

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Daniel¹

BSEA #1504287

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Hearing Officer on the Motion of King Philip Regional School District for Summary Judgment, filed December 18, 2014, and the Student's² Cross-Motion for Summary Judgment, filed with his Opposition to the District's Motion for Summary Judgment on December 26, 2014. During a conference call held to discuss the matter, the parties requested that the Hearing Officer rule on these Motions without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. For the reasons set forth below, the District's Motion for Summary Judgment is DENIED in part, with respect to the manifestation determination issue and ALLOWED in part, with respect to the question of a Free and Appropriate Education. The Student's Motion for Summary Judgment is ALLOWED in part, with respect to the manifestation determination issue and DENIED in part, insofar as it seeks immediate reinstatement of Daniel to a special education placement.

PROCEDURAL HISTORY³

On December 11, 2014, Daniel filed a Request for Expedited Hearing with the Bureau of Special Education Appeals (hereinafter "BSEA") against the King Philip Regional School District (hereinafter "the District"), alleging that: (1) the District is currently denying Daniel a Free Appropriate Public Education (FAPE); (2) the District has violated its Child Find responsibilities by failing to move expeditiously to evaluate Daniel once he requested re-enrollment and special education services; and (3) that the District denied Daniel FAPE by expelling him without first conducting a manifestation determination review.

On December 15, 2014, expedited status was granted as to issues (1) and (3) only (hereinafter "the expedited issues"), and a Hearing before Hearing Officer Catherine Putney-Yaceshyn was scheduled for December 26, 2014 on these issues only, with the remaining issues to be addressed at a Hearing on January 15, 2015. The case was reassigned administratively to

¹ "Daniel" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Daniel is eighteen years old and he, not his parent, is the moving party in this case.

³ Both Daniel and King Philip Regional High School were parties to a previous matter before the Bureau of Special Education Appeals, BSEA #1408200. The parties had filed cross requests for expedited hearings on June 19, 2014. After Daniel withdrew from enrollment in the District on or about October 19, 2014, his Motion to Dismiss that matter, which was opposed by the District, was denied on October 28, 2014. After Daniel formally withdrew his consent for special education services from the District by letter dated October 29, 2014, the District withdrew its request for Hearing on October 30, 2014 and the case was subsequently dismissed.

this Hearing Officer on December 16, 2014 and the District requested that the first Hearing, scheduled for December 26, 2014, be postponed due to unavailability of counsel and witnesses. On December 18, 2014, the District filed a Motion for Summary Judgment, accompanied by a Memorandum of Law and supporting documents. During a conference call held on December 22, 2014 a brief postponement was allowed, with the assent of counsel for the Student, and the expedited portion of the case was rescheduled for Hearing on January 5, 2014.

Also during the conference call, as explained above, the parties requested that the Hearing Officer address the expedited issues on cross-motions for summary judgment pursuant to *BSEA Rule VII* without a Hearing, though January 5, 2015 was reserved in the event that both Motions for Summary Judgment were denied.⁴ Daniel filed his Opposition to the District's Motion for Summary Judgment and Cross-Motion for Summary Judgment, accompanied by a Memorandum of Law and supporting exhibits, on December 26, 2014. The District filed its Response to the Student's Cross-Motion for Summary Judgment and Opposition to the District's Motion for Summary Judgment on December 29, 2014.

DISCUSSION

A. Legal Standard for Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.” This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure.⁵ The party seeking summary judgment bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

In this case the parties each submit that there are no genuine issues of material fact in dispute that would prevent the grant of summary judgment on the expedited issues. Upon review of the Motions, Memoranda of Law, and exhibits submitted by the parties, this Hearing Officer agrees.⁶ The facts relevant to a decision on the expedited issues only, therefore, are summarized below, followed by an analysis of the law.

⁴ Given that this Ruling resolves the expedited issues, the January 5, 2015 hearing has been cancelled.

⁵ Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

⁶ Although disputes as to some of the facts exist, and I have noted these disputes in the footnotes, I find that none of these disputes is material to resolution of the expedited issues. See *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986) (“As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”)

B. Factual Findings

1. At some time during the fall of 2012, Daniel was charged with a delinquency felony for an incident that occurred on September 30, 2012.
2. At the time of the felony charge, Daniel was an identified special education student.
3. From December 2011 until either late September or early October 2012,⁷ Daniel attended the Primavera Center, a public day school, pursuant to an Individualized Education Program (IEP) developed by the District.
4. After Daniel was discharged from the Primavera Center, the District sent out referrals to several private day programs.
5. Daniel was placed at Bay Cove Academy following a Team meeting in November 2012, and began attending on December 14, 2012.
6. On May 9, 2013, Daniel received a suspended sentence with probation until the age of eighteen (18) in connection with the felony charge.⁸
7. In August or September, 2013,⁹ Daniel was detained and placed in the custody of the Department of Youth Services.
8. On September 12, 2013, Daniel was committed to DYS for a violation of the conditions of his probation.
9. Following a dispute over whether FAPE required a private day program or a residential placement for Daniel,¹⁰ Daniel withdrew from school by sending a letter to the District on October 16, 2014.
10. On October 29, 2014 Daniel withdrew from special education and revoked his consent for special education services from the District.
11. On November 17, 2014 counsel for Daniel informed counsel for the District by letter (hereinafter “November 17th letter”) that Daniel wished to re-enroll in the District.¹¹
12. The November 17th letter indicated that Daniel wished to retract both his withdrawal from school and his withdrawal of consent for special education.

⁷ According to the District’s Memorandum of Law, Daniel attended Primavera until approximately September 2012. According to Daniel’s Memorandum of Law, he attended until October 2, 2012. This possible discrepancy is not relevant to resolution of the expedited issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

⁸ The parties’ submissions do not make clear what led to the suspended sentence, i.e. whether Daniel was convicted, adjudicated delinquent, admitted to guilt, etc. This question, however, is not relevant to resolution of the expedited issues. *See id.*

⁹ According to the District’s Memorandum of Law, Daniel was detained by the Department of Youth Services (DYS) and placed at Centerpoint, an Intensive Residential Treatment Program, on September 17, 2013. According to Daniel’s Memorandum of Law, he was detained and placed in DYS custody on August 5, 2013, committed to DYS on September 12, 2013, and after several hospitalizations during DYS detention was placed at Centerpoint on February 10, 2014. Again, though these facts may be in dispute, I find that the dispute is immaterial to resolution of the expedited issues. *See id.*

¹⁰ As noted *supra* note 3, this matter came to the attention of the BSEA through the filing of cross Requests for Hearing. After Daniel withdrew his Hearing Request, withdrew from school and withdrew his consent for special education, the District withdrew its request for Hearing.

¹¹ This letter was submitted as Exhibit 1 in support of Daniel’s Motion.

13. On December 5, 2014, Daniel was provided with a Notice of Expulsion pursuant to M.G.L. c. 71, § 37H ½¹² based upon his 2012 felony conviction, adjudication of delinquency, or admission of guilt.¹³
14. An appeal of Daniel's expulsion is scheduled for January 12, 2015.
15. No manifestation determination review was held in connection with Daniel's December 5, 2014 expulsion.
16. Daniel had not been suspended or expelled previously in connection with the felony charge, suspended sentence, or DYS commitment.¹⁴

C. Legal Analysis

Given that there exists no dispute of material fact between the parties, summary judgment may be granted to a moving party who is entitled to prevail as a matter of law. Two legal questions are germane to resolution of the expedited issues: (1) Was Daniel entitled to a manifestation determination review prior to his expulsion; and (2) Is the District required to provide him with special education services immediately, pending resolution of the appeal of his expulsion and/or upon expulsion, because he is entitled to FAPE?

Daniel argues that because he was not provided with a manifestation determination review, his expulsion cannot stand. Moreover, he asserts that he remains eligible for special education and must be placed immediately in an appropriate educational program, ideally as a day student at Bay Cove Academy, in order to receive FAPE.

The District, on the other hand, asserts that because he withdrew consent for special education services, Daniel is a general education student. As such, he is entitled to neither a manifestation determination review nor FAPE during the pendency of his appeal or upon expulsion.

I shall address each issue in turn.¹⁵

¹² Pursuant to M.G.L. c. 71, § 37 ½, “[u]pon a student being convicted of a felony or upon an adjudication or admission in court of guilt with respect to such a felony or felony delinquency, the principal or headmaster of a school in which the student is enrolled may expel said student if such principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school. The student shall receive written notification of the charges and reasons for such expulsion prior to such expulsion taking effect. The student shall also receive written notification of his right to appeal and the process for appealing expulsion; provided, however, that the expulsion shall remain in effect prior to any appeal hearing conducted by the superintendent.”

¹³ As explained above, *supra* note 8, it is unclear whether Daniel was convicted, adjudicated delinquent, admitted guilt in court, etc. Neither of the parties has raised this issue before the BSEA at this time.

¹⁴ Pursuant to M.G.L. c. 71, § 37 ½, “[u]pon the issuance of a felony delinquency complaint against a student, the principal or headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster if said principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.”

¹⁵ Several additional issues were raised by the parties, including whether the District provided its notice to discontinue services based on the revocation of consent a reasonable time before the services were discontinued;

1. Manifestation Determination

Pursuant to 20 U.S.C. § 1415(k)(1)(E), a manifestation determination must be held “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 purpose of a manifestation determination review is for the relevant members of the child’s IEP Team, including the parent, “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 (LEA)’s failure to implement the IEP.” *Id.*

If the LEA, the parent, and relevant members of the IEP Team determine that the conduct was a manifestation of the child’s disability, the IEP Team must take several steps, including conducting a functional behavioral assessment (FBA) and implementing a behavioral intervention plan (BIP) or reviewing an existing BIP. *See* 20 U.S.C. § 1415(k)(1)(F). In the absence of special circumstances not alleged to exist in the present case, the Team must also return the child to the placement from which the child was removed, unless the parent and LEA agree to a change of placement as part of the modification of the BIP. *See id.*

There is no question that expulsion constitutes a change in placement that would exceed ten school days. The parties agree that the District did not perform a manifestation determination review prior to expelling Daniel. They disagree as to whether Daniel was entitled to one.

Daniel argues that he cannot be expelled in the absence of a manifestation determination review for three reasons: (1) he had revoked his withdrawal from special education services prior to the disciplinary action being taken; (2) he was a special education student at the time of the conduct for which he is being disciplined; and (3) he is entitled to a manifestation determination review under Section 504 of the Americans with Disabilities Education Act.

As to the first argument, the District asserts that because Daniel and his parent revoked their consent¹⁶ to special education services in October 2014, before he was expelled in December, he was essentially a general education student at the time of his expulsion. As such he was entitled only to an initial evaluation under the District’s Child Find obligation, not a manifestation determination. To the extent Daniel might argue that the District knew or should have known that he was a child with a disability at the time it expelled him, according to the District, the revocation of consent to receive special education services relieves it of both the

whether Daniel was re-enrolled in school on a timely basis; and whether and to what extent the issue of enrollment is currently before Program Quality Assurance. I find that none of these issues is relevant to the limited questions before me at this time and therefore do not address them.

¹⁶ The Code of Federal Regulations refers to revocation of consent for special education services by a parent, rather than by the student himself or herself. In the instant case, Daniel and his mother both signed his revocation of consent for special education services. Because Daniel, and not his parent, is a party to this matter I refer to his revocation of consent.

obligation to provide FAPE and the presumption that it knew or should have known that Daniel was a child with a disability.

The District is correct in its assertion that as a consequence of Daniel's decision to revoke his consent to special education services effective October 29, 2014 he was a general education student at the time of his expulsion.¹⁷ Furthermore, because of Daniel's revocation of consent and resulting reclassification as a general education student, the District cannot be deemed to have knowledge that Daniel was a child with a disability at the time it expelled him due to his prior status as a child with a disability.¹⁸ If Daniel's November 17th letter withdrawing his revocation of consent to receive special education services effectively served as either the communication of a concern in writing to supervisory or administrative personnel of the LEA or a teacher of the child that Daniel was in need of special education and related services or a request for evaluation, the District would be deemed to have knowledge that he was a child with a disability.¹⁹ The parties appear to disagree as to this point, but, as explained below, it need not be resolved because Daniel was entitled to a manifestation determination review prior to his expulsion on the basis of the fact that he was a special education student at the time he committed the infraction for which he is being disciplined.²⁰

¹⁷ See 34 CFR 300.300(b)(4), providing, in pertinent part: "If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency – (i) May not continue to provide special education and related services to the child . . . ; (iii) "Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and (iv) Is not required to convene an IEP Team meeting or develop an IEP . . ." See also Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed. Reg. 73,011 ("Once a parent revokes consent for a child to receive special education and related services, the child is considered a general education student") (discussion of 34 CFR 300.300(b)(4)).

¹⁸ See 34 CFR 300.534(c)(1)(ii), providing, in pertinent part: "Exception: A public agency would not be deemed to have knowledge [that a child who has not been determined to be eligible for special education and related services . . . and who has engaged in behavior that violated a code of conduct . . . was a child with a disability before the behavior that precipitated the disciplinary action occurred] if – (1) The parent of the child – (ii) Has refused services under this part." See also Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed. Reg. 73,012 ("When a parent revokes consent for special education and related services under § 300.300(b), the parent has refused services as described in § 300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections") (discussion of 34 CFR 300.534).

¹⁹ See 20 U.S.C. § 1415(k)(3)(5)(A), providing, in pertinent part: "A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred," and 20 U.S.C. § 1415(k)(3)(5)(B), providing, in pertinent part: "A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred – (i) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (ii) The parent of the child requested an evaluation of the child pursuant to [IDEA]." See also 34 CFR 300.534(a)-(b) (implementing regulations).

²⁰ Daniel has offered a third argument in support of his entitlement to a manifestation determination review: that he is entitled to the procedure pursuant to Section 504 of the Americans with Disabilities Act. Because I find that he

The Individuals with Disabilities Education Act (IDEA) directs the LEA, parent, and relevant members of the child's IEP Team to convene within 10 school days of a decision to change the placement of a child with a disability because of a violation of a code of student conduct.²¹ The Team must review all relevant information in the student's file to determine whether the student's behavior constituted a manifestation of his disability.²² The purpose of this requirement is to ensure that the placement of a child with a disability is not changed as a result of misconduct that was caused by or had a direct and substantial relationship to the child's disability, or that was the direct result of the LEA's failure to implement the child's IEP.²³

In the present circumstances, the felony charge and resulting conviction, adjudication of delinquency, or admission of guilt occurred while Daniel was an identified child with a disability, attending school on an IEP. It is the time during which the behavior for which the child is being disciplined occurred, not the time during which the disciplinary action was administered, that is relevant for purposes of determining whether Daniel was entitled to a manifestation determination review. *See* 20 U.S.C. § 1415(k)(3)(5)(A) and 34 CFR 300.534 (both noting that the relevant time frame for determining whether a public agency had knowledge that a child was a child with a disability is "*before the behavior that precipitated the disciplinary action occurred*") (emphasis added).²⁴ Holding otherwise might well result in a child having his placement changed for behavior that was a manifestation of his disability, in clear contravention of the explicit purpose of the procedural protections guaranteed by the IDEA.

Because Daniel was a child with a disability at the time of the behavior that precipitated the disciplinary action at issue, and the District was aware of his status as such, he is entitled to a manifestation determination within ten days of the District's decision to change his placement by expelling him. Given that Daniel was expelled on December 5, 2014, and no manifestation determination has taken place since that date, that expulsion cannot stand. The District is hereby directed to return Daniel to school immediately and expunge the expulsion from his record. Should the District elect to take further disciplinary measures constituting a change in placement based on any behavior that occurred while Daniel was enrolled in the King Philip Regional School District as an identified child with a disability, it must first conduct a manifestation determination review.

was entitled to a manifestation determination review as a child with a disability pursuant to the Individuals with Disabilities Education Act (IDEA), I need not address this argument.

²¹ *See* 20 U.S.C. § 1415(k)(1)(E)(i).

²² *See* 20 U.S.C. § 1415(k)(1)(E).

²³ *See* 20 U.S.C. § 1415(k)(1)(E)-(F).

²⁴ *See* 34 CFR 300.9(c)(2) ("If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).") In the instant case, the felony charge and conviction, adjudication of delinquency, or admission of guilt for which Daniel has been expelled took place after his parent had given consent for him to receive special education services, and before that consent was revoked. As such, he was a child with a disability at the time.

2. FAPE

The fact that Daniel is no longer expelled does not resolve fully the expedited issues before the BSEA. As explained above, when Daniel and his parent revoked his consent to receive special education services, he became a general education student.²⁵ As such, he is not presently entitled to placement at a private day school or in any other special education program pursuant to FAPE. Instead, when he returns school he is entitled to that to which any student is entitled: placement in general education classes at the District's high school. The District's "Child Find" obligations, and its obligation to respond to Daniel's request for evaluations on a timely basis to determine whether he is entitled to FAPE and if so, whether FAPE requires placement at a private day school, remain in full force.

CONCLUSION

Upon consideration of the Cross-Motions for Summary Judgment and Oppositions thereto, as well as the Memoranda of Law and exhibits submitted in support of the Motions, I find that there are no genuine issues of material fact in dispute, and that Daniel is entitled to prevail as a matter of law. The District's action in expelling Daniel without a manifestation determination review was improper and cannot stand. I also find that because Daniel is presently a general education student due to his decision to revoke consent to special education and related services, the District has no current obligation to provide him with immediate placement at a private special education day school.

²⁵ See note 17, *supra*, and accompanying text.

ORDER

The District's Motion for Summary Judgment on the expedited issues is hereby DENIED to the extent it seeks to uphold Daniel's expulsion without a manifestation determination review, and ALLOWED to the extent it alleges that it has no present obligation to provide Daniel with FAPE. The Student's Cross-Motion for Summary Judgment on the expedited issues is hereby ALLOWED to the extent it seeks a reversal of the expulsion based on the District's failure to conduct a manifestation determination review, and DENIED to the extent it seeks a finding that the District is currently denying Daniel FAPE.

The District is ordered to return Daniel to school immediately and expunge the expulsion from his record.

The non-expedited issues in the case are scheduled for hearing on January 20, 21, and 23, 2015.

By the Hearing Officer:

Amy M. Reichbach
Dated: December 31, 2014