

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 15488-1415AS

Child's Name: C.L.

Date of Birth: [redacted]

Dates of Hearing: 11/10/14

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]*

School District

Mars Area
116 Browns Hill Road
Valencia, PA 16059

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

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Graham
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November 12, 2014

November 24, 2014

Anne L. Carroll, Esq.

*Student's Grandmother, who also has educational decision-making authority, along with Student's Mother, qualifies as a "Parent" under 34 C.F.R. §300.30(a)(3). (N.T. p. 3)

INTRODUCTION AND PROCEDURAL HISTORY

Student, an elementary school-aged child, entered the School District at the beginning of the 2014/2015 school year with a diagnosis of Oppositional Defiant Disorder and a longstanding history of disruptive behavior. Student began exhibiting significantly challenging classroom behaviors within the first few weeks of the school year, prompting the District to suggest an alternative placement by mid-September. Mother refused, but signed a Permission to Evaluate form (PTE) at the request of the School District to determine whether Student is IDEA eligible.

While the evaluation was underway, Student was suspended from school for a total of 14 days for disciplinary infractions. After a series of behavior incidents on October 27, 2014 the District initiated expulsion proceedings, but first conducted a manifestation determination review which resulted in the conclusion, over Parents' dissent, that the behaviors in question were not a manifestation of Student's disability.

Parents' appeal of the District's manifestation determination conclusion was heard in an expedited due process hearing on November 10.

The due process hearing record very clearly established that the District's manifestation determination conclusion was erroneous because it was based on standards unsupported by either law or logic, and that the expulsion proceedings were designed to achieve a change of Student's educational placement prior to an IDEA eligibility determination that would give Parents the right to object to, and would likely foreclose, immediate transfer to the alternative educational setting that the District believes will better serve Student's behavior needs. The District, therefore, is required to reinstate Student to the regular education placement and to follow IDEA educational placement procedures in accordance with the order that follows.

ISSUES

1. Did the School District accurately and appropriately determine that behaviors in which Student engaged on October 27, 2014 were not a manifestation of Student's disability?
2. Was the District, therefore, justified in imposing the same discipline it would have imposed on a non-IDEA eligible student for a serious violation of the District's code of student conduct, *i.e.*, Student's expulsion from the District for the 2014/2015 school year?

FINDINGS OF FACT

1. [Student], [an elementary school-aged] child, born [redacted] is a resident of the School District. An initial psycho-educational evaluation by the District to determine Student's IDEA eligibility was not completed by the date of the expedited due process hearing. The District, however, considered Student a child "thought to be eligible for special education services. (Stipulation, N.T. p. 6)
2. Although Student has not yet been formally identified as IDEA eligible, based upon a nearly completed psycho-educational evaluation the District will recommend that Student be identified as IDEA eligible in the Other Health Impairment (OHI) disability category. (N.T. p. 170; HO-3 p. 17); 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii).
3. At the age of 2½, Student was diagnosed by a community behavioral health provider with Oppositional Defiant Disorder (ODD) based upon behaviors such as verbal and physical aggression, defiance and property destruction. Student was provided with behavioral health services in the form of a behavior specialist consultant (BSC) and mobile therapist. (N.T. p. 15; P-1 pp. 1, 5, 7)
4. Prior to entering the District at the beginning of the current (2014/2015) school year, Student attended a private academic pre-school/kindergarten on a full time basis for three years. (N.T. pp. 66, 67, 89, 94, 95)
5. Student displayed intense and challenging behaviors throughout the pre-school and kindergarten years, but the school staff, who had developed a close relationship with Student, were somewhat successful in diminishing the behaviors through interventions, such as telling Student that hitting staff or peers are unacceptable behaviors, and reminding Student to take a breath, to stop and to think before acting. (N.T. pp. 68—70, 72—74, 87, 88, 90, 91; P-6 pp. 14—18)
6. Control of Student's unacceptable behaviors began to improve significantly between September and December 2013, after the behavioral health agency assigned a Therapeutic Support Staff (TSS) worker to accompany Student for the entire school day. The TSS worker stayed close to Student and was often able to prevent or interrupt unacceptable behaviors. The behaviors continued to improve during the second half of the kindergarten school year, but were not eliminated. At times, Student was removed

from the classroom, and was sometimes sent home before the end of the school day due to severe escalation of behaviors. (N.T. pp. 69, 70, 74, 75, 78—86; P-6)

7. Despite the extreme behaviors, Student developed strong pre-academic and academic skills during pre-school and kindergarten, commensurate with or more advanced than same-age peers. (N.T. p. 99; P-6 pp. 3—11)
8. When Student enrolled in the District, the behavioral health agency discontinued Student's school day TSS services. Within the first two weeks of the current school year, Student frequently began exhibiting extreme difficulties with behavior regulation and non-compliance. Student's severe challenging behaviors included pushing, hitting and kicking peers and staff, [redacted], throwing objects and property destruction. (N.T. pp. 13, 19, 38, 77, 101, 102; P-1 p. 2, S-7)
9. The District and Parents met on September 17 to consider how to address Student's behaviors. The District suggested, and has continually recommended, an alternative placement in a program that the District believes will be better able to address Student's behavior issues, but Parents rejected that suggestion. (N.T. p. 217; P-1 p. 2)
10. At the September 17 meeting, the District also requested, and Parents immediately provided, consent to initiate a psycho-educational evaluation to determine whether Student is eligible for special education services due to the extreme behaviors that were disruptive to Student's learning. (N.T. pp. 103, 104; P-1 p. 2, S-7 p. 1)
11. The District developed two behavior plans to be implemented until completion of the initial evaluation, and assigned an aide or other staff to accompany Student during the school day. (N.T. pp. 140—142; P-1 p. 1, S-4, S-5)
12. On September 24, 2014, a licensed clinical psychologist under contract with the behavioral health provider re-evaluated Student. Based upon Student's records and current information about Student provided by Parents and District staff, the psychologist re-confirmed the ODD diagnosis, identified ADHD as another likely condition related to Student's behaviors, and recommended TSS services for Student during the school day. (N.T. pp. 8, 10, 13, 33; P-1 p. 7)
13. The psychologist concluded that Student becomes easily overwhelmed and frustrated by the environment and by demands placed on Student, resulting in volatile, explosive behaviors. (N.T. pp. 15, 23, 24)
14. Impulsive behaviors and dysregulation, an inability to exercise the level of behavioral control expected of a child at the same developmental level as Student, are associated with ADHD, particularly in young children. Due to sensory overload and undeveloped coping skills, a young child with ADHD is more likely to react to frustration with severely challenging behaviors. Behaviors that Student regularly displays, such as physical aggression toward peers and adults and property destruction are characteristic of

- ADHD in a young child, and of ODD. (N.T. pp. 15, 16, 19, 21, 23—30, 52, 53; P-1 p. 5, P-4 p. 10)
15. Co-morbid diagnoses of ODD and ADHD significantly increase the likelihood that a young child will engage in violent and aggressive behaviors in response to frustration and conflict. When such behaviors occur in a child diagnosed with ODD and ADHD, there is a high probability that the behaviors are related to those conditions. (N.T. pp. 29, 30, 38, 47, 50, 51, 54, 55)
 16. By the time the behavioral health provider reviewed the psychologist’s recommendation for TSS services, located and assigned an appropriate TSS worker to Student, the services could not begin because the District no longer permitted Student to attend school. (N.T. p. 45)
 17. Because of extreme behaviors, Student was suspended from school for disciplinary reasons for a total of 14 days between September 18 and October 21, 2014. During that period, Parents filed a due process complaint to preclude the District from continuing to suspend Student from school due to behaviors that Parents contended were due to Student’s ODD and ADHD diagnoses. (S-7 pp. 2, 3, 5, 6, 9, 10, S-9, S-10 p. 6)
 18. On October 28, 2014 the District began the process of expelling Student because of four behavior incidents that occurred over a period of several hours on October 27, *viz.*, “physical confrontation with a classmate; physical confrontation with the guidance counselor; flipping a chair and throwing of [items]; throwing items in the guidance suite.” (N.T. pp. 105—109; P-3, P-11 p. 2, S-7 p. 10, S-10 p. 6)
 19. Because an IDEA evaluation was underway, and Student was thought to be disabled, the District conducted a manifestation determination review on November 3, 2014. Since the October 27 behavior incidents were determined not to be a manifestation of Student’s prospective disability and current diagnoses, the District proceeded to an expulsion hearing that began immediately after the manifestation determination review concluded on November 3. The expulsion hearing concluded and was completed on November 5. (P-11, S-12, S-13)
 20. The District members of the team that conducted the manifestation determination review rejected the opinions of Parents and of a psychologist who believe that the behaviors in question were caused by or had a direct and substantial relationship to Student’s diagnoses and IDEA disability. The District concluded that the behaviors on which the expulsion proceedings are based were not a manifestation of Student’s diagnosed disabilities, ODD and/or ADHD at the time the behaviors occurred on October 27. (N.T. p. 107; P-11 pp. 3—5)
 21. In reaching that conclusion, the District relied heavily on the opinion of its school psychologist, who was not present to observe any of the behaviors on October 27. (N.T. pp. 108, 147, 186; P-11 p. 4)

22. The school psychologist, in turn, relied exclusively on the report and opinions of the school counselor, who was present when the behaviors occurred, and other staff reports in reaching his opinion that none of the behaviors that occurred on October 27 were a manifestation of Student's disability on that day. (N.T. pp. 106—111, 147, 164, 165, 167; P-11 p. 4, S-3, S-7 p. 10)
23. Although the behaviors in which Student engaged on October 27 were identical to the behaviors that Student had consistently exhibited from the beginning of the school year, and to behaviors described by the behavioral health psychologist as characteristic of ODD and ADHD, the school psychologist, relying primarily upon the description, characterization and circumstances of the behaviors as reported by the school counselor, believed that on October 27, 2014 the aggressive and destructive behaviors were not impulsive, but were volitional and completely under Student's control, and, therefore, were not a manifestation of Student's disability on that day. (N.T. pp. 113—124, 126—132, 146, 149, 156—163, 178, 184, 187, 193, 204; P-7, P-11 p. 4)
24. The school psychologist gave several reasons why Student's October 27 behaviors were not a manifestation of disability, including Student's ability to comply with the counselor's requests to stop a behavior before returning to it or beginning another challenging behavior, short-lived, periodic de-escalation of the behaviors over the span of several hours, and the perceived functions of the behaviors at the moment the behaviors occurred, as divined from the counselor's description of the behavior incidents and the section of the manifestation determination worksheet describing when behaviors of concern should be considered a manifestation of disability. (N.T. pp. 115—139, 146, 149, 156—163, 179, 187, 188; P-11 p. 3)
25. The school counselor confirmed that she believed that Student's behaviors on October 27 were purposeful and volitional, and for those reasons not a manifestation of Student's disability on October 27. The counselor believes that her several weeks of working with Student allowed her to discern a lack of impulsiveness in Student's behaviors on October 27. When similar behaviors occurred prior to October 27, the counselor tried numerous strategies to help Student gain control of extreme behaviors. From the beginning of the school year, Student exhibited the ability to gain control and move back to acceptable classroom behaviors after a period of disruptive behaviors. (N.T. pp. 207—211)
26. At the time of the expedited due process hearing, the District's initial evaluation report was nearly completed. The District school psychologist's conclusion and intended recommendation that Student be identified as IDEA eligible in the OHI disability category is based upon the behaviors that had been occurring regularly since the beginning of the school year and the ODD and ADHD diagnoses. The school psychologist was still considering whether to propose emotional disturbance (ED) as a secondary disability category. (N.T. pp. 170, 171, 178, 179; HO-3 pp. 17, 18)
27. In the draft ER, District staff cited Student's behaviors that they observed on a daily basis that were a safety concern and that disrupted the learning of Student and peers, including: Physical aggression toward peers (shoving, throwing objects); physical aggression toward

staff (hitting, kicking); verbal aggression toward peers and staff (yelling, [redacted]); destruction of school property (throwing objects, kicking walls and doors, tearing down bulletin boards); running toward exit doors in the building. (N.T. pp. 179, 180, 184; HO-3 pp. 9, 10)

28. The school psychologist based his conclusion that Student is IDEA eligible due to OHI on the “heightened alertness to environmental stimuli” component of the OHI definition in the IDEA regulations, since Student is easily distracted in the classroom, leading to off-task, highly disruptive behaviors that adversely affect Student’s educational performance. (N.T. pp. 191, 192)
29. Rating scales completed by Student’s Mother, first grade teacher and former kindergarten teacher yielded very elevated scores on several scales, including Defiance/Aggression (argumentative, defying adult requests, poor control of anger responses, breaking rules, destructive tendencies, being manipulative); Hyperactivity/Impulsivity (restless, difficulty remaining quiet, tendency to interrupt others, becoming overly excited, high activity level). (HO-3 pp. 12, 13)
30. In the behavioral information section of the ER, the District school psychologist noted that Parent and teacher rating scale responses indicated that Student is “more argumentative, has a greater proclivity to show violent and destructive tendencies and to become defiant when request/demands are made...from adults...has a greater tendency than is average...to intentionally damage or destroy things that belong to others, physically hurt others, and threatens or scares others.” (HO-3 p. 16)
31. The placement recommendation by teachers in the draft ER is for all day behavioral support in the regular classroom setting. (HO-3 p. 10)
32. The District school psychologist believes that there is a distinction between considering whether Student’s behaviors support IDEA eligibility and considering whether the identical behaviors are a manifestation of Student’s disability, based upon the District’s purpose in examining the behaviors. According to the school psychologist, the same behaviors that are related to Student’s diagnoses and that require modification of the curriculum because of educational disruption and safety concerns can also be the basis for a disciplinary action that results in a change of educational placement depending upon the function of each behavior at the moment it occurred, as well as whether Student had time to think between the occurrences of extreme behaviors. (N.T. pp. 165—178, 184, 187)
33. The school psychologist discerned the function of each of the behaviors that resulted in expulsion proceedings in light of the totality of the circumstances at the moment each of the behaviors occurred, as described to him, including the environment, the time of day, and others who were present. (N.T. pp. 165, 168, 169, 174, 188)
34. The School Board committee that heard the evidence concerning the behaviors that occurred on October 27 recommended Student’s expulsion to the entire Board and

included the following recommendations: 1) Direct the Special Education Department to identify an appropriate placement outside the District that will meet Student's needs; 2) direct that the District's ER be completed as soon as possible, and if Student is determined to be IDEA eligible, the IEP team should develop and implement an appropriate IEP and behavior support plan based upon an FBA; 3) if Student makes progress on the IEP, Student's IEP team may recommend Student's return to the District at the beginning of , or any time after, the second semester of the current school year; 4) if return to the District is recommended, the IEP team should develop an appropriate transition plan. (N.T. pp. 213, 214, 226, 227; HO-2 p. 3)

35. The expulsion recommendation to the Board also authorized Student's IEP team to determine whether Student is entitled to compensatory education, and, if so, to develop and implement an appropriate compensatory education plan. (HO-2 p. 3)
36. The expulsion recommendation is consistent with the change of placement to an alternative setting that the District has consistently offered and recommended for Student since the beginning of the current school year. (N.T. pp. 217, 228—230)
37. District discipline proceedings that might result in an expulsion recommendation are sometimes resolved when the student who is involved "is somewhere else" by the time of the expulsion hearing. (N.T. pp. 224, 225)

DISCUSSION AND CONCLUSIONS OF LAW

The facts and procedural posture of this case were unusual in several respects. First, the Student whose behaviors led to expulsion proceedings is a very young child who had just entered the District. (FF 1) Second, the disciplinary action occurred approximately two months after the school year began, and by that time Student had been already suspended from school for 14 days. (FF 17) Third, despite the extreme behaviors that Student had exhibited from a very young age, and the diagnosis of ODD, Student had not previously been referred for an evaluation and identified as IDEA eligible during the pre-school years. Instead, Student received supportive services only through a community behavioral health organization. (FF 3)

This case is also unusual in that when the circumstances that led to the due process hearing occurred, the District's initial psycho-educational evaluation had not yet been completed, and under the usual timeline for evaluations, was not due, although Parents had consented to the

evaluation as soon as the District requested it. (FF 2, 10, 26) Consequently, at the time the disciplinary proceedings occurred, Student was not formally identified as IDEA eligible. The District school psychologist, however, had nearly completed an initial psycho-educational evaluation, and the District acknowledged that Student was likely to be identified as a child with a disability once the parties met to review the completed evaluation report. (FF 26) For purposes of the discipline proceedings, therefore, the District treated Student as “thought to be eligible” and provided the discipline procedural safeguards available to students already identified as IDEA eligible. (FF 1, 2, 19)

At the time the due process hearing was held, the final expulsion determination had not been made by the District School Board. (FF 34) Nevertheless, the manifestation determination review had been completed, and based upon the outcome of that proceeding, an expulsion hearing had been held and a recommendation prepared for the Board to expel Student. (FF 19, 34) It was anticipated that the Board would accept the recommendation at its meeting scheduled for November 11, 2014, the day after the due process hearing.¹

Legal Standards

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents have challenged the appropriateness of the District’s actions with respect to determining that the

¹ As noted, after the manifestation determination review hearing on November 3, the District immediately began the expulsion hearing, which was conducted in two sessions on November 3 and 5, 2014. (FF 19; S-12, S-13) On November 4, Parents filed a motion to stay the expulsion proceedings, contending that the manifestation determination was erroneous. (P-10) The motion was denied because the due process hearing was scheduled for a few days later, and there was no factual record available to determine the correctness of the outcome of the manifestation determination until the hearing on November 10. (HO-1)

behaviors that led to Student's expulsion from school were not a manifestation of Student's disability, Parents were required to establish that the District's manifestation determination conclusion was wrong.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis ordinarily affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). Nevertheless, included with the burden of proof analysis is the common sense notion that the party with the burden of persuasion also bears a burden of production. A party cannot prevail if fails to produce sufficient evidence to support a claim. In other words, the party seeking relief also necessarily bears a responsibility for going forward with the evidence and providing a substantive evidentiary basis for a decision in its favor on claims raised in the due process complaint.

In this case, as explained in greater detail below, Parents presented ample persuasive evidence to establish that the behaviors that led to the discipline proceedings and ultimately resulted in Student's expulsion were a manifestation of Student's ODD medical diagnosis and of the IDEA disability that the District's initial evaluation identified, OHI, which, in turn, is based on the conclusion that Student has ADHD. The District's conclusion that the behaviors in question were not a manifestation of Student's disability was, therefore, erroneous and must be reversed.

Disciplinary Authority, Changes of Placement

According to the federal regulations implementing IDEA, an LEA is permitted to remove a child with a disability from his/her regular education setting for violation of a code of student conduct to the same extent as nondisabled students for a period of no more than 10 consecutive school days within the same school year. 34 C.F.R. §300.530(b). In addition, an LEA is permitted to implement disciplinary removals for separate incidents of misconduct for fewer than 10 consecutive school days, provided that such removals do not constitute a “change of placement.” §300.530(b) A “change of placement” based on disciplinary removals from the regular education setting is defined as removal for more than 10 consecutive school days, or a series of removals during the same school year that a public agency determines constitutes a “pattern” §300.536(a)(1),(2) The federal regulations list several factors that an LEA should use to determine on a case by case basis whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement, *i.e.*, removals for more than 10 non-consecutive school days, or for conduct substantially similar to the conduct that precipitated prior removals, or additional factors, such as the length or proximity of other removals and the total amount of time the student has been removed. §300.536(a)(2), (b). Pennsylvania law explicitly defines one “pattern” that constitutes a disciplinary change of placement as exclusion from the regular educational setting that exceeds fifteen (15) days in the same school year. §300.536(a)(2)(i), 22 Pa. Code §14.143(a)

If an LEA’s disciplinary procedures for a violation of the code of student conduct provides for more than 10 consecutive school days of removal, or a series of disciplinary removals of a student within the same school year would effect a change of placement, the LEA must conduct a manifestation determination review to determine whether the violation of the

code of student conduct that led to the proposed discipline “was caused by or had a direct and substantial relationship to the child’s disability or ... was the direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. §300.530(e)(1)(i), (ii). Such determination must be made within 10 school days of any decision to change an eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA).” §530(e)(1). The participants in the manifestation determination meeting “must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents.” §300.530(e)(1).

If, after conducting an appropriate review in compliance with the applicable regulatory standards, the IEP team concludes that the behavior at issue was not caused by the student’s disability, had no direct and substantial relationship to the student’s disability, and/or was not a direct result of the LEA’s failure to implement the IEP, the LEA may take the same type of disciplinary action that it would take with respect to a student without a disability, provided that if an eligible student is removed from his/her current educational placement, the school district must ensure that the Student is provided with a free, appropriate public education (FAPE), continues to participate in the general curriculum, although in an alternative setting, and continues to make progress toward achieving his/her IEP goals. §300.530(c), (d)(1)

If the outcome of the manifestation determination review permits the LEA to proceed with a disciplinary change of placement, the student’s IEP team determines appropriate services, as well the alternative educational setting for delivery of FAPE. §§530(c), (d)(5), 531 A parent who disagrees with the results of the manifestation determination, or with the alternative placement decision, is entitled to appeal the LEA’s actions by means of a due process hearing. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511, 532(a). If the hearing officer

determines that the LEA violated the procedures required by §530, or that the behavior was a manifestation of the child’s disability, the hearing officer may return the child to the original placement or order a change of placement to a 45 day alternative placement upon determining that “maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” §532(b)(1), (2)

A child subject to discipline for a violation of the code of student conduct who is not yet determined to be IDEA eligible may assert the protections available to eligible students if the school district knew that the student is a child with a disability “before the behavior that precipitated the discipline occurred.” §534(a). Knowledge sufficient to require a school district to treat a not yet identified student as IDEA eligible for disciplinary actions is triggered by, *inter alia*, a parent request for an evaluation and specific teacher concerns “about a pattern of behavior demonstrated by the child” and expressed directly to the school district’s director of special education or other school district supervisory staff. §534(b)(2), (3).

District’s Manifestation Determination Review and Conclusion

Legal and Factual Basis for the District’s Manifestation Determination

The District’s fundamental error in this matter arose from its belief that behaviors characteristic of Student’s condition from an early age, and regularly displayed in the school setting during the current school year, can be a manifestation of Student’s disability—or not—depending upon the context of the behaviors in the moment specific behaviors occurred. (FF 23, 24, 25) Even assuming that a manifestation determination could be based upon the specific circumstances under which behaviors occur on a particular occasion, a highly dubious proposition at best, the testimony of the District witnesses in this case does not support the

conclusion that Student's behaviors on October 27, 2014 were not a manifestation of disability, allowing the District to expel Student.

In this case, the District school psychologist's assessment of the function of Student's behaviors, and of the level of control that Student was able to exert at the moment each behavior occurred was the primary basis for the manifestation determination conclusion. The school psychologist, however, did not directly observe the behaviors on October 27, and had no firsthand knowledge of the circumstances surrounding the behavior incidents. Nevertheless, he purported to discern the function of the behaviors and the level of control Student, a very young child, could exercise over each behavior incident at the moment it occurred. (FF 21, 22, 23, 24) Drawing the conclusion that Student's behaviors could be so explicitly and precisely dissected and assessed based upon the description and opinions of others, whose experience with Student was not constant, and whose time with Student spanned only a few weeks, is beyond speculative. Consequently, even if the underlying premise is accepted, *i.e.*, that it might be appropriate to base a manifestation determination upon the particular functions of behavior, and the child's perceived level of control over the behaviors at the moment such behaviors occurred, the District members of the manifestation determination review team had no reasonable basis for drawing the conclusion that Student's behaviors on October 27 were not a manifestation of Student's proposed educational disability, or of Student's ODD diagnosis or ADHD diagnosis. The school psychologist who offered that opinion had to rely entirely upon third-party observations and conclusions about Student's behaviors on that day, which provides a grossly deficient basis for his expert conclusions concerning Student's level of control or of the functions of the behaviors at the precise moment each of the several behaviors occurred. Simply describing the basis for the District school psychologist's manifestation determination

conclusion, *i.e.*, an assessment of Student's momentary motives and reactions, momentary level of control over the behaviors and the momentary functions of the behaviors as they occurred, based solely on reports from others, suggests the unreliability, if not absurdity, of the conclusion that none of the behaviors that occurred on October 27 were a manifestation of Student's disability.

More important, however, the District's conclusion that none of the separate behavior incidents that occurred on October 27 were a manifestation of Student's disability is unsupportable because the underlying premise is flawed. Nowhere in the federal IDEA statute or regulations, or in Pennsylvania special education regulations, is there any suggestion that determining the function of a specific behavior at a specific moment in time is a reasonable basis for determining whether unacceptable behaviors arose from, or were substantially related, to Student's undisputed diagnoses and/or Student's prospective IDEA disability category.

Further, even if examining each specific behavior in isolation at the time the behavior occurred could serve as a reasonable basis for determining whether the behaviors, in total, were a manifestation of disability, and even if there was a reasonable basis for determining that each specific behavior that occurred on October 27 was not directly caused by ADHD or ODD or the combination of factors that support the OHI IDEA disability category at the moment the behaviors occurred, that exercise was ultimately futile, since the District clearly failed to fully and reasonably consider whether the behaviors that occurred on October 27 had "a direct and substantial relationship to the child's disability." 34 C.F. R. §300.530(e)(i)

Direct and Substantial Relationship of the Behaviors to Student's Disability

The District argued that Parents failed to meet their burden of proof, noting that neither the psychologist who testified at the expulsion hearing, nor the psychologist who testified at the

due process hearing offered definite testimony concerning the specific trigger and function of Student's behaviors at the precise moment each of the behaviors in question occurred on October 27. The fact that Parents' witnesses declined to engage in rank and ultimately pointless speculation of that nature, however, does not support the conclusion that Parents failed to meet their burden of persuasion with respect to whether the District's manifestation determination was wrong. The District's manifestation determination conclusion is so lacking in legal support and a reasonable factual basis that Parents could have met their burden of persuasion simply by questioning the District witnesses.

Parents, however, did not need to rely solely upon the testimony of the District witnesses to meet their burden of persuasion. The psychologist who evaluated Student in September 2014 for the behavioral health organization from which the family receives services cogently and persuasively explained the direct and substantial relationship between ODD and ADHD to the behaviors that occurred on October 27. (FF 13, 14, 15)

Moreover, the District's recommendation that Student be identified as IDEA eligible is admittedly directly and substantially based upon behaviors identical in nature, character and all outward appearances to the behaviors that occurred on October 27. (FF 26, 27, 28, 29, 30) The District school psychologist's attempt to draw a distinction between identical behaviors when examined for purposes of determining the need for special education and related services and when determining whether Student could be treated as a regular education student for disciplinary purposes was wholly unpersuasive. The behaviors that Student has exhibited for years, including daily during the current school year with varying degrees of intensity, adversely affect Student's educational performance, supporting IDEA eligibility. The District school psychologist freely admitted that the behaviors in which Student engaged on October 27 looked

exactly the same as the behaviors Student frequently exhibited in school. To conclude that on a particular day, those same behaviors were not directly and substantially related to Student's disability, but on many days supported the need for special education services is, as noted above, absurd. To accept the District's premise and conclusion would, presumably, require a daily assessment of whether Student's behaviors should be the basis for special education services or for disciplinary action on that particular day. Indeed, the District suggests that every instance of challenging behaviors even when several occur on the same day, is subject to the same analysis.

Clearly, however, if behaviors are the primary reason for IDEA eligibility because such behaviors interfere with Student's education, and on a given day, Student engages in several instances of behaviors that are identical in nature and character to the behaviors that support the need for special education, and on that same day, those identical behaviors interfere with Student's ability to remain in the classroom and participate in learning, such behaviors obviously have a direct and substantial relationship to Student's disability. Logic and common sense support that conclusion. There is no need to parse the behaviors and conjure the child's momentary motives and fluctuating control. Indeed, there is only one reason to engage in such an exercise: To "backfill" support for a pre-conceived determination that Student would be expelled.

Change of Placement Resulting from the Manifestation Determination

The District took considerable umbrage at the suggestion by Parents' counsel that the District's actions in this matter were undertaken to "get rid of" Student. That characterization was, perhaps, unnecessarily inflammatory, since the District clearly intended to meet its obligation to provide special education services to Student throughout the period of expulsion. On the other hand, however, the District's approach to the manifestation determination review,

and its unreasonable determination that the same behaviors that support the conclusion that Student has an IDEA disability, and by reason thereof, needs specially designed instruction, were not a manifestation of Student's disability on one particular day, lead directly to the inference that the District was determined to effect a change of Student's educational placement. Notably, District counsel elicited testimony from the school counselor that from nearly the beginning of the current school year, the District had proposed the same alternative placement for Student that was included in the expulsion recommendation to the School Board. (FF 34, 35, 36)

Obviously, Parents were unwilling to agree to the change of placement that the District wanted. Instead of following IDEA procedures to change Student's placement, which might have been accomplished by proceeding with the evaluation, followed by development of an IEP and a recommended placement—including an out of District placement, and submitting a due process complaint when/if Parents rejected the recommendation, the District clearly attempted to circumvent the IDEA statutory scheme via expulsion proceedings. By proceeding with a change of educational placement via expulsion proceedings, the District did not need to obtain Parents' consent, and would have remained entirely in control of when and whether Student returned to a District placement during the current school year, without having to consider and abide by the pendent placement ("stay put") requirements.

The problem for the District, however, is that in order to accomplish its change of placement objective, the District had to distort reality and ban logic and common sense from the manifestation determination review. In this matter, the District blatantly violated IDEA placement and discipline procedures.² The District, therefore, will rescind Student's expulsion,

² Moreover, testimony from the school counselor relating to disciplinary removals, in general, suggests that it may be a District pattern and practice to coerce "voluntary" removal of students with behavior problems, since expulsion proceedings have been terminated in the past when the student in question was "somewhere else" by the time of the expulsion hearing. (FF 37) If that is the case, it suggests that the District needs to re-examine its policies, practices

since its manifestation determination was clearly erroneous as a matter of both fact and law. The order that follows also directs the District to adhere to appropriate IDEA standards in determining Student's educational placement.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

- 1) Reinstate Student to the regular education setting from which Student was expelled, unless Parents agree that Student will attend the alternative education setting recommended by the District, or another placement agreed to by Parents and the District, which may be proposed by either Parents or the District.
 - a. The reinstatement shall be accomplished by the first day that students in the District return to school after the Thanksgiving holiday, unless Parents request or agree to a later date for reinstatement;
 - b. The District shall take whatever steps are necessary to assure that Student is accompanied by an adult at all times during each school day;
 - c. By the beginning of the third marking period of the current (2014/2015) school year, the District shall secure the services of a board certified behavior analyst (BCBA) to provide training in effective techniques for managing Student's behaviors for any District employee who teaches Student, provides counseling or other services to Student, or who is assigned, permanently or temporarily, to serve as an instructional aide or personal care assistant to help manage Student's behaviors, whether on a one to one basis or as a classroom assistant;
 - d. TSS services by a behavioral health organization may supplement District services, but shall not supplant or diminish the District's obligations to work toward assuring that Student's challenging behaviors do not compromise the safety of Student, peers and staff, and that disruptions to the learning of Student and peers are minimized to the extent reasonably possible.
- 2) If not already done, convene Student's IEP team to consider the results of the District's ER and develop an appropriate IEP, including a comprehensive behavior support plan, and recommend an appropriate educational placement for Student.

and procedures with respect to student discipline, in general, and in the future, that the District should be particularly careful to use appropriate standards when conducting manifestation determination reviews for IDEA eligible, or thought to be eligible students.

- 3) The District's regular education setting shall remain Student's pendent educational placement until such time as Student's IEP team recommends, and Parents sign a NOREP agreeing, to a change of educational placement.
- 4) If the District proposes, and wants to implement a change of educational placement for Student to which Parents do not agree, the District shall follow prescribed and appropriate IDEA consent override procedures by submitting a due process complaint under 34 C.F.R. §§300.507(a), 508 and/or 300.532.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

November 24, 2014