and that in the yard "he would be more likely to manifest, to have less control over his behavior" (Tr. At 57-58).

Having found that Haferd did not consider relevant evaluations, observations, and other information with respect to Jonathan at the MDR, I further find that Haferd did not make determinations concerning the relationship between the appropriateness of Jonathan's IEP and the misconduct, and the effect of his disability upon his ability to control his behavior, which Haferd is required to make pursuant to 20 U.S.C. § 1415(k)(4)(c)(ii) prior to concluding that his behavior was not a manifestation of his disability. The record at the impartial hearing is silent on this point. In any case, as Haferd admits she was unaware as to what was meant by "aggression" in the IEP, she would be unable to ascertain whether Jonathan could control his "aggression."

It is my finding that Jonathan has a history of aggressive behavior relating to his emotional disturbance that needed to be addressed in his IEP. There have been sufficient warnings by his previous psychologist and his current teacher that Jonathan requires strict supervision at all times, particularly in unstructured settings, as noted by the frequency of his misbehavior in the yard (See Exh. C, p. 1 and Exh. G, p. 4). These issues were not appropriately addressed in the IEP. Indeed, there was confusion expressed on the record

Case No. 104778

as to whether or not the BIP applied outside the classroom. The record does not show that, in relationship to the April 7, 2006 incident, Jonathan's IEP was appropriate, particularly when the principal considers Jonathan to be a "danger" prior to April 7, 2006. If Jonathan was a danger, the Department should have taken measures to address his misbehavior, whether it was old or a recent change, by reconvening the CSE and creating a new IEP providing supervision during unstructured time.

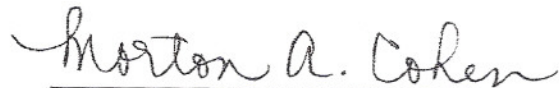

Having determined that the MDR was not conducted in accordance with 8 NYCRR 201.4(c), the following is Ordered:

ORDER

1. The MDR of May 19, 2006 is declared a nullity and any notations of the suspension, due to the April 7, 2006 incident, shall be expunged from all school records.
2. A related services authorization (RSA) shall be issued within 7 days of the date of this Order, for Jonathan for counseling services, 14 sessions of 40 minute duration each, to be used until September 1, 2006.

Within 60 days of this Order, the CSE shall reconvene and devise an IEP for Jonathan that will include a provision for supervision during school time when Jonathan is not in class.

Dated: July 3, 2006


MORTON A. COHEN, ESQ. 
Impartial Hearing Officer

MAC:jm

PLEASE SEE FOLLOWING PAGE FOR APPEAL NOTICE

Case No. 104778

DOCUMENTATION ENTERED INTO RECORD JUNE 14, 2006

A.	Part 201 Regs., Undated, 3 pp.	Parent
B.	IEP, 3/16/06, 10 pp.	Parent
C.	Counseling Report, 4/14/04, 2 pp.	Parent
D.	Parent Interview, Undated, 3 pp.	Parent
E.	Social History, 5/22/01, 9 pp.	Parent
F.	Report Card, 4/25/06, 2 pp.	Parent
G.	Suspension Papers, 4/7/06, 11 pp.	Parent
H.	FOIL Request, 2/7/05, 3 pp.	Parent
I.	IDEA Sections, Undated, 8 pp.	Parent
1.	Suspension Hearing Notice, 4/10/06, 7 pp.	Department of Education
2.	IEP, 3/16/06, 12 pp.	Department of Education
3.	Notice to Conduct MDR, 5/9/06, 2 pp.	Department of Education
4.	Disposition of Hearing, 5/23/06, 6 pp.	Department of Education
5.	Notice of MDR, 5/10/06, 8 pp.	Department of Education
6.	Anecdotal Material, Undated, 5 pp.	Department of Education
7.	Psychological Evaluation, 2/18/04, 5 pp.	Department of Education