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**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Child: ET  
ODR # 7740/06-07 LS

Date of Birth: xx/xx/xx

Dates of Hearing: June 26, 2007

CLOSED HEARING

Parties to the Hearing:

Representative:

Mr. and Mrs.

Philadelphia City School District  
Legal Office -3<sup>rd</sup> Floor  
440 North Broad Street  
Philadelphia, PA 19130

Kenneth Cooper, Esquire

Date Transcript received:

June 27, 2007

Date of Decision:

July 10, 2007

Hearing Officer:

Marcie Romberger, Esquire

## BACKGROUND

Student was an Eighth Grade Student in the Philadelphia City School District during the 2006-2007 school year. Student was eligible for special education services as a result of his Attention Deficit/Hyperactivity Disorder and academic disabilities in math and reading. He received support in the resource room. On May 14, 2007, Student broke into the [redacted] School and stole money, personal checks, and food. He was caught and arrested. The District completed a manifestation review, determined his behavior was not a manifestation of his disability, and recommended that he be placed in an alternative educational setting. Student did not agree that his behavior was not a manifestation of his disability and did not consent to being removed to an alternative educational placement.

## FINDINGS OF FACT

1. Student was an Eighth Grade Student in the Philadelphia City School District (hereinafter, "District") during the 2006-2007 school year. N.T. 6.
2. Student was identified as a child with Attention Deficit/Hyperactivity Disorder and learning disabilities and received special education instruction in the resource room for math and reading during the 2006-2007 school year. S-4; N.T. 7, 23.
3. Student had an Individualized Education Program (hereinafter, "IEP") in place from May, 2006 to May, 2007. S-4; N.T. 19-20.
4. As part of Student's IEP, a behavior plan was implemented. S-4. The behavior plan focused on assisting Student to stay on task, complete assignments, and ask for help when needed. S-4; N.T. 20.
5. Student's teachers described Student as a nice, respectful, social child who had a bit of difficulty remaining on task, but who could be redirected. N.T. 23-24, 26, 27. At no time did any of Student's teachers believe he was emotionally disturbed. N.T. 23.
6. At 11:20 p.m. on May 14, 2007, Student and two other juveniles broke the guard screen on a window and entered the School. S-2; N.T. 10-11. The juveniles stole approximately \$800 in cash and an additional amount in personal checks. Id. They also removed food from the school kitchen. S-2. A school police officer caught the juveniles. Id. Student punched out three panes of glass on the kitchen door in an attempt to flee. S-1; N.T. 13. Student was later caught at his home. S-1, S-2.
7. Student was arrested by the Philadelphia Police Department, and received a suspension from school. S-2; N.T. 11.

8. The District also initiated a disciplinary change of placement for Student as a result of Student committing a Level 2 violation of the District's Code of Conduct. S-2; N.T. 10-11.
9. On May 17, 2007, the District completed a manifestation determination document. S-3. A manifestation determination meeting was held on May 21, 2007. S-3. Student's mother attended the meeting. S-3.
10. The team determined Student's behavior, breaking into the school and stealing money and checks, was not a manifestation of his disability: the conduct was not caused by or have a direct and substantial relationship to the child's disability; and the conduct was not a direct failure of the District to implement Student's IEP. S-3; N.T. 15-16.
11. Student's parent disagreed with the determination that Student's behavior was not a manifestation of his disability and refused to consent to a change of placement. S-6.
12. Student's IEP was being implemented. N.T. 24.

## ISSUES

Was Student's behavior a manifestation of Student's disability?

Can Student be assigned to an alternate educational setting as a result of his behavior?

## DISCUSSIONS AND CONCLUSIONS OF LAW

### Burden of Proof

Following [Schaffer v. Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 \(Nov. 14, 2005\)](#), and [L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 \(3d Cir. 2006\)](#), the burden of persuasion, as one element of the burden of proof, is now borne by the party bringing the challenge. As it was the District who filed this due process request, it has the burden of persuasion. Pursuant to [Schaffer](#), though, it only comes into play when neither party introduces preponderant evidence and, as a result, that evidence is fairly evenly balanced.

## Discipline

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 child's IEP Team 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 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 District's failure to implement the IEP. 34 C.F.R. § 300.530(c). The conduct is determined to be a manifestation of the child's disability if the parent and members of the child's IEP Team determine that one of the above conditions exist. 34 C.F.R. § 300.530(c).

Student has Attention Deficit/Hyperactivity Disorder and other academic needs necessitating an IEP. Student did have a behavior management plan, but it focused on assisting Student to stay on task, complete assignments, and ask for help when needed, not conduct related to burglary or theft. S-4; N.T. 20. In school, Student did not exhibit any behaviors that related to his conduct in the burglary and theft. N.T. 20, 23-24, 26, 27. Based on the testimony offered at the hearing, Student's conduct in the burglary/theft was not caused by, or had a direct and substantial relationship to, his disability. In addition, Student's teacher testified the District was implementing Student's IEP. N.T. 24. There was no testimony to refute this claim. Therefore, Student's conduct in question was not the direct result of the District's failure to implement the IEP.

Because Student's conduct was not caused by, or had a direct and substantial relationship to, Student's disability, or was Student's conduct the direct result of the District's failure to implement Student's IEP, Student's conduct was not a manifestation of his disability. When a student's behavior is determined not to be a manifestation of the student's disability, school personnel may remove a child with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative educational setting when the disciplinary procedures used on the child with a disability are in the same manner and for the same duration as procedures applied to children without disabilities.. 34 C.F.R. § 300.530 (c).

Since Student's conduct was not a manifestation of his disability and Student violated the District's Code of Conduct, he can be disciplined as any non-disabled student. In the District, any student who commits a Level 2 violation of the Code of Conduct can have his educational placement changed to an alternative educational placement. N.T. 9-10. Student can be removed from his current school and placed in an appropriate interim alternative educational setting.

Students who are removed because of a violation of a code of student conduct shall continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and to receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and

modifications, that are designed to address the behavior violation so that it does not recur.  
34 C.F.R. § 300.530(c).

The Notice of Recommended Educational Placement offered to Student after the violation of the Code of Conduct provides for Student to be placed in an alternative educational setting receiving part time learning support services. Student will continue to receive educational services to progress towards meeting the goals as set forth in his IEP and will participate in the general education curriculum for part of the day.

The District has proved that Student's behavior was not a manifestation of his disability, the conduct committed was a serious Level 2 violation of the Code of Conduct subject to removal from Student's current school and placement at an alternative educational setting, and that Student will continue to receive special education services according to his IEP while in the alternative educational setting.

## ORDER

Student's behavior was not a manifestation of his disability. As the conduct committed was a serious Level 2 violation of the District's Code of Conduct, Student is subject to the same discipline as a child who is not disabled. Therefore, Student can be removed from his current school and placed at an alternative educational setting as per the Notice of Recommended Educational Placement dated May 21, 2007.

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Marcie Romberger, Esquire  
Hearing Officer