

Division of Administrative Hearings  
State of Colorado

Case No. **ED 99-04 (S99:105)**

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**Decision Upon State Level Review**

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[Student], by and through his parent, [Parent],

Petitioner – Appellant,

v.

**Jefferson County School District R-1,**

Respondent – Appellee.

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This matter is a state level review of the decisions of an Impartial Hearing Officer (IHO) after a due process hearing pursuant to the Individuals with Disabilities Education Act, (IDEA) 20 USC §§ 1400 *et seq.* A local level evidentiary hearing was held before the IHO on April 20, May 5, and May 6, 1999. The IHO in case number L99-105 issued “Findings and Decision” on May 17, 1999, and an “Addendum to Previous Findings and Decision” on July 6, 1999.

This decision will not contain the name of the student or the parent other than on this first page. State Plan, Part II, VII, 4, e, (3), and Part II, VII, 9, f. In this decision [Student] will be referred to as the ‘Student’, [Parent] as the ‘Parent’, and Jefferson County School District R-1 as the ‘District’.

The Student through his Parent filed an appeal. Neither party requested the opportunity to present additional evidence on state level review. No additional evidence was received. The record of the proceedings below consisting of exhibits and the IHO’s orders has been received and considered. The parties agreed that transcripts or tape recordings of the hearings were not to be included in the record. No transcript or tape recording of the hearings before the IHO has been received or considered. Briefs from both parties have been received and considered. This matter was set for oral argument on September 7, 1999. The Parent failed to appear for oral argument, and the hearing was vacated.

**IHO Decisions**

The IHO, in his decision of May 17, 1999, determined that:

1. The holding of a manifestation determination hearing on February 10, 1999, was proper;
2. The Student’s disability did not prevent the Student from understanding the rules;

3. There is no requirement that the IEP team consider an opinion from a medical practitioner before making its determination;
4. The IEP team's conclusion that the Student's placement was appropriate was reasonable;
5. The District did not violate the "stay put" provision of the IDEA;
6. Except for the requirement that the Parent take certain actions, the objections of the Parent to the behavior plan were denied;
7. Good cause exists for an independent educational evaluation to be conducted by an evaluator chosen by both of the parties or the IHO. Following completion of the evaluation the IEP team is to meet and consider the evaluation;
8. When the IEP team reconvenes, the Principal of the Student's school may attend and join in any discussion, but shall abstain from participating in the decision;

The IHO, in his "Addendum to Previous Findings and Decision" of July 9, 1999, determined that:

9. The Parent and the District did not agree on an evaluator and the Parent refused to allow the Student to be evaluated by an evaluator to be chosen by the IHO; and
10. The manifestation hearing was proper, and no further manifestation hearing is necessary.

### **Issues on Review**

This issues on review are:

1. Was the School Principal's participation in the manifestation hearing improper so as to require a new manifestation hearing?
2. Should the IEP team reconvene the manifestation hearing and consider additional information provided by an evaluator of the Parent's choice?
3. Should the District be required to pay for an evaluation of the Student by an evaluator of the Parent's choice?
4. Did the IHO violate the rights of the Parent by rejecting the Parent's choice of an independent evaluator?

## **Findings of Fact**

1. The Student was born [D.O.B.]. The Student has a Perceptual or Communicative Disability and cannot receive reasonable benefit from regular education alone. The Student qualifies for services under the IDEA. The Student was enrolled in the 9th Grade at [High School].
2. The Student allegedly burned another student on the school bus on January 21, 1999. The School Principal investigated the alleged incident.
3. A manifestation hearing was held on February 10, 1999. Present at that meeting was the Student's IEP team. Those present at the meeting were [School Principal], School Principal; [Assistant Principal], Assistant Principal; [Social Worker], Social Worker; [Special Education Teacher], Special Education Teacher and primary provider; [Educational Consultant], Educational Consultant; [Counselor], Counselor; [Resource Teacher], Resource Teacher; [P.E. Teacher], P.E. Teacher; [Psychologist], Psychologist; [Nurse Consultant], Nurse Consultant; [Director], Director, Intervention Services; and the Parent. [Director] conducted the hearing.
4. At the manifestation hearing the School Principal described the Student's alleged conduct. The School Principal stated that the Student burned a middle school student on a bus. The Student allegedly lit a lighter until the metal end was hot, and then pressed the hot metal against the neck of a student. The School Principal alleged that the Student's action was unprovoked. The Parent objected to the Principal's comments.
5. At the manifestation hearing the Parent expressed a concern that the IEP was not being met. Those present at the meeting determined that the Student was receiving an appropriate education at the time of the alleged infraction.
6. Those present at the meeting discussed whether the Student's alleged behavior may have been a manifestation of his disability. The Parent commented that the Student may not have been aware of the consequences of burning somebody. [Psychologist] commented that the Student's behaviors and emotions may have impaired him. [Nurse Consultant] commented that the Student's impulses may be part of this disability.
7. The Parent objected to a determination of whether the alleged behavior was a manifestation of his disability on the ground that nobody present was qualified to make the determination. A vote of those present was taken. One was not sure, one stated he was not qualified to make the determination, and the remainder voted that the Student's alleged behavior was not a manifestation of his disability. The IEP team determined that the behavior was not a manifestation of the Student's disability.
8. The IEP team at the manifestation meeting recommended that the District proceed with the expulsion proceedings.
9. An expulsion review hearing was held on February 16, 1999. It was determined that the Student's behavior on January 21, 1999, constituted "behavior on or off school property which is

detrimental to the welfare or safety of other students... including behavior that creates a threat of physical harm to the student or to other students.” The Student was expelled for one year to January 21, 2000.

10. The Parent requested a due process hearing to review the manifestation determination of the IEP team.

11. After holding hearings, the IHO issued his “Findings and Decision” on May 17, 1999. The IHO ordered that an evaluation be conducted by an outside evaluator at District expense. The IEP team was ordered to reconvene to reconsider the manifestation determination after the new information was available. The Order provided that the parties would agree on who was to perform the evaluation. The IHO was to name the evaluator if there was no agreement.

12. The IHO in his “Findings and Decision” of May 17, 1999, refers to a memo from the Colorado Department of Education dated March 27, 1996. The Department stated that the manifestation determination should not be made by the same individuals responsible for the school’s regular disciplinary procedures. The IHO ordered that the School Principal could attend when the IEP team reconvened the manifestation hearing, but the School Principal was not to participate in the IEP team’s decision. The IHO stated, “One ought not to act as policeman, prosecutor, and juror.”

13. The Parent requested that [Doctor 1] perform the evaluation of the Student. The District objected on the ground that [Doctor 1]’s practice was limited to ADHD issues. The District also objected on the ground that [Doctor 1] was not independent because he had previously examined and treated the Student. The District requested that [Doctor 3] or [Doctor 2] perform the evaluation. The Parent objected to anyone conducted the evaluation other than an evaluator he selected.

14. The IHO conducted a telephone hearing on June 14, 1999, and issued a modified order on June 15, 1999. The IHO ordered that [Doctor 1] not perform the evaluation because he had previously treated the Student. The IHO found the two potential evaluators named by the district to be qualified. The IHO gave the Parent three options: (1) the Parent agree to an evaluation of the Student to be performed by either [Doctor 3] or [Doctor 2]; (2) the Parent agree to an evaluation of the Student to be performed by an evaluator chosen by the IHO, or (3) the Parent refuse testing and elect not to participate in an evaluation. The IHO ordered that the Parent respond by June 23, 1999.

15. The Parent responded to the Order of June 15, 1999, by a letter dated June 21, 1999. The Parent objected to either [Doctor 3] or [Doctor 2] performing the evaluation and again requested that [Doctor 1] perform the evaluation. The Parent argued that the evaluation would be treatment, and that he had the right to determine who would treat the Student.

16. The IHO entered a ruling on the Parent’s response on June 25, 1999. The IHO found that the evaluation would not constitute treatment. The IHO ruled that the Parent had apparently elected to refuse testing and not to participate in an evaluation. The IHO granted the parties until

July 2, 1999, to show why he was incorrect in his finding that the Parent elected to refuse testing and to show why the IHO should not proceed to conclude the due process hearing.

17. The Parent responded by letter dated June 29, 1999, to the IHO order of June 25, 1999. The Parent rejected the option of selecting one of the evaluators suggested by the District, and rejected the option of an evaluator to be named by the IHO. The Parent again requested that [Doctor 1] perform the evaluation.

18. The IHO issued an “Addendum to Previous Findings and Decision” on July 9, 1999. The IHO ruled that the Parent had in fact refused to participate in any evaluation not controlled by him. The IHO further ruled that the manifestation hearing was properly conducted and that no further manifestation hearing was required. The IHO noted that the decision was final and concluded the appeal. The Parent appealed the IHO’s order of July 9, 1999.

### **Conclusion of Law**

#### **1. Was the School Principal’s participation in the manifestation hearing improper so as to require a new manifestation hearing?**

The School Principal investigated the complaint regarding the allegation that the Student had burned another student on the school bus on January 21, 1999. The School Principal commented on his investigation and conclusions at the manifestation hearing on February 10, 1999. The School Principal also fully participated in the IEP team’s deliberations on February 10, 1999. The participants in the manifestation hearing, including the School Principal, concluded that the Student’s behavior was not a manifestation of his disability and permitted the disciplinary action to proceed.

The IHO in his “Findings and Decision” of May 17, 1999, refers to a memo from the Colorado Department of Education dated March 27, 1996. The Department stated that the manifestation determination should not be made by the same individuals responsible for the school’s regular disciplinary procedures. The School Principal conducted the investigation into the Student’s conduct, and fully participated in the manifestation hearing. The IHO ordered that when the IEP team reconvenes for the manifestation hearing the Principal may attend and join in any discussion, but shall abstain when the IEP team makes its decision relative to the manifestation issue. The final order of the IHO does not require any further manifestation hearing and upholds the conclusion of the IEP team after the manifestation hearing on February 10, 1999.

The manifestation hearing must be conducted by the Student’s IEP team and “other qualified personnel”. Section 300.523(b). The IEP team must include persons with authority to make building level decisions regarding service delivery. 1CCR 301-8 §4.02(3)(a)(v). Members of the IEP team also include persons who have information relevant to the functioning, achievement and performance of the child. 1 CCR 301-8 §4.02(3)(a)(vi). The IEP team consists of individuals knowledgeable about the child. The IEP team is unlike a jury, where the jurors are to have no or little knowledge concerning the individuals involved.

The school principal fits within the description of persons who are to participate in the Student's IEP team. He is a proper member of the Student's IEP team. He should be a full participant in the decision making process during the manifestation hearing. There was nothing improper in the Principal's full participation in the manifestation hearing on February 10, 1999. The IHO did not err in refusing to require a new manifestation hearing in his last order.

**2. Should the IEP team reconvene and consider additional information provided by an evaluator of the Parent's choice?**

The IEP team at its manifestation hearing did not have any evaluations from experts as to whether the Student's behavior was a manifestation of his disability. A manifestation hearing is required before there is any change in placement of a child with a disability. Section 34 CFR 300.523. It must be determined that the Student's IEP and placement were appropriate in relationship to the behavior subject to disciplinary action. It must also be determined that the Student's disability did not impair the ability of the child to understand the impact and consequences of the behavior, and that the Student's disability did not impair the ability of the child to control his behavior that is subject to the disciplinary action. Section 34 CFR 300.523(c)(2). The IEP team at a manifestation hearing must consider all relevant information, including evaluation and diagnostic results. Results or other relevant information includes results or information supplied by a parent of the child. 34 CFR 300.523(c)(1). Information from an expert evaluation certainly would be helpful to the IEP team in making these determinations. However, there is no requirement in the IDEA or the rules that require the District to have an evaluation before the manifestation hearing.

The IHO may request an evaluation of the child. 34 CFR 300.503(d). Such an evaluation is to be at public expense. The IHO therefore acted within his discretion in ordering the evaluation. The Parent did not agree to an evaluation by either of the two doctors selected by the District and did not agree to an evaluation by an evaluator to be named by the IHO. The IHO acted within his discretion when he then withdrew the order for an evaluation.

No evaluation of the child is required prior to the manifestation hearing. Therefore the IEP team is not required to reconvene the manifestation hearing to consider any further evaluations.

**3. Should the District be required to pay for an evaluation of the Student by an evaluator of the Parent's choice?**

The Parent seeks an independent evaluation at public expense. A parent is entitled to an independent evaluation at public expense if a parent disagrees with an evaluation obtained by the public agency. 34 CFR 300.503(b); 20 USC §1415(b)(1). No evaluation was obtained in this case by a public agency. There is no evaluation for the Parent to disagree with. The Parent has a right to an evaluation in this circumstance, but not at public expense. The District has the right

to select the person to conduct the evaluation when the evaluation is at its expense. *Half Hollow Hills Central School District*, 21 IDELR 406 (SEA N.Y. 1994).

**4. Did the IHO violate the rights of the Parent by rejecting the Parent's choice of an independent evaluator?**

The Parent argues that an evaluation will necessarily lead to treatment by the evaluator. The IHO disagreed, as does the ALJ on this state level review. The independent evaluation will not lead to treatment by anyone unless the Parent agrees.

Schools do have the right to select individuals to evaluate children with disabilities. *Half Hollow Hills Central School District*, 21 IDELR 406, (SEA N.Y., 1994); *Vander Malle v. Ambach*, 673 F.2d 49 (2nd Cir. 1982). The Parent does not have a right to reject evaluation of the Student at public expense by an evaluator chosen by the District or the IHO.

**Order**

1. The School Principal's participation in the manifestation hearing was proper. A new manifestation hearing is not required.

2. The IEP team is not required to reconvene to consider additional information.

3. The District is not required to pay for an evaluation of the Student by an evaluator of the Parent's choice.

4. The IHO did not violate the rights of the Parent by rejecting the Parent's choice of an independent evaluator.

5. The IHO's Addendum to Previous Findings and Decision is affirmed.

6. This decision of the Administrative Law Judge is the final decision of the state level review. Any party may bring a timely civil action in an appropriate federal or state court. 20 U.S.C. §1415(e); State Plan, Part II, A, VII, B.

Dated: 15 September, 1999

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Bruce C. Friend  
Administrative Law Judge  
Division of Administrative Hearings