

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

Child's Name: D. J.
Date of Birth: [redacted]
CLOSED HEARING¹

ODR File No. 18869-16-17KE

Parties to the Hearing:

Parents
Parent[s]

Representative:

Parent Attorney
None

Local Education Agency
Pocono Mountain School District
135 Pocono Mountain School Road
Swiftwater, PA 18370

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Dates of Hearing:

March 3, 2017 and March 24, 2017

Date of Decision:

April 7, 2017

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

¹ The Parents indicated that the hearing sessions in a related file number would be open to the public. Because the hearing transcripts in the related cases were incorporated into other file numbers, but recognizing that a prior hearing on a discipline matter was closed, this decision is considered to follow a Closed Hearing.

INTRODUCTION

The student (hereafter Student)² is a mid-teenaged student in the Pocono Mountain School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).³ As relates to this decision, the District filed a Complaint on March 6, 2017 that reflected the parties' agreement to address a new disciplinary issue, a 45-day alternative placement, as a different but related case proceeded to hearing. Due to the timing of the new issue and the hearing sessions, the matters were consolidated; two hearing sessions convened with evidence presented on the instant disciplinary Complaint.⁴

For the reasons that follow, the District's 45-day alternative placement will be affirmed but the related manifestation determination will be reversed.

PROCEDURAL HISTORY

- A. The Parents' Due Process Complaint was filed on December 21, 2016 and included certain disciplinary issues, which were bifurcated and heard in a separate hearing with a decision pursuant to the expedited timelines in February 2017. (*D.J. v. Pocono Mountain School District*, ODR No. 18588-1617KE (Skidmore, February 5, 2017 (hereafter February 5, 2017 Decision)); HO-5).
- B. The Parents' Due Process Complaint included issues that were non-disciplinary and would proceed under the standard IDEA timelines. The parties were advised of all applicable timelines. (HO-1)
- C. Following a decision on the discipline matter raised in the Parents' Complaint, the District was directed to convene another meeting of the manifestation determination team to include the Parents. (February 5, 2017 Decision at 13).

² In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page of and elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

³ 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

⁴ Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to the various transcripts will include the date of hearing.

- D. The Parents and counsel for the District participated in a conference call on February 21, 2107, at which time this hearing officer was advised that other disciplinary incidents had occurred that resulted in a 45-day placement in an alternative education setting (AES), and that a manifestation determination meeting had convened regarding that matter at the same time as the team met pursuant to the February 5, 2017 Decision. (HO-6)
- E. The parties agreed to proceed on this new disciplinary matter at the same time as the issues that remained following bifurcation of the original Complaint. Written confirmation of the parties' agreement was provided on February 26, 2017. (HO-6)
- F. The District filed a formal Complaint with the Office for Dispute Resolution raising the issue of the manifestation determination for the 45-day placement on March 6, 2017.
- G. Hearing sessions were scheduled for March 3 and March 15, 2017. The March 3, 2017 hearing session convened to address the issue of the manifestation determination for the 45-day placement; one witness was not available to testify on that date (*see* N.T. 3/3/17 at 195, 240-42). Due to inclement weather, the District closed its schools for five of the six school days from March 10 through March 17, 2017. (N.T. 3/3/17 at 7-243; N.T. 3/24/17 at 310-11; HO-8)
- H. The Parents and counsel for the District participated in another conference call on March 14, 2017 to discuss rescheduling the March 15, 2017 session. (HO-10)
- I. Evidence on the disciplinary issue at ODR No. 18869-1617KE was presented at the March 3 and 24, 2017 hearing sessions, both within twenty school days of the date of the parties' February 26, 2017 agreement to proceed on that claim. (N.T. 3/3/17 at 7-243; N.T. 3/24/17 at 249-369; 34 C.F.R. § 300.532(c)(2))
- J. The transcripts from all prior hearing sessions involving this Student (at ODR Nos. 18588-1617KE, 18683-1617KE, and 18869-1617KE) were incorporated into the record for consideration of the issues addressed in this decision. The February 5, 2017 decision was also incorporated into the record. However, the parties were advised that the exhibits introduced at the January 25, 2017 hearing on ODR No. 18588-1617KE would not be made part of the record for purposes of the decisions in ODR Nos. 18683-1617KE and 18869-1617KE unless introduced and admitted again. (N.T. 3/3/17 at 20-22; HO-6 p. 2)
- K. The record on the issues addressed in this decision was completed on March 24, 2017. (N.T. 3/24/17 at 342-69) This decision is issued within ten school days of the completion of the March 24, 2017 hearing session at this file number. (HO-5; 34 C.F.R. § 300.532(c))

ISSUE

Whether the District's manifestation determination regarding weapons offenses that led to the 45-day alternative education setting (AES) placement was appropriate?

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District and is eligible for special education under the IDEA. (N.T. 1/25/17 at 32-33)
2. Student was first enrolled in the District at the start of the 2016-17 school year, having previously attended school in another state. The District did not have Student's Individualized Education Program (IEP) from the other school until after the school year started, but the Parents did provide progress monitoring information at the time of enrollment. (N.T. 1/25/17 at 82, 215, 311-12; N.T. 3/3/17 at 158-59, 171, 221; N.T. 3/24/17 at 309, 313-16; P-1, P-8, P-9; S-5 pp. 13-14)
3. In the other state, Student had been placed in a non-public special education school for children with emotional and behavioral difficulties. (P-1, P-8)
4. The District obtained education records from the prior school in the other state and received those several weeks after Student was enrolled. An IEP was part of the records the District received, specifying that Student had been provided with emotional support. (N.T. 3/3/17 at 159-61, 222; S-5 pp. 12-13, 20-32)
5. The District developed a "transfer IEP" for Student to start the school year. This document incorporated the prior state's IEP, which provided for a highly structured, therapeutic learning environment addressing academic and behavioral needs, with weekly counseling for social skills, self-esteem, and managing emotions. Annual goals addressed reading decoding and comprehension, written expression, mathematics, and social/emotional needs. There was no behavior plan included, because the IEP noted behaviors were addressed through the structured environment of the non-public special education school in the other state. (S-5 pp. 12-32)
6. Student began the school year in the District in regular education classes. Several weeks later, after receiving the IEP from the prior school in the other state, Student was provided with academic instruction in an emotional support classroom. (N.T. 1/25/17 at 105-07, 215-16; N.T. 3/3/17 at 61, 127-28, 222-2; S-5 pp. 13-15)
7. A meeting convened in October 2016 where the parties had a discussion regarding Student's educational needs and how the District would address them. The District proposed a structured program outside of the regular education environment and outside of the District, that provided small class sizes and various behavioral and other support. The District issued a Notice of Recommended Educational Placement (NOREP). The Parents did not agree to the District's proposal. A full-time paraprofessional was

assigned to Student at that time. (N.T. 1/25/17 at 38-40, 119-20, 233, 261-62; N.T. 3/3/17 at 164-69, 224-26; N.T. 3/24/17 at 262; P-4; S-5 pp. 13-15)

8. The role of Student's paraprofessional was to redirect and prompt Student as needed. She was with Student throughout the school day except when she had her lunch period. (N.T. 3/3/17 at 129-32; N.T. 3/24/17 at 256, 260, 262-63)
9. The District has a school resource officer assigned to the school building that Student attended when first enrolled. (N.T. 3/3/17 at 23-24)

REEVALUATION REPORT

10. The District conducted an evaluation of Student at the request of the Parents. A Reevaluation Report (RR) was issued on December 1, 2016 with a conclusion that Student was eligible for special education on the bases of an Emotional Disturbance and Other Health Impairment (due to Attention Deficit Hyperactivity Disorder (ADHD)). (N.T. 3/3/17 at 108, 223; P-6; S-3)
11. The RR provided a summary of Student's education records from the other state, as well as attendance, grades, and disciplinary referrals at the District. Student's medical history was noted to include diagnoses of ADHD, Disruptive Behavior Disorder, and Oppositional Defiant Disorder. Cognitive and achievement assessments in the other state was also reported. (P-6 pp. 1-2; S-3 pp. 1-2)
12. Observations by the paraprofessional and teachers reflected Student's need for redirection, and behaviors that included calling out, disrupting the class, and putting head down on the desk. Student's teachers recommended a therapeutic setting to address emotional needs. (P-6 p. 3; S-3 p. 3)
13. The District conducted a cognitive assessment (Wechsler Intelligence Scale for Children, Fifth Edition). Student attained a full scale IQ score in the very low range, with a General Ability Index (GAI) score in the low average range. Student's subtests scores were variable, with a relative strength in visual spatial reasoning and relative weaknesses in working memory and processing speed, indicating that the GAI score was an important consideration in estimating Student's cognitive ability. (P-6 pp. 4-8; S-3 pp. 4-8)
14. Results of the Woodcock-Johnson Tests of Achievement – Fourth Edition reflected areas of relative strength and weakness. The majority of subtest scores were in the very low range, but Student attained higher scores on some reading and mathematics subtests, with an average range score on applied problems. (P-6 pp. 8-9; S-3 pp. 8-9)
15. One of the Parents and two teachers completed the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2). The Parent ratings did not indicate any areas of concern. The teacher ratings indicated a number of areas of concern, including resisting impulses, appropriate awareness of functioning in social settings, reaction to events, initiating tasks, and planning and organization. The teachers' BRIEF-2 scales suggested significant difficulties with problem solving and emotional regulation. (P-6 pp. 9-12; S-3 pp. 9-12)

16. One of the Parents and two teachers completed rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3), and Student completed a self-report. BASC-3 results suggested parental concerns with attention, but that Student exhibited slightly better ability to react to change than peers. The teacher rating scale results revealed significant concerns on the Externalizing Problems (hyperactivity, aggression, and conduct problems) and School Problems (attention and learning problems) Composites and on the Behavioral Symptoms Index (atypicality), as well as anger control, bullying, social skills and communication, emotional control, executive functioning, and negative emotionality. Other concerns were noted with respect to depression, several adaptive skills, and resiliency. Student reported concerns with attitude toward teachers. (P-6 pp. 12-23; S-3 pp. 12-23)
17. The RR made recommendations for a Functional Behavioral Assessment (FBA) and a structured educational program to address behavioral and academic needs. (P-6 p. 26; S-3 p. 26)

BEHAVIOR AND DISCIPLINE

18. District teachers and administrators have been concerned about Student's behaviors since the start of the school year. (N.T. 3/3/17 at 44, 45, 137-38, 140, 144-45)
19. Between the start of the 2016-17 school year and mid-January 2017, Student was subject to lunch detentions, "time out" in detention, in-school suspension, and out of school suspension, as well as suspension from the bus. Student's father was called to the school to address Student's behavior, and on at least one occasion was asked to remove Student from school. (February 7, 2017 Decision at 3-6; P-3, S-1)
20. The behaviors that led to the new manifestation determination and subsequent 45-day AES placement were as follows:
 - a. On January 31, 2017, Student was observed walking by another student who was seated at a desk and then poke him/her in the neck with a pencil several times. Student was removed from the classroom.
 - b. On February 6, 2017, Student was observed in [a redacted] classroom holding sewing shears and [other objects] to chase (follow and quickly approach) other students and poke at them with the items. The sewing shears were metal, approximately 9" long,⁵ pointed at the end, with blades sharp enough to cut fabric, and were held with the blades pointed out toward the other students. Those items were removed from Student and Student was redirected as the class period ended.

⁵ Although the witness first testified that the shears were "a foot" in length (N.T. 3/3/17 at 80), she appeared to be unsure and not confident in her estimate of the size. This hearing officer's observation of the witness' physical indication of the length of the shears was that they were two or three inches shorter than one foot.

- c. Also on February 6, 2017, Student was observed in the same [redacted c]lassroom to have [sharp objects which were] were removed from Student and Student was redirected.

(N.T. 3/3/17 at 46-51, 62, 64-65, 67, 69, 74-76, 80-81; N.T. 3/24/17 at 276-79, 292-94, 299; S-8)

21. A manifestation determination meeting convened on February 16, 2017, and the Parents attended. At least eight District representatives also attended. At that meeting, the team revisited the first manifestation determination pursuant to this hearing officer's February 5, 2017 Decision. The team also considered whether the conduct involved in Finding of Fact 20 above on January 31 and February 6, 2017 was a manifestation of Student's disability. (N.T. 3/3/17 at 96-97, 200; N.T. 3/24/17 at 319-21; S-5, S-7 pp. 4, 9-10, 17)
22. The team determined that the behaviors that were the subject of the February 5, 2017 Decision were a manifestation of Student's disability. That determination was based upon a review of Student's IEP, teacher observations that included inappropriate behaviors (inattention and off-task behavior) and need for frequent redirection and prompting; and Student's impulsivity and history of uncontrolled behavior as well as difficulty understanding consequences of inappropriate behaviors as a result of Student's disability. The team also determined that Student's behaviors were not the result of a failure to implement Student's IEP. The District members of the team again recommended an FBA. (N.T. 3/3/17 at 122-23; S-5 pp. 5-11)
23. The District members of the manifestation determination team then concluded that Student's behaviors on January 31 and February 6, 2017 were not manifestations of Student's disability because they observed Student to have demonstrated an ability to act appropriately, and believed that Student was acting deliberately with respect to the conduct on those dates. The District members of the team also found that those behaviors were not impulsive as might relate to Student's ADHD. Finally, the team concluded that Student's behaviors were not the result of a failure to implement Student's IEP. (N.T. 3/3/17 at 50-51, 99, 102, 109-11, 114, 123, 129; N.T. 3/24/17 at 270, 336; S-7 pp. 4-10)
24. The Parents did not agree with the District team members on the issue of whether the behaviors on January 31 and February 6, 2017 were a manifestation of Student's disability. They also did not believe that Student had engaged in behaviors that were beyond mild horseplay. (N.T. 3/3/17 at 209-13, 231)
25. The manifestation determination forms that were completed for the January 31 and February 6, 2017 behavioral incidents referenced the prior report following the February 5, 2017 Decision. The documents also referenced the behavior rating scales in the RR, indicating "inconsistency" among them (S-7 p. 6). (S-7 pp. 4-10)
26. Student was moved to the 45-day AES placement on March 1, 2017. That placement is at the same location where the District proposed services in October 2016. (N.T. 3/3/17 at 166, 189-90, 232; S-9)

27. An IEP revision/intake meeting was held, that included staff from the AES placement, before Student began to attend there. The Parents also attended this meeting. Student's IEP was revised to add de-escalation when needed due to Student presenting a danger to self or others, and to revise the counseling services. The AES placement offers a variety of special education programs including emotional support. Student's program was described as one of emotional support. (N.T. 3/3/17 at 177-79, 189; S-9 pp. 9-10, 12)
28. The AES placement is able to meet Student's needs through implementation of Student's IEP. (N.T. 3/3/17 at 179-80, 189)
29. The Parents have not consented to the District's requests to conduct an FBA. (N.T. 1/25/17 at 263; N.T. 3/3/17 at 104)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of production and the burden of persuasion in this case were assigned to the District as the party requesting this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position, as is the situation here, based on the applicable law.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible on matters that were necessary to a determination

of the issues, all testifying to the best of his or her recollection and from his or her perspective. Conversely, there was some discrepancy in the testimony on matters that were not essential to disposition of the issue presented, such as whether certain remarks were made in a particular meeting or encounter. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' arguments.

RELEVANT DISCIPLINE PRINCIPLES

The District's Due Process Complaint sought to affirm its decision that Student's behaviors on January 31 and February 6, 2017 were not manifestations of Student's disability. Implicit in the issue presented, from the Parents' perspective, is whether the District properly removed Student to the AES placement for a period of 45 days. As noted above, the parties agreed to proceed pursuant to 34 C.F.R. §§ 300.532(a) and (c) to resolve these disagreements.

IDEA PRINCIPLES – DISCIPLINARY PROVISIONS

The IDEA provides a number of important protections when a Local Educational Agency (LEA) seeks to impose discipline on a student who is eligible for special education. Specifically, when an eligible student is facing a change in placement for disciplinary reasons, a meeting must convene to determine whether or not the conduct in question was a manifestation of the student's disability:

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency)* shall 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 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's failure to implement the IEP.

20 U.S.C. § 1415(k)(1)(E)(i) (emphasis added); *see also* 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii); *see also* 34 C.F.R. § 300.530(e)(2). Additionally, if the conduct is determined to be a manifestation of the child's disability, the LEA must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F); *see also* 34 C.F.R. § 300.530(f).

By contrast, if school personnel determine that the behavior which resulted in discipline was not a manifestation of the student's disability, the LEA may apply the same disciplinary procedures applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education (FAPE). 20 U.S.C. §§ 1415(k)(1)(C) and (D); 34 C.F.R. §§ 300.530(c) and (d).

As is also relevant here, an LEA is permitted to remove an eligible child to an alternative educational setting on an interim basis under certain "special circumstances" regardless of whether the conduct in question was a manifestation of the student's disability. The relevant provision is as follows.

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency[.]

20 U.S.C. § 1415(k)(1)(g); *see also* 34 C.F.R. § 300.530(g). The definition of “weapon” is that set forth in Section 930 of the U.S. Code: “a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.” 18 U.S.C. § 930(g)(2) (as referenced in 20 U.S.C. § 1415(k)(7))⁶. The IDEA also references the specific definition for the term “serious bodily injury” in Section 1415(k)(7)(D) (*see also* 34 C.F.R. § 300.530(i)(3)) by referring to Section 1365 of Title 18 (the code section defining Crimes and Criminal Procedure), which provides:

[T]he term "serious bodily injury" means bodily injury which involves—

- (A) a substantial risk of death;
- (B) extreme physical pain;
- (C) protracted and obvious disfigurement; or
- (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]

18 U.S.C. § 1365(h)(3). If a student is removed to an AES pursuant to special circumstances, the IEP team makes the decision on the AES where services will be provided. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.

REMOVAL TO AES PLACEMENT

Before turning to the manifestation determination issue, it is prudent to first address whether the District’s removal to the 45-day placement was proper under the IDEA. Although the District points to three different items that constitute a “weapon” for purposes of this hearing,

⁶ The IDEA also permits an LEA to notify law enforcement and other officials of conduct that may constitute a crime. 20 U.S.C. § 1415(k)(6); 34 C.F.R. § 300.535. As was noted several times throughout these proceedings, any potential criminal matters are beyond the scope of this hearing officer’s jurisdiction.

it is only necessary to determine whether any one of those meets the requisite definitions because, importantly, the District treated the conduct on January 31 and February 6, 2017 together in imposing a single 45-day AES placement. This hearing officer shall do likewise.

As the sewing shears were described, it is evident that they fall within the definition of a “weapon” within the meaning of the applicable section of the U.S. Code, since the manner in which Student held and used them on February 6, 2017 rendered them readily capable of causing serious bodily injury through extreme physical pain or disfigurement.⁷ Further, as described, the shears cannot be deemed to fall within the 2½ inch or shorter knife blade exception to this definition. Although the Parents suggested that Student did not intend to harm anyone with the shears, the applicable provisions including the special circumstances language in the IDEA do not specify any particular intent in its definitions relating to weapons.⁸ Accordingly, the District was within its authority to remove Student to the AES placement.

Finally on this issue, there is no suggestion in the record that Student’s IEP team did not make the decision on the AES placement, or that Student’s special education services cannot be provided in that setting. For all of these reasons, this hearing officer concludes that the District’s removal of Student to the AES placement for a period up to 45 days was authorized under the applicable law. Accordingly, Student must remain in the AES placement until expiration of the 45-day period.

MANIFESTATION DETERMINATION

Although the 45-day AES placement was authorized whether or not the conduct was a

⁷ This conclusion is not inconsistent with the factually distinguishable situation in *California Montessori Project*, 56 IDELR 308 (Cal. SEA 2011) (finding the use of small children’s scissors with rounded tips and dull blades that were less than 2 ½” did not fit within definition of weapon for purposes of a disciplinary AES placement).

⁸ The IDEA does specifically require “knowing” possession of controlled substances under the “special circumstances” provisions for 45-day AES placements. 20 U.S.C. § 1415(k)(1)(G)(ii); 34 C.F.R. § 300.530(g)(2).

manifestation of Student's disability, the District has raised the manifestation determination issue in connection with the January 31 and February 6, 2017 behaviors.⁹ Under Section 1415(k)(E)(i)(I), the unambiguous language requires a determination of whether the conduct was "caused by" or had a "direct and substantial relationship to" the child's disability.

Before proceeding to the manifestation determination itself, it is noteworthy that the Parents expressed concerns with the composition of the team that reviewed the behaviors and participated in the February 16, 2017 meeting. (*See, e.g.*, N.T. 3/3/17 at 226-27, N.T. 3/24/17 at 272) As set forth above, that team is to be comprised of an LEA representative, the parents, and IEP team members as determined by the LEA and the parents. There is no evidence here that the Parents were consulted or otherwise had any input into who would participate in the important manifestation determination, contrary to the applicable disciplinary provisions. Parental participation is a significant focus of the IDEA, and can rise to the level of a procedural denial of FAPE.

In any event, a team of District personnel and the Parents concluded that previous conduct that was the subject of the February 5, 2017 Decision was [] a manifestation of Student's disability. However, the District members of the team reached the opposite conclusion regarding the incidents on January 31 and February 6, 2017, because each believed that Student could control behavior at times, and was acting deliberately and not impulsively on the dates in question. The Parents disagreed with that conclusion, believing that Student's behavior was a manifestation of Student's disability, as well as not as serious as portrayed.

The District's ER determined that Student was eligible for special education on the bases of an Emotional Disturbance and Other Health Impairment. Emotional disturbance is defined in

⁹ The parties agreed that this was an issue. (N.T. 3/3/17 at 18-19)

the IDEA implementing regulations as follows.

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i). The disability of Other Health Impairment (OHI) is defined as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as [ADHD] and (ii) Adversely affects a child's educational performance.” 34 C.F.R. § 300.8(c)(9).

Throughout the RR, Student was described, among other things, as exhibiting the following in the school setting: having difficulty with the abilities to “resist impulses” and “react to events appropriately;” to “lose emotional control;” to be “restless and overactive” and “have difficulty controlling [] impulses;” displaying “a high number of aggressive behaviors;” to “frequently engage[] in rule-breaking behavior;” being “disconnected from [] surroundings;” having “difficulty maintaining [] self-control;” and tending “to be disruptive, intrusive, and/or threatening toward other students.” (P-6 pp. 12, 15-21; S-3 pp. 12, 15-21) Each of these characteristics is consistent with Student's identification of eligibility as a student with an Emotional Disturbance and/or OHI based on ADHD, as is fully documented in the District's RR. As such, the conduct in question unquestionably bore a direct and substantial relationship to

Student's disabilities, as did the behaviors that were reviewed following the February 5, 2017 Decision. Consequently, this hearing officer concludes that the manifestation determination regarding the January 31 and February 6, 2017 conduct was in error, and that those behaviors were a manifestation of Student's disability.

If a behavior was a manifestation of the student's disability, the IEP team must conduct an FBA and revise or develop a behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f).¹⁰ With respect to the FBA, the District has continually recommended the need for this assessment and sought permission from the Parents. An FBA is unambiguously warranted and necessary in this case, to provide important information to the IEP team for identification of behaviors of concern, to seek an understanding of their function, and to lead to the development of an intervention plan.¹¹ This hearing officer has no doubt that the District would arrange for an appropriately qualified individual to complete such an assessment. However, the relationship between the parties is plainly strained at best, and the Parents' resistance to the ongoing request of the District to conduct an FBA is but one signal of the current lack of harmony and collaboration between the parties. Accordingly, in an exercise of the hearing officer's broad discretion to fashion an appropriate remedy under the IDEA,¹² and recognizing that hearing officers have the authority to order an IEE at public expense as part of a due process hearing, 34 C.F.R. § 300.502(d), the District will be ordered to provide an independent FBA at public expense for consideration of the IEP team upon its completion. This remedy of a publicly funded IEE will serve the important function of "guarantee[ing] meaningful participation [of the

¹⁰ As explained above, where an AES placement has been made under special circumstances, the student need not be returned to the previous placement even if the behavior is a manifestation of the child's disability.

¹¹ Information about the FBA process is available at <http://www.pattan.net/Search/?st=global&search=FBA&s=rel&f=publications> (last visited April 3, 2017).

¹² See, e.g., *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009).

Parents] throughout the development of the IEP” and future placement decisions. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11th Cir. 2012); *see also Schaffer, supra*, 54 U.S. at 61 (noting that an IEE can afford parents “a realistic opportunity to access the necessary evidence” and information relating to an appropriate program and placement for their child). An independent FBA should also serve the critical purposes of providing crucial information about Student’s behaviors from an objective and neutral viewpoint, and foster meaningful programming collaboration between the parties. The ordered FBA will be conducted on an expedited basis to assist the parties and IEP team with future placement and programming decisions following the conclusion of the 45-day AES placement.

Finally, it is necessary to address the Parents’ concerns that Student was being singled out, and that District staff exaggerated Student’s behaviors (N.T. 3/3/17 at 197-99, 215-18) and affirmatively provoked Student to engage in concerning conduct (N.T. 3/3/17 at 211-12). These assertions will be addressed more fully in the decision in the companion case at ODR No. 18683-1617KE; however, it should be noted that Student’s presentation at home and in the community is clearly much different than Student presents in the school setting, as detailed in the RR. For purposes of this decision, there is no evidence that Student was somehow provoked into using the sewing shears as was done in this case, and the use of the item met the requisite definitions applicable to the IDEA discipline procedures as a special circumstance, despite the conclusion above that the conduct was a manifestation of Student’s disability.

Lastly, the parties will need to continue to meet as members of Student’s IEP team to discuss the educational program and placement going forward. The independent FBA should assist the parties in doing so; and, this hearing officer also strongly encourages them to consider including a neutral IEP facilitator, such as is offered by the Office for Dispute Resolution at no

cost, as they meet to make appropriate educational programming decisions into the future.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District was authorized to remove Student to the AES placement for a period of up to 45 days, and that the behavior in question was a manifestation of Student's disability. The District will be ordered to arrange for an independent FBA to inform future program and placement decisions.

ORDER

AND NOW, this 7th day of April, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's removal of Student to the 45-day AES placement on the basis of the January 31 and February 6, 2017 conduct was authorized and not a violation of the IDEA disciplinary provisions.
2. The manifestation determination on February 16, 2017 that Student's behaviors on January 31 and February 6, 2017 were not a manifestation of Student's disability was erroneous and is REVERSED. The District shall, within ten calendar days of the date of this decision, correct Student's education records to reflect that Student's behaviors on January 31 and February 6, 2017 were a manifestation of Student's disability.
3. The District shall arrange for an FBA by an independent Board Certified Behavior Analyst (BCBA).
 - a. Within four calendar days of the date of this Order, the District shall provide to the Parents a list of not less than three local qualified individuals who are BCBAs, from which one will be selected to promptly perform an Independent FBA of Student. The Parents shall make an election from that list within three calendar days of receipt of the list, and notify the District in writing.
 - a. If the Parents do not notify the District, in writing, of their selection within three calendar days of receipt of the list, the District shall promptly make the selection(s) from the same list of BCBAs.

- b. The selected BCBA shall be given access to Student's education records, and shall determine the scope of the FBA.
 - c. The selected BCBA shall conduct the FBA as soon as possible and, not later than ten school days of assignment, provide a preliminary written report of the FBA results to aid in development/revision of a behavior plan, unless otherwise agreed by the parties. The final written report of the FBA results shall be completed and disseminated within twenty school days of the date of this Order.
 - d. The Independent FBA shall be at public expense.
 - e. A meeting of Student's IEP team shall convene to review the results of the preliminary and final written reports of the FBA for creation of a behavior plan and any other appropriate interventions.
4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 18869-1617KE