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PENNSYLVANIA

***SPECIAL EDUCATION HEARING OFFICER***

DECISION

DUE PROCESS HEARING

Name of Child: N.R.

ODR #7061/06-07 LS

Date of Birth: xx/xx/xx

Date of Hearing: November 9, 2006

CLOSED HEARING

Parties to the Hearing:

Representative:

Pro Se

Michelle Cori  
MaST Community Charter School  
Philadelphia, PA 19136

Patricia Hennessy, Esquire  
Latsha, Davis, Yohe & McKenna  
350 Eagleview Boulevard, Suite 100  
Exton, PA 19341

Date Transcript Received:

November 14, 2006

Date of Decision:

November 21, 2006

Hearing Officer:

Marcie Romberger, Esquire

## BACKGROUND

Student is a xx year old student who attended 10<sup>th</sup> grade at the MaST Community Charter School at the beginning of the 2006-2007 school year. Student is a child diagnosed with disabilities. On October 5, 2006, the School was informed that Student had a knife on the school bus the previous day. School officials searched Student and found a knife with a blade greater than 2 ½ inches in Student's possession. Student was suspended. A manifestation determination meeting was held and the team determined Student's actions were not a manifestation of his disabilities. Student disagreed to the team's finding. As a result, MaST Community Charter School asked for this hearing.

## FINDINGS OF FACT

1. Student began the 2006-2007 school year in the 10<sup>th</sup> grade at the MaST Community Charter School (hereinafter "School"). N.T. 49; S-11.
2. Student has been enrolled at the School since he was in the 4<sup>th</sup> grade. N.T. 48.
3. When he entered the School in 4<sup>th</sup> grade, Student was diagnosed with learning disabilities and Attention Deficit Hyperactivity Disorder (hereinafter "ADHD"). N.T. 48-49. He had an Individualized Education Program (hereinafter "IEP") from his previous placement which provided him with learning support services. Id. In addition, Student received therapeutic support services. N.T. 49.
4. Student was also diagnosed with Oppositional Defiant Disorder, but it is unclear when he was first diagnosed. S-9. 1
5. During his tenure at the School, Student's learning support services remained the same. N.T. 49. Student's therapeutic support services were discontinued, however, in 4<sup>th</sup> grade. N.T. 49. The School followed Student's behaviors through functional behavioral assessments and through goals in his IEP. N.T. 49-50.
6. Student has always had impulsive behaviors in the classroom, such as inattentiveness, not attending to task, and being social with peers. N.T. 54. These issues continued during the 2006-2007 school year. N.T. 65, 67; S-9. His chair had to be moved in most classes to assist him with focusing. S-9.
7. Student had been taking Strattera for his ADHD. N.T. 64. Student felt the medicine helped him focus. S-9. He stopped taking the medication in June, 2006 because his prescription ran out, his treating physician moved out of state, and he was not taken to another doctor to obtain a new prescription. N.T. 64, 90, 116. Student's primary physician would not provide Student with a prescription since she was not the treating physician for Student's ADHD. N.T. 120, 121.

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1 The District commented that Student was diagnosed with oppositional defiant disorder prior to Student's private evaluation on October 18, 2006. S-9. It is unclear from where and from when this diagnosis came.

8. Student's mother noticed changes in Student's impulsivity, oppositional outbursts, and attention at home when Student was not on his medication, and told the School about the changes. N.T. 116; S-15.
9. Student's teachers also noticed a difference in Student's behavior this school year; Student was more distracted in the classroom and off task with his work. S-12. Student's teachers changed his seat, monitored his work completion, and chunked his assignments. S-12. No changes to the IEP, however, were made to address the increase in behaviors. N.T. 92-93; S-11.
10. Student's mother referred Student to the school counselor. N.T. 61. Student began going to the counselor on October 3 and 4, 2006. S-9, 12. However, Student should have been seeing the counselor 30 minutes a week from the beginning of the school year as part of his IEP to work on Student's attending to task, focusing issues, and frustration with school work. N.T. 61; S-11. Student had been receiving support from the school counselor in previous years for those reasons as well as assistance with social skills. N.T. 92.
11. Student told the school counselor that he felt frustrated at school and home and wanted to talk to someone about it. S-12. He was relieved to have the opportunity to discuss his issues with her. S-12.
12. From the beginning of the school year to October 5, 2006, Student received two detentions: once for cursing in the classroom, and once for calling out in the hallway. N.T. 52-53. No supports were added to the IEP after either detention. S-11. Student was only reminded of proper behavior. N.T. 53; S-11.
13. At the beginning of the 2006-2007 school year, an assembly was held where code of conduct rules and regulations were discussed. N.T. 36.
14. Student attended the assembly and signed a form stating he understood the Discipline Code. S-5. Under the discipline code, a student possessing a weapon on a school vehicle or on school property is subject to expulsion. S-4. Although Student signed the form, it is unknown whether Student actually understood the consequences in the discipline code as no one asked him to recite the code, and no assistance similar to what he receives during the normal school day was provided to Student to help him understand the provisions of the code.
15. On October 5, 2006, School personnel were informed that a student had carried a knife on the bus the previous day and that threats were made by the student holding the knife. N.T. 29, 32. A description was provided of the student with the knife and School personnel conducted an investigation. N.T. 29. School personnel identified Student as a possible suspect. N.T. 29.

16. School personnel asked Student if anything happened on the bus the previous day that might have caused a student concern; Student answered, "No." N.T. 29, 31. Student also commented that he did not know why School personnel were talking to him, and that he was not carrying anything that he would not want anyone to find. N.T. 30, 31. When asked to empty his pockets, Student emptied one pocket half way and the other not at all until asked two more times. N.T. 30; S-2. When he did completely empty his pockets, he produced a knife with a blade greater than 2 ½ inches. N.T. 30, 33-34; S-3.
17. Student did not express remorse for carrying the weapon. N.T. 42. He said he was aware of the school policy but he needed the knife for protection. S-2. He also stated he did not threaten or intend to harm anyone. S-2. Witnesses stated that Student did threaten someone but then said he was just joking. S-12. This is inconsistent with the notation from the principal. S-2.
18. Student was suspended for 10 school days. N.T. 52.
19. On October 7, 2006, Student's mother took Student to the [redacted] Hospital, a psychiatric hospital, where Student was evaluated. S-15. His diagnoses from history were ADHD and oppositional defiant disorder. S-15. During the evaluation, Student appeared mildly depressed and irritable and his affect was flat. S-15. Student was also determined to have poor judgment. S-15.
20. Student was referred by the [redacted Hospital] to the [redacted] crisis center, also part of the Hospital, for a full evaluation regarding anxiety, depression, ADHD, and oppositional defiant disorder. S-15.
21. Subsequent to the knife incident, School personnel received a call from the parents of a student concerned about threats made on the internet. N.T. 39. The parent directed school personnel to Student's My Space account where school personnel found pictures of weapons in which Student had access. N.T. 39-40; S-6. School personnel could not determine whether the weapons in the pictures were real or plastic replicas. N.T. 41.
22. During Student's interview with School personnel on October 12, 2006, Student again stated he carried the knife to school solely for protection when walking home from school. N.T. 60; S-9. He also stated that he brought the knife to school some days at the end of the 2005-2006 school year and some days during the beginning of the 2006-2007 school year. N.T. 61; S-9.
23. Student also expressed that the school counselor was working with him on his frustration with school work and his anger at home. S-9, 12.
24. Also during the interview, Student expressed remorse for the first time and indicated he understood the consequences of his actions. N.T. 62, 93. This

- interview was a week after the knife incident, and Student's mother was in attendance during the interview. S-9.
25. Student's mother made him write a letter expressing his remorse. S-10. In fact, it appears the letter is written by someone other than Student as the handwriting of the letter is different than Student's signature on both the letter and the discipline code form. S-5, 10.
  26. On October 18, 2006, Student was evaluated by a psychiatrist and psychologist from Program at the Hospital. N.T. 100; S-14. Program is a short term outpatient psychiatric crisis facility. N.T. 100. Student was diagnosed with oppositional defiant disorder, posttraumatic stress disorder, and impulse control disorder. S-14. The psychiatrist who diagnosed Student attempted to contact the school psychologist to discuss the diagnosis, but no actual conversation occurred. N.T. 79.
  27. The school psychologist does not believe Student exhibits symptoms of oppositional defiant disorder in the classroom. N.T. 67; S-12. None of Student's teachers testified at the hearing.
  28. As a result of the private evaluation of Student on October 18, 2006, the manifestation determination commenced later than 10 day from the date of the knife incident. N.T. 56; S-7, 8.
  29. An IEP/manifestation determination meeting was convened on October 20, 2006. N.T. 55. In order to make the determination of whether the action was a manifestation of his disabilities, the School interviewed teachers, Student, and his mom, and reviewed Student's IEP and the documents from Hospital. N.T. 55-56.
  30. The team determined Student's actions were not a manifestation of his disabilities. N.T. 73. The team also determined that Student did not have an impaired ability to understand the impact and consequences of his behavior because during the interview a week after the incident, Student expressed remorse and knew the consequences of his actions. N.T. 74. The School does not explain why it did not consider Student's lack of remorse at the time of the incident.
  31. The team did not factor the My Space posting in its determination. N.T. 81.
  32. Student's mother was not in agreement with the manifestation determination. N.T. 74. Student's mother did agree to place Student at the alternative placement, however. N.T. 76; S-13.
  33. The School filed for a due process hearing. N.T. 82; S-16.
  34. Student's IEP for 10<sup>th</sup> grade provided Student with itinerant learning support, redirection to task, one-on-one support/instruction from teachers, a special

- education aide, and other accommodations and modifications. N.T. 50-51. The duties of the aide are to help Student focus on tasks and in class, complete work, and understand instruction. N.T. 52.
35. Student's IEP does not consider Student to have behaviors that impede his learning although Student's IEP states Student "will continue with accommodations and supports for his overall attending issues in the classroom" because he "continues to require certain accommodations in order to stay on task and complete work." S-11, 12. In addition, Student had the assistance of the school counselor and an aide as part of his IEP to help with attending to task, focusing, and frustration with school work. N.T. 61; S-11.
  36. Student's IEP states, Student "requires support from teachers with his overall attending skills but has increased these skills throughout the years and no longer requires a full behavior management plan." S-11. This is inconsistent with teachers' comments that Student's behaviors were becoming more difficult in the classroom this school year. S-12.
  37. The specially designed instruction in Student's IEP provides Student with frequent breaks to stay on task, assistance with on-task behavior and attending skills, but does not provide preferential seating, inconsistent with the testimony of the school psychologist. S-11; N.T. 51.
  38. No changes to the IEP were made after the knife incident except for the addition of Student's new diagnosis. N.T. 92-93; S-11.
  39. According to the school psychologist, Student's IEP was being implemented during the school year. N.T. 54, 70-72. None of Student's teachers testified during the hearing.
  40. The school psychologist does not believe that bringing a knife to school at different times during the 2005-2006 and 2006-2007 school year is a result of Student's impulse control disorder. N.T. 61-62. Nor does she believe that expressing remorse is typical of oppositional defiant disorder. N.T. 62.
  41. The social worker from Program stated that depending on the child, the case and the circumstances, a child diagnosed with oppositional defiant disorder can be remorseful for their actions. N.T. 108.
  42. Student was placed in an alternative placement whose personnel told the school psychologist that the alternative placement can meet Student's needs. N.T. 67-68. To the school psychologist's knowledge, the alternative placement is providing Student with his IEP services. N.T. 72.

43. Student is currently receiving weekly psychological counseling services at Program to help Student understand the consequences of his actions of bringing a weapon to school. N.T. 76, 105.
44. Student no longer has access to weapons at his mother or his father's houses. N.T. 127.
45. Student started taking Strattera again at the end of October/beginning of November, 2006. N.T. 126.

## ISSUES

Was Student's action a manifestation of his disabilities?

## 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 the School has filed for a due process, it has that 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.

### Manifestation Determination

Under the Individuals with Disabilities Education Act (hereinafter "IDEA"), 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 if the child possesses a weapon at school. 34 C.F.R. § 300.530 (g). If a student with a disability's action was not determined to be a manifestation of the student's disability, school personnel may apply disciplinary procedures in the same manner as for children without disabilities. 34 C.F.R. §300.530(c).

The School's removal of Student to an alternative placement is not at issue in this matter. What is at issue is whether Student's action of bringing a knife to school was a manifestation of Student's disabilities. In order to determine if an action was a manifestation of a student's disability, the following must occur:

(1) 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.

(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.

34 C.F.R. § 300.530 (e).

Therefore, several questions must be answered by the IEP team when conducting a manifestation determination and by a hearing officer when reviewing the decision of an IEP team: (1) Was the review conducted by the District's IEP team and other qualified personnel; (2) Did the IEP team consider all relevant information including evaluation results, information supplied by the parents and observations of the student, the student's IEP and placement; (3) Did the IEP team determine that the IEP and placement were appropriate and that special education services were provided in a consistent manner with the IEP; (4) Did the student's disability impair the student's ability to understand the consequences of his behavior; and (5) Did the student's disability impair the student's ability to control the behavior that was subject to the disciplinary action? In re the Educational Assignment of A.H. A Student in the Philadelphia City School District: Special Education Opinion Number 1695 (March, 2003).

Was the review conducted by the District's IEP team and other qualified personnel?

Members of the team determining whether Student's action was a manifestation of his disabilities included Student's mother, Student's regular and special education teachers, a Local Education Agency representative, the principal of Student's school, the school psychologist, and school counselor. S-12. The team conducting the manifestation review was appropriate and qualified to make the determination.

Did the IEP team consider all relevant information including evaluation results, information supplied by the parents, observations of the student, the student's IEP and placement?



In order to make the manifestation determination, the School interviewed teachers, Student, and Student's mother, and reviewed Student's IEP and documentation from Hospital. N.T. 55-56. In fact, the School waited to hold the manifestation determination until the private evaluation was completed. N.T. 56; S-7, 8. Therefore, it appears that the School did consider all relevant information.

Did the IEP team determine that the IEP and placement were appropriate and that special education services were provided in a consistent manner through the IEP?

The school psychologist stated that the IEP was appropriate and that special education services were provided to Student consistent with his IEP. N.T. 54, 70-72. However, other testimony and a review of the IEP are not consistent with the testimony of the school psychologist. Student's IEP for the 2006-2007 school year provided for Student to see the school counselor for 30 minutes a week to work on Student's attending to task, focusing issues, and frustration with school work. N.T. 61; S-11. However, Student only began seeing the counselor on October 3 and 4, 2006, one day preceding his bringing a knife to school and a month after school began, because his mother referred him. S-9, 12. In addition, Student's IEP did not provide for preferential seating, clearly necessary to assist Student with his distractibility issues, although the school psychologist testified preferential seating was in his IEP. S-11; N.T. 51.

In addition, no changes or additions to Student's IEP were made after his detentions or his suspension from school for bringing a knife to school. N.T. 92-93; S-11. Student was only reminded of proper behavior after his detentions. N.T. 53; S-11. In addition, no additional supports were provided in Student's IEP this year after Student's mother noticed changes in Student's impulsivity, oppositional outbursts, and attention at home and after Student's teachers noticed a difference in Student's behavior in the classroom. N.T. 92-93, 116; S-12, 15.

Therefore, I disagree that Student's IEP was appropriate or that supports were provided in a consistent manner.

Did the student's disability impair the student's ability to understand the consequences of his behavior? Did the student's disability impair the student's ability to control the behavior that was subject to the disciplinary action?

Student has been diagnosed with ADHD, oppositional defiant disorder, posttraumatic stress disorder, and impulse control disorder. Although the school psychologist claimed symptoms of oppositional defiant disorder were not being observed in the classroom, no teachers testified to Student's behaviors in the classroom.<sup>2</sup> Nor did the School argue or present testimony that the diagnoses of ADHD, oppositional defiant disorder, posttraumatic stress disorder, and impulse control disorder were incorrect. Rather, the School placed these diagnoses in the October 20, 2006 IEP. S-11. Therefore,

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<sup>2</sup> The School provided no testimony regarding whether any symptoms of posttraumatic stress disorder and impulse control were being seen in the school setting.

I will determine whether Student's action was a manifestation of his diagnosed disabilities of ADHD, oppositional defiant disorder, posttraumatic stress disorder, and impulse control disorder.

Attention Deficit Hyperactivity Disorder is based upon hyperactivity or impulsivity persisting for at least 6 months to a degree that is maladaptive and inconsistent with developmental levels. Symptoms of ADHD are as follows:

- Fidgeting with hands or feet or squirming in seat;
- Leaving seat;
- Running around inappropriately;
- Difficulty playing or engaging in leisure activities;
- Blurts out answers, difficulty awaiting turn or interrupts or intrudes on others.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994.

Impulse control disorder is the failure to resist an impulse or temptation that is harmful to the person or to others. "Following the act there may or may not be regret, self-reproach, or guilt." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994.

Oppositional defiant disorder is a pattern of negative, hostile, or defiant behavior lasting at least 6 months, during which four or more of the following symptoms are present:

- Often loses temper;
- Often argues with adults;
- Often actively defies or refuses to comply with adult's requests or rules;
- Often deliberately annoys people;
- Often blames others for his mistakes or misbehaviors;
- Is often touchy or easily annoyed by others;
- Is often angry or resentful;
- Is often spiteful or vindictive.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994.

A person is diagnosed with posttraumatic stress disorder if the person's symptomology includes the following:

1. the person has been exposed to a traumatic event in which:
  - The person experienced, witnessed, or was confronted with an event that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others;
  - The person's response involved intense fear, helplessness, or horror
2. the traumatic event is reexperienced in one of the following ways:

- Recurrent and intrusive distressing recollections of the event, including thoughts or perceptions;
  - Acting or feeling as if the traumatic event were recurring;
  - Intense psychological distress or physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
3. persistent symptoms of increased arousal can be seen though hypervigilance, irritability, or difficulty concentrating.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994.

As very little testimony was provided about Student's behavioral problems and issues surrounding his diagnoses, 3 it is difficult to ascertain with certainty whether Student's disabilities impaired his ability to control his behaviors and understand the consequences of his actions. The school psychologist does not believe that Student bringing a knife to school with him at different times during the 2005-2006 and 2006-2007 school year is a result of Student's impulse control disorder. N.T. 61-62. She did not testify if this behavior could have been a result of posttraumatic stress disorder. She also does not believe that expressing remorse is typical of oppositional defiant disorder. N.T. 62. The social worker from Program disagrees, stating that depending on the child, the case and the circumstances, a child diagnosed with oppositional defiant disorder can be remorseful for their actions. N.T. 108. This testimony is consistent with the DSM-IV.

Of course, it is not clear if Student's remorse was genuinely his or that of his mother. Student was not remorseful when caught with the knife. S-2. Student only became remorseful after discussions with his mother and when interviewed in front of his mother a week after he brought a knife to school. S-12. The School does not explain why it considered Student's remorse a week after the incident in its manifestation determination, but did not consider Student's lack of remorse at the time of the incident in its manifestation determination. The possible explanation is that the manifestation determination would have changed as Student's lack of remorse at the time of the incident could have been a symptom of his disabilities.

In addition, Student's insistence to everyone that he brought the knife to school because he needed protection walking home is consistent with symptoms of posttraumatic stress disorder as defined in the DSM-IV. N.T. 60; S-2, 9. The posttraumatic stress disorder, as well as his impulse control disorder and ADHD, could have impaired his ability to control his behaviors and understand the true consequences of his actions. In fact, Student's private counseling service has identified understanding the consequences of actions as the one area that needs to be addressed with Student as a result of his disabilities.

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3 Student was acting pro se, and the School did not inform this Hearing Officer of the experience and education of the school psychologist. Therefore, it is difficult to ascertain the credibility of the school psychologist's comments regarding Student's actions and whether they were a manifestation of his disabilities.

When neither party introduces preponderant evidence and, as a result, the evidence provided is fairly evenly balanced, the party requesting the hearing has the burden of persuasion. There was enough evidence provided to prove that the team determining the manifestation question was appropriate and that the team reviewed all relevant information. There was also enough evidence to prove that the IEP was not appropriate nor were services being consistently provided to Student. That alone would reverse the IEP team's decision that Student's actions were a manifestation of his disability. Moreover, neither party provided preponderant evidence to ascertain whether Student's disabilities impaired his ability to control his behaviors and understand the true consequences of his actions. Therefore, as Student's disabilities could have impaired his ability to control his behavior and truly understand the consequences of his actions, I find the School did not meet its burden of persuasion to prove that Student's actions were a manifestation of his disability.

Under the IDEA, if a Hearing Officer determines that a team incorrectly found that an action was not a manifestation of the Student's disabilities, the Hearing Officer can return the child to his removed placement. Since I find the IEP team incorrectly determined that Student's actions were a manifestation of his disabilities, I order the Student returned to the School after his 45 day placement is completed. The IEP team should also meet immediately to change Student's IEP to provide extra supports to Student to begin upon Student's return to School. I suggest Student's private counselors from Program be part of the IEP team to assist the team in providing necessary supports to Student.

Student should not believe that if he brings another weapon into school that he will be allowed to remain at the School. I suspect if Student brings another weapon into school, Student will be expelled from school, never to return.

## ORDER

The manifestation determination made by the IEP team was incorrect. Student's behavior was a manifestation of his disabilities. Student is ordered to return to School after his 45 day placement is completed. The IEP team should meet immediately to change Student's IEP to provide extra supports to Student which will begin upon Student's return to School. I suggest Student's private counselors from Program be part of the IEP team to assist the team in providing necessary supports to Student.

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Marcie Romberger, Esquire  
Hearing Officer