

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: K.N.

Date of Birth: [redacted]

ODR No. 3128-11-12-KE

EXPEDITED HEARING
CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

Heather Hulse, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Tunkhannock School District
41 Philadelphia Avenue

Tunkhannock, PA 18657

William McPartland, Esquire
Marshall Dennehey Warner Coleman &
Goggin
50 Glemaura National Boulevard
Moosic, PA 18507

Date of Hearing:

May 31, 2012

Record Closed:

June 11, 2012

Date of Decision:

June 12, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Background

Student is a high school aged student residing in the District and enrolled in a District school. The Parent asked for this hearing to challenge the District's conclusion that certain behaviors in question were not a manifestation of Student's disability.

The hearing was conducted in one session on an expedited basis. I conclude that the District's procedure in conducting the manifestation determination was inappropriate, although I find that the District's conclusion that the behavior was not a manifestation of Student's disability was correct.

Issues

Were the District's manifestation determination procedures appropriate?

Were Student's behaviors a manifestation of Student's disability?

If the District incorrectly determined that Student's behaviors were not a manifestation of Student's disability, should the District provide Student with compensatory education for days of suspension and take any action with regard to the police and the courts?

Findings of Fact

1. Student is classified under the IDEA as a child with Other Health Impairment due to a diagnosis of Attention Deficit Hyperactivity Disorder [ADHD]. [P-11]
2. A May 5, 2011 Re-Evaluation Report [RR] notes that Student's "Discipline/Attendance history is not significant". [P-11]
3. On November 3, 2011, according to a written eyewitness report Student was found with a razor blade, a tin of chewing tobacco, and a lighter on school premises and received 3 days of out-of-school suspension for possession of tobacco. [P-14, P-19, P-20]
4. On March 24, 2012, according to Student's written self-report Student was at [an event] and, becoming bored, walked with another student into the locker room. Student [left marks on school property.] Student received 3 days of out-of-school suspension, and the [redacted] incident was reported to the Township police. [P-14, P-20]
5. On or about April 3rd Student reportedly made a provocative gesture towards a teacher and received a 3 day out of school suspension for Harassment. [P-14, P-20]
6. On or about April 11th Student reportedly made a provocative gesture and received a 3 day out of school suspension for Harassment. [P-14, P-20]

7. Student has not been expelled from the District school. [NT 42]
8. Because Student had been suspended for more than 10 cumulative school days, the District gathered a team and held a manifestation determination meeting to discern whether the disciplinary incidents constituted a pattern of behavior. [NT 72; P-20]
9. Prior to the meeting the Director of Special Education engaged in consults with various personnel including the Vice-Principal, the Case Manager and someone from the Vo-Tech program. [NT 71]
10. The Director of Special Education testified she also consulted with the school psychologist about whether or not the psychologist thought the behavior reflected ADHD, but could not remember when she consulted, and thought it was during a phone call while she was driving in her car. [NT 79-80]
11. The team gathered for the manifestation determination meeting consisted of the District Superintendent, the Director of Special Education, the building Vice-Principal and the Parent. [NT 20]
12. At the meeting Student's latest Re-Evaluation Report was referenced but was not reviewed. [NT 21, 60]
13. At the meeting Student's IEP was referenced but not reviewed. [NT 21]
14. The team considered whether Student's current IEP was being implemented. [NT 76; P-20]
15. In examining whether there was a pattern of behavior the District considered if the behaviors were substantially similar to one another, the nature of the behaviors, the total amount of time Student was removed from school and how close together in time the incidents were. [NT 73-74; P-20]
16. At the meeting the team did not consider the full diagnostic criteria for Student's qualifying disability, [Other health Impairment – ADHD], as outlined in the DSM-IV¹ and the District's psychologist was not present to explain the criteria. [NT 20, 28-29, 55, 57-58]
17. During the manifestation determination meeting the team did not consider Student's written account of the incident [redacted] that occurred in March 2012. [NT 31; P-14]
18. The team found that Student's behaviors were not a manifestation of Student's disability because Student "does not demonstrate a severe intellectual impairment nor does [Student] demonstrate a severe emotional disturbance or a neurological impairment that would result in involuntary/uncontrollable behavior". [P-20]

¹ American Psychiatric Association's Diagnostic and Statistical Manual – Fourth Edition.

19. The team concluded that Student “has not demonstrated a pattern of uncontrollable behavior and has demonstrated a history of voluntary control of [Student’s] behaviors”. [NT 51-52; P-20]
20. The District Superintendent who participated on the manifestation determination team testified that he was of the opinion that Student’s behaviors were not a manifestation of Student’s disability based on his belief that Student knew right from wrong, and that students exhibiting repeated behaviors should know right from wrong regardless of their impulsivity. [NT 23-25]
21. The Director of Special Education who participated on the manifestation determination team was of the opinion that Student’s behaviors were not uncontrollable. [NT 52]
22. The Director of Special Education also believes that the four incidents were not a manifestation of Student’s disability [ADHD] because “they didn’t constitute a pattern”. [NT 75-76]
23. The Parent disagreed with the team’s conclusions on the grounds that she didn’t believe Student “intentionally harassed any teacher on purpose”. [NT 82-83; P-20]

Legal Basis

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to *Schaffer*, and in this matter parent accepted the burden of production even though case law does not clearly assign same to either party. On one issue [harassment] neither side produced probative evidence. Thus the scale was equally balanced and therefore having failed to meet her burden of proof the Parent could not prevail on that issue.

Credibility

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the

hearing.² Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. The witnesses who testified were District employees called by the Parent. The witnesses' testimony reflected their consciousness of the need to be exact, and although they did not demonstrate a clear understanding of the legal criteria for determining whether a student's behavior was a manifestation of the disability, they appeared to be testifying frankly.

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* This federal special education statute recognizes that a child's disability may lessen or remove his/her responsibility for a behavioral infraction, and thus mitigate the disciplinary consequence of the action.

Discipline Procedures

The IDEA and its implementing regulations set forth detailed provisions for disciplinary matters. Provisions relevant to this case are presented as follows:

34 CFR §300.530 Authority of school personnel.

- (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.
- (b) General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536). (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.
- (c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

² 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

(e) Manifestation determination. (1) Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under §300.536, 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) 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 LEA's failure to implement the IEP. [Emphasis added]

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(h) Notification. Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in §300.504.

§300.532 Appeal.

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing. [Emphasis added]

(b) Authority of hearing officer. (1) A hearing officer under §300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(c) Expedited hearing. (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.510 through 300.514, except as provided in paragraph (c)(2) through (5) of this section.

(2) The SEA or LEA must arrange for an expedited hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.

(6) The decisions on expedited due process hearings are appealable consistent with §300.514. (Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A)) [Emphasis added]

Change of placement is discussed in 34 C.F.R. 300.536. It provides:

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if--

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern--

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.

Compensatory Education

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. *M.C. v Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996); *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, 488 U.S. 923 (1991).

Police Reports

The IDEA's implementing regulations provide that:

“Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities

from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability."³ 34 C.F.R. 300.535.

Discussion and Conclusions of Law

It is undisputed by the parties that Student is eligible for special education services under federal and state special education laws, and that Student is a protected handicapped student under federal law⁴. The parties do not dispute Student's classification as Other Health Impaired due to having a diagnosis of Attention Deficit Hyperactivity Disorder. Students eligible for special education are entitled to certain protections in the area of discipline, such that in the absence of specific exceptions they cannot be disciplined in the same way that nondisabled students are disciplined. Federal and state statutes and regulations require that an inquiry be done as to whether or not a student's inappropriate action was "caused by, or had a direct and substantial relationship to, the child's disability". The same statutes and regulations also require an inquiry as to whether "the conduct in question was the direct result of the LEA's failure to implement the IEP". If either criterion is met, the student is exempt from disciplinary measures imposed on non-disabled students.

The IDEA requires a local education agency [LEA] which in this case is the District to conduct a manifestation determination procedure if it seeks to change the placement of an eligible child for disciplinary reasons. 34 C.F.R. §300.530(c). The manifestation determination is made by the agency, the parent, and relevant members of the child's IEP team, as determined by the parent and the LEA. 34 C.F.R. §300.530(e)(1). These individuals are required to review all available information, including parental input. 34 C.F.R. §300.530(e)(1). The individuals must determine whether or not the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability" 34 C.F.R. §300.530(e)(i).

Procedural Errors

Predetermination

The Director of Special Education testified to gathering information from various individuals including the school psychologist prior to the meeting. She testified that she asked the psychologist if in her professional opinion the incidents "were part of the characteristics of ADHD". Based on her testimony a reasonable inference can be drawn that the District came to the manifestation determination meeting with a predetermined outcome which is contrary to the IDEA's intent that the determination be a team decision with the parent an integral part of the team.

Failure to Utilize IDEA Test for Manifestation

³ As per the District's written closing argument, See also *Joseph M. v. Southeast Delco Sch. Dist.*, 2001 U.S. Dist. LEXIS 2994, [E.D.Pa 2001], where the Court held that there is nothing in the IDEA that prohibits school officials from reporting a crime committed by a child with a disability to appropriate state law enforcement or judicial authorities, to the same extent that crimes committed by children without disabilities would be reported.

⁴ See Section 504 of the Rehabilitation Act of 1973.

The Director of Special Education and the Superintendent testified to the process by which the District conducted its manifestation review at the meeting on April 17, 2012. Nowhere in their testimony did either witness advert to the IDEA test for manifestation as set forth in the regulations. 34 C.F.R. §300.530(e)(i). On the contrary, they testified to considering whether Student “knew right from wrong” and whether the action was “uncontrollable”. The manifestation determination worksheet likewise reflects this incorrect process. Further, at one point in her testimony the Director of Special Education seemed to confuse establishing whether or not there was a pattern of behavior versus discerning whether the behaviors were a manifestation of Student’s disability. Thus, the group making the manifestation determination failed to carry out the mandate of the IDEA – it did not consider what the IDEA requires to be considered.

Substantive Issue

Pattern of Behavior/Change in Placement

The manifestation determination team considered whether or not Student’s behavioral incidents resulting in suspension constituted a change in placement. The team determined that there was not a pattern of behavior. I agree. There were only four incidents, four months elapsed between the first and the second incident, and only the last two incidents were close in time and similar to one another. Two harassment incidents as of the date of the manifestation determination meeting were not sufficient to establish a pattern; however, in the future the presence of a pattern should be considered if any additional incidents of this particular type⁵ should occur, especially given that following these two incidents Student and the Parent have experienced serious negative consequences including this due process hearing and court involvement.

Direct and Substantial Relationship of the Incidents to the Disability

Although the District did not conduct a manifestation determination process that was consistent with the IDEA’s requirements, the conclusion was that Student’s behavior was not a manifestation of Student’s disability. I agree and find that they reached the correct conclusion for the wrong reasons.

Impulsivity is one of the index criteria for Attention Deficit Hyperactivity Disorder. Low frustration tolerance, temper outbursts, stubbornness, and mood lability are ADHD’s associated characteristics, and individuals with this diagnosis typically have conflicts with school authorities. [See P-26 for the complete diagnostic criteria as put forth in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition – Text Revision (DSM-IV-TR)] Based on the written descriptions of the first two incidents – [redacted] – I conclude that neither incident was impulsive. Both involved prior actions and some planning. [Redacted.] Student [redacted] engaged in a purposeful act for a specific, albeit a rather foolish and puerile, purpose [redacted].

The mandate of the IDEA, to discern whether a behavior is *caused by*, or had a *direct and substantial relationship to* a student’s disability, requires a careful and conservative analysis. In cases where the disability in question is ADHD one has to be especially careful not to be

⁵ Notably, Student was suspended for one day for an incident of Disrespect to School Personnel on May 3rd. The suspension notice appeared as part of P-14 but that incident was not explained further and it is not known therefore if it was similar to the harassment incidents.

over-inclusive lest any action other than one meticulously planned becomes a manifestation of the disability. Unless a team considers the act or behavior in detail including its antecedents, and then places it in the context of complete diagnostic criteria for ADHD, there is the danger that an eligible student's responsibility for almost any callow disregard of rules and the rights of others including property rights could be mitigated, thus making what was meant to be an exception [manifestation] the rule. The information in the record about the first two incidents does not lead to the conclusion that ADHD caused the behavior or bore a direct and substantial relationship to the behavior.

With regard to the third and fourth incidents, the information introduced by the parties through documents and testimony was scant at best. The lack of probative evidence concerns the harassment incidents which are the incidents about which the Parent specifically indicated disagreement and requested a hearing. First, neither the Student nor the teacher(s) in question testified about the alleged two harassment incidents, and no one who testified had witnessed the incidents. Second, although the exhibits document the suspensions following the harassment incidents, unlike the [other incidents], there were no detailed descriptions of the harassment incidents. Of the four incidents in question, the harassment incidents could conceivably have been "caused by", or "had a direct and substantial relationship to, the child's disability" as they were likely spontaneous, impulsive and immediate responses to an authority figure. However, neither side provided evidence concerning the harassment incidents. Not having any more information than the District counsel's unsworn hearsay statements on the record, I cannot determine whether in fact the incidents were manifestations of Student's disability. Given that the Parent bore the burden of persuasion in this matter, under *Schaffer* she therefore cannot prevail on this point.

IEP Implementation

The manifestation determination worksheet and a witness' testimony suggest that the IEP was referenced during the meeting. Again, neither side presented detailed testimony about whether the IEP was actually being implemented. Based only on the written manifestation determination document and the IEP, and in the absence of the Parent's having challenged the IEP's implementation through testimony, I conclude that the IEP was being implemented and/or the Parent was not challenging the implementation.⁶

Conclusion

I conclude that the District's manifestation determination was inappropriate on procedural grounds, although I find the District reached the correct conclusion that the behaviors in question were not a manifestation of Student's disability. Further I conclude that the suspensions Student incurred were appropriate, that the District did not violate Student's rights by reporting Student's behavior to the police, and that the District is neither required to provide compensatory education nor take any action on Student's behalf regarding the court or the police.

⁶ Unlike requirements under the IDEA before its reauthorization in 2004, whether or not the IEP was appropriate is no longer a question before a hearing officer when deciding an expedited disciplinary matter. The Parent has in fact challenged the appropriateness of the IEP along many dimensions, and this issue along with others will be the subject of another hearing that is scheduled for the end of June.

ORDER

It is hereby ORDERED that:

1. The District's manifestation determination procedures were not appropriate.
2. Student's behaviors were not a manifestation of Student's disability.
3. The suspensions Student incurred for the behaviors in question were appropriately conferred and Student is not entitled to compensatory education for the school days missed.
4. The District did not violate Student's rights when reporting the incident(s) to the police.
5. The District need take no action on Student's behalf regarding the court or the police.

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

June 12, 2012

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official