

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: M.P.

Date of Birth: [redacted]

Dates of Hearing:

May 1, 2013

May 3, 2013

CLOSED HEARING

ODR Case # 13715-1213KE

Parties to the Hearing:

Representative:

Parent

Pro Se

Parent

Pro Se

Millcreek Township School District
3740 West 26th Street
Erie, PA 16506

Jennifer Gornall, Esq.
Knox McLaughlin, et. al.
120 West 10th Street
Erie, PA 16501

Date Record Closed:

May 3, 2013

Date of Decision:

May 17, 2013

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is a [late teenaged] student residing in the Millcreek Township School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹. The District has imposed significant discipline against the student, amounting to an expulsion from school, based on a behavioral incident. The parent opposes the expulsion.

Parent filed a complaint on April 5, 2013 after the finding of a manifestation determination review that the behavioral incident was not a result of the student’s disability under the IDEA. Parent disagreed and sought to have the determination overturned.²

Because parent’s complaint regards a disciplinary change in placement, this decision is on an expedited timeline. (34 C.F.R. §300.532(c); 22 PA CODE §14.162(q)(4). The hearing was conducted in two sessions on May 1 and May 3, 2013. The decision is due within ten school days of the hearing. (34 C.F.R. §300.532(c)(2)). The 10-school day timeline expired on May 17, 2013. (Hearing Officer Exhibit [“HO”]-4).

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

² The singular “parent” is used throughout the decision because the student’s mother filed the complaint and was the sole parental participant throughout. The student’s father has been copied on all communications, and is being provided with a copy of the decision, but had no substantive role in the proceedings.

For the reasons set forth below, I find in favor of the parent regarding the result of the manifestation determination review.

ISSUE

Was the outcome of the manifestation determination process correct in finding that the student's behavior was not a manifestation of the student's disability?

FINDINGS OF FACT

1. The student enrolled in District schools in March 2012, near the end of the 10th grade year. (Notes of Testimony ["NT"] at 307, 309, 330).
2. Beginning in early May 2012, the student's inappropriate behavior in school, including non-compliance, arguing, and inappropriate language, escalated markedly, resulting in over a dozen student behavior referrals. (School District Exhibit ["S"]-14 at page 4).
3. In May 2012, the student was hospitalized at a local hospital mental health unit. (Parent's Exhibit ["P"]-1 at pages 89-97; S-14).
4. In July 2012, the student was involved in a traumatic incident which resulted in another hospitalization. (P-1 at pages 98-107; S-14).
5. Upon admission, the student was reported to have engaged in [specific behavior]. (P-1 at pages 98, 102; S-14)

6. The District was aware of [the specific] behavior. (S-6; NT at 309-311, 340-342).
7. In August 2012, the District issued a re-evaluation report (“RR”). (S-14).
8. The August 2012 RR included review of a February 2010 neuropsychological evaluation (“neuropsych evaluation”) conducted as a result of a referral by the student’s then-current school district in [another] state. (S-13).
9. The February 2010 neuropsych evaluation recorded a long history of emotional and behavior problems, including multiple educational placements in therapeutic and private settings. (S-13).
10. The February 2010 neuropsych evaluation cast some doubt on an identification of autism and suggested that an emotional disturbance may be a more accurate identification. (S-13).
11. The February 2010 neuropsych evaluation concluded that the student had “impaired executive functioning skills”, with “strong indication” of poor attention and low vigilance and lack of impulse control. (S-13 at pages 7, 10-11).
12. The February 2010 neuropsych evaluation indicated significant impairments in social skills, socialization with peers, and pragmatic speech and language skills. (S-13).
13. The February 2010 neuropsych evaluation made recommendations for extensive additional therapeutic and

educational evaluations and, ultimately, highly restrictive private educational placements. (S-13).

14. Throughout the student's educational history, including at the District, the student exhibited non-compliant behavior with faculty and staff, inappropriate classroom behavior, inappropriate language, and socially inappropriate interaction with peers, both in terms of aggression or and for attention-seeking. (S-13, S-14).
15. The August 2012 RR noted that when engaged one-on-one with faculty and staff, however the student is "very appropriate....kind, courteous, and respectful". After reprimand for inappropriate behavior, the student is often contrite and respectful, often seeking out staff, or making an explicit effort, to apologize. (P-1 at pages 39, 43, 154-157, 162; S-14 at page 4; NT at 230-231).
16. In August 2012, the District developed a positive behavior support plan, including the identification of antecedents to behaviors of concern/behaviors of concern/consequences for maintaining behaviors of concern, and individualized education plan ("IEP") goals related to behavior. (S-12).
17. Most of the behaviors of concern are related to inappropriate classroom behavior and compliance, but antecedents include, among others, a lack of social skills, attention seeking, negative social interaction, and unstructured activities. (S-12).

18. Over the course of the 2012-2013 school year until early March 2013, the student was involved in multiple problematic behaviors in the school environment. (See findings of fact below).
19. The student would request permission to leave class and was unaccounted for or did not appear for scheduled services. Similarly, the student would often be late to class, excessively leave class and/or roam unescorted in the school environment, extensively use District phones to call mother, and engage in non-compliance with school bus protocol and discharge procedures. (P-1 at pages 13-14, 25, 28, 30, 41-42, 127-136, 144, 147-148, 151, 162-163, 168-169; NT at 228-231, 534; NT at 114-115,).
20. The student communicated inappropriately with peers, including communications regarding use of drugs, derogatory comments regarding other students, threatening students and false boasting. (P-1 at pages 15-16, 19, 22, 43-44, 47-49, 51, 89, 94; NT at 461, 517).
21. In January 2013, the student was involved in a fight with another student off school property but after the student had come under the control of the District by being bused to the school. (P-1 at pages 16-24, 27, 160; NT at 399-400).
22. In January 2013, the student was disciplined for violating the District's tobacco policy by using chewing tobacco. (P-1 at pages 33-37, 87).

23. Over the course of the 2012-2013 school year, the student routinely engaged in problematic classroom behaviors including defiance, acting out, and use of profanity (P-1 at pages 37, 42, 47-48, 51, 59-61, 66, 89, 94, 118, 127-136, 140-152, 161; NT at 74-95, 364-425).
24. Over the course of the 2012-2013 school year, the student would meet regularly with a student assistance/mental health liaison, at least twice daily. While at the hearing the District characterized this as hundreds of mental health contacts, the vast majority of those contacts were regularly-scheduled, multiple, daily check-ins with the student. Of those which were not part of the regular check-in protocol, some were initiated by the student and some were initiated by the liaison. (P-1 at pages 171-172; S-6 at page 4; NT at 34-35, 102, 111-115, 124-127).
25. On February 27, 2013, a District special education administrator voiced concerns about the student's "steadily escalating" behaviors. The administrator indicated that the behavior implicated potential discipline responses and envisioned a manifestation determination process. (P-1 at pages 43-44).
26. On March 1, 2013, a District special education administrator emailed District staff working with the student about a staff meeting to discuss IEP implementation and concerns/input

- regarding the student's IEP and behavior support plan. (P-1 at page 49).
27. In early March 2013, the District began to consider changes to the behavior support plan and to engage an independent autism behavior consultant. (P-1 at pages 52-57).
 28. On March 3, 2013, the District school psychologist completed a threat assessment for the student. The assessment indicated that the student was capable of hurting self or others. (P-1 at pages 58, 121-122).
 29. On March 7, 2013, a District administrator documented 13 problematic behaviors, including purported drug use in school, inappropriate classroom behavior, threats and disruption on the cafeteria, threats against another student, use of profanity, and inappropriate language at dismissal. The administrator indicated that if the student did not cease using profanity and disrupting the hallways, community police would be called and disorderly conduct charges might be pursued. (P-1 at pages 59-61; NT at 212-216).
 30. As a result of the events of March 7th, a District special education administrator opined to school-based members of the IEP team that the student needed a crisis plan in the IEP. (P-1 at page 60).

31. On March 8, 2013, an IEP team meeting was scheduled for March 14th. (P-1 at page 63; S-7).
32. On the morning of March 14, 2013, at approximately 8:35 AM, the student was excused with other students for a class-wide bathroom break. The student entered the bathroom ahead of two fellow students. (P-1 at 155; NT at 38-42).
33. The student [engaged in behavior in the bathroom]. As much as the student was engaged in the behavior for [Student's own] self, the student directed the behavior toward the two peers, showing off in misbehavior. (P-1 at pages 154-159; NT at 38-42, 48-49).
34. The three students returned to class, and the student's classmates informed the classroom teacher about the [bathroom] incident. The teacher took the student out of class and interrogated the student about the incident. (NT at 48-49, 129-157).
35. The student was escorted to the school office. (NT at 135).
36. [An] alarm never sounded nor did the District take any action to activate an alarm or clear students from the area of the bathroom or the school generally. (NT at 134-135, 138-139, 148-149, 476-477).
37. The student admitted to the behavior. The student indicated that another student had provided [an item] to the student at an

- off-campus convenience store after the student had been bused to the school. (P-1 at pages 73, 83; NT at 28-29, 129-157, 194-196).
38. The student had previously been in possession of [similar items] in school. (NT at 407).
39. On March 14, 2013, at approximately 10 AM, the student's mother arrived for the previously-scheduled IEP meeting. (P-1 at pages 63, 73-74, 258-260).
40. The student was suspended for three days for generally violating the District code of student conduct and an informal disciplinary hearing was scheduled for March 18, 2013. (P-1 at pages 88, 111-112; S-18a).
41. On the afternoon of March 14th, the central administration of the District was already considering extending the suspension and holding an internal administrative review because of the seriousness of the behavior. On the evening of March 14th, the student's mother requested of a special education administrator a manifestation determination review. On the evening of March 15th, a special education administrator indicated that disciplinary matters, including the need for a manifestation determination, were still in flux. (P-1 at pages 73-81).
42. On March 15, 2013, the District school psychologist conducted a second threat assessment, including information related to the March 14th incident. The second assessment again

- indicated that the student was capable of hurting self or others. (P-1 at pages 120-126).
43. On March 18, 2013, as a result of the informal disciplinary hearing held at the building level, the student's suspension was extended for an additional six days (or a total of nine days). The student was still deemed to be in general violation of the District code of student conduct. The parent was informed that a superintendent's hearing, an internal review by District central administration, would also take place. (S-18b).
44. On March 18, 2013, by separate notice, the District assistant superintendent (and acting superintendent) indicated that he would convene a superintendent's hearing on April 2nd, a day before the conclusion of the nine-day suspension. In the assistant superintendent's March 18th letter, however, the District now indicated that the student was not in general violation of the District code of student conduct but that the student was in violation of a specific District policy regarding terroristic threats/acts. (S-18c, S-20).
45. On March 22, 2013, parent was informed that the April 2nd meeting would not be a superintendent's hearing but rather a manifestation determination review. (S-4).
46. On April 2, 2013, the District conducted a manifestation determination. (P-1 at pages 86-87; S-5, S-6).

47. The parent, relevant members of the student's IEP team, District administrators, and the parent's educational advocates attended the meeting. (S-6).
48. The manifestation determination worksheet contained details of the March 14th incident. It also contained information regarding the student's therapeutic needs, information from the August 2012 RR, the student's increasing aggression, non-compliance, and inappropriateness over the course of the 2012-2013 school year, and the report of two [redacted] incidents at home over the prior year. (S-6).
49. The manifestation determination review found that the March 14th incident was not caused by the student's disability or had a direct and substantial relationship to the student's disability. (S-6).
50. The manifestation determination review found that the March 14th incident was not caused by a District failure to implement the student's IEP. (S-6).
51. The manifestation determination review found that the student could be disciplined under the code of student conduct similarly to a student without disabilities. (S-6).
52. The manifestation determination worksheet was presented in draft form entirely completed by the District except for check-boxes which indicated "yes" or "no" to determinative questions. The

- finalized worksheet was the same as the draft except for completion of the check-boxes. (S-5, S-6; NT at 279-280, 285-287).
53. The manifestation determination review was hurried. While not prejudicially so, or conducted in such a way that the outcome was predetermined, the student's mother and advocates testified credibly that the meeting was time-constrained and somewhat non-collaborative. (S-6; NT at 281-286, 463-507).
54. The parent had obtained medical and mental health records just before the manifestation determination review. Due to certain concerns about duplication of records and a lack of clarity as to what the student's mother saw in them, the parent did not wish to share the records at the meeting. Following the meeting, the parent did not subsequently share the records. (NT at 262-266).
55. The parent disagreed with the outcome of the manifestation determination review. (S-6).
56. On April 5, 2013, and following on the manifestation determination review, the District issued a notice of recommended educational placement ("NOREP") for the student to attend a District alternative education program for disruptive youth. The parent rejected the NOREP, indicating that the parent would pursue a special education due process hearing. These proceedings resulted from the complaint filed thereafter. (S-3).

57. As a prehearing matter, parent asserted that the stay-put protection applied to the student and that the student should be returned to the educational placement operative at the time of the manifestation determination review. The District filed a response. On April 12, 2013, this hearing officer issued a ruling denying stay-put protection, holding that 34 C.F.R. Section 300.533 explicitly excludes stay-put protection where manifestation determination proceedings are the basis for the change in placement. (HO-1, HO-2, HO-3).

DISCUSSION AND CONCLUSION OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA CODE §§14.101-14.162). Under these laws, students with disabilities have protections regarding school district discipline. (34 C.F.R. §§300.530-300.536; 22 PA CODE §§14.101(a)(2)(xxxii), 14.162(q)). These protections, and consequent processes, will be outlined in detail.

When a student with a disability is suspended from school in excess of 15 cumulative school days in a school year (22 PA CODE §14.143(a)), or in excess of 10 consecutive school days (34 C.F.R. §300.536(a)(1)), that disciplinary action constitutes a change in the student's educational placement. An intricate series of protections must

be observed before a school district can impose the discipline. (34 C.F.R. §300.530).

Pursuant to the applicable federal regulations, the parent and relevant members of the student's IEP team must conduct a review to determine whether the behavior which led to the proposed discipline "was caused by or had a direct or substantial relationship to the child's disability or was the direct result of the (school district's) failure to implement the IEP." (34 C.F.R. §300.530(e)(1)). This is referred to a manifestation determination review.

Such determination must be made within 10 school days of any decision to change an eligible child's placement. (34 C.F.R. §530(e)(1)). The participants "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." (34 C.F.R. §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 a manifestation of the child's disability, the school district may take the same type of disciplinary action that it would take with respect to a child with no disabilities, provided that if the student is removed from the current placement, the school district must ensure that the child is provided with a free, appropriate public education, continues to participate in the general curriculum in the alternative setting, and continues to make progress toward achieving

his/her IEP goals. (34 C.F.R. §300.530(c),(d)). If the manifestation determination review results in upholding the school district's recommendation for an alternative placement, the IEP team determines the alternative setting. (34 C.F.R. §300.531).

If, on the other hand, the manifestation determination review results in a finding that the behavior was a manifestation of the student's disability or disabilities, the manifestation determination team must address the student's behavior through by conducting a functional behavioral assessment and developing a behavior support plan, or re-visiting such an assessment/plan if those already exist, and return the student to the educational placement from which he/she was removed (unless the IEP team agrees to some other placement). (34 C.F.R. §300.530(f)).

A parent who disagrees with the results of the manifestation determination review, or with the alternative placement decision, is entitled to appeal by means of a due process hearing. (34 C.F.R. §300.532(a)). If the hearing officer determines that the district violated the manifestation determination procedures, or that the behavior was a manifestation of the child's disability or the school district's failure to implement the IEP, the hearing officer may (1) return the child to the original placement or (2) order a change of placement to an alternative placement for 45 school days upon determining that "maintaining the

current placement of the child is substantially likely to result in injury to the child or to others.” (34 C.F.R. §300.532(b)(1),(2)).

In this case, the District has complied with the procedural requirements of the manifestation determination process. Appropriate members of the IEP team convened a timely meeting and reviewed relevant information concerning the student in terms of the behavioral incident. Testimony by the student’s mother, and advocates who attended the manifestation determination review, was persuasive that the manifestation determination meeting was somewhat rushed. Less persuasive was testimony that the District representatives did not consider information provided by the parent, as the student’s mother did not make available certain records which she brought with her to the manifestation determination review. And even though the contents of the “draft” review were not revised at all when made final (except for the completion of check-boxes), the District did not predetermine the outcome of the manifestation determination review.

Additionally, the District’s contentions regarding the nature of the [redacted] incident are inconsistent. On the day of the incident itself, [redacted], no one felt that there was a [redacted] dangerous situation that threatened student health/safety. No alarm was sounded and no other students were moved as the result of safety concerns. The disciplinary actions taken in the days thereafter indicate that the student was being disciplined for general breaches of the code of conduct. Only

later, after the initial suspension and an informal hearing at the building level had already taken place, did the District seem to elevate the nature of the incident to a level where terroristic threats/acts were implicated.

This is not to say that the District acted inappropriately; that day and thereafter, the situation was fluid, and views might certainly change. But the District's initial reaction on the day of the incident and the days thereafter, including communications that very day with the acting superintendent, did not have the hallmarks of a response which implicated terroristic threats or acts.

Still, taking all of these procedural matters as whole, the District complied with its procedural obligations in conducting the manifestation determination. The substantive evidence for setting aside the manifestation determination, however, is more compelling.

The student has a complex, multi-faceted, and years-long history of problematic behaviors in the school environment. Impulsivity, rule-breaking, and peer engagement issues (both aggressive and attention-seeking) were part of this history and known to the District.

Soon after the student enrolled in the spring of the 2011-2012 school year and throughout the 2012-2013 school year, these behaviors manifested themselves and intensified. As of the summer of 2012, the student was engaged in [specific] behavior, behavior which the District knew about at the time of the August 2012 RR.

The student exhibited highly inappropriate behaviors not only in classroom environments but in unstructured contexts as well—on the school bus, after arrival at school in off-campus situations, during hallway time, during cafeteria time, and at dismissal.

On March 14th, during unstructured time in the bathroom, the student impulsively engaged in rule-breaking behavior to have an impact on peers. The misbehavior involved [an item], rule-breaking that the student had previously engaged in. [Redacted] was behavior that the student had engaged in before, albeit outside of the school environment, but behavior that the District had been aware of nonetheless. The entirety of the record supports a finding that the March 14th incident was a manifestation of the student’s disability.

Nothing in this decision should be read to fault the District or imply that the District acted in bad faith. As set forth above, the District did not predetermine the manifestation determination review. Every District witness testified credibly in his/her view that the student’s behavior that morning was not, in their eyes, a manifestation of the student’s disability. In that regard, the sincerity of the District witnesses is not called into question. Yet, regrettably, the District members of the manifestation determination team came to the incorrect conclusion.

In sum, then, the behavior exhibited by the student in the incident of March 14th was “caused by, or had a direct and substantial relationship to”, specifically, the student’s identification of emotional

disturbance. (34 C.F.R. §300.530(e)(i)). As such, the finding of the manifestation determination review that the incident of March 14th was not a manifestation of the student's disability was in error.

An order will be issued for the return of the student to the educational placement, although that order will address certain specific matters related to the student's return.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the manifestation determination result of April 2, 2013 is overturned. The behavior incident of March 14, 2013 was caused by, or had a direct and substantial relationship to, the student's emotional disturbance.

Within 10 school days of the date of this order, the student's IEP team shall meet to plan a return of the student to the student's educational placement prior to the removal. The IEP team shall explicitly:

- discuss and, if deemed necessary, plan for a functional behavior assessment and/or modification of the student's behavior plan related behaviors involving both lone activity and peer interaction in unstructured settings;
- consider the need for a one-on-one aide for, or direct supervision of, the student in unstructured/unsupervised settings such as school bus transportation, school arrival

and dismissal, passing between classes, moving through the school for services or restroom breaks, and cafeteria time;
and

- re-visit the student's goals, program modifications, specially designed instruction and related services for social skills involving peers.

While the District may be able to provide appropriate behavior support and other services to allow the student to be educated in a less restrictive setting within the District in the 2013-2014 school year, in the future, the IEP team may need to consider the full spectrum of potential educational placements to identify whether or not the student's needs can be met in a District placement.

Furthermore, given that the school year is nearing its end and a degree of planning may be necessary to implement this order and address potential other issues in the student's educational planning, to the extent that the IEP team feels that a return to the educational setting is best left for the start of the 2013-2014 school year, the IEP team may do so. In such an instance, the District shall arrange for appropriate homebound instruction, or other appropriate educational services, for the student.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer
May 17, 2013