

*This is a redacted version of the original hearing officer decision. Select details may 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

#### EXPEDITED DUE PROCESS HEARING

Name of Child: E. C.  
ODR #6023/05-06 LS

Date of Birth: xx/xx/xx

Date of Hearing: November 21, 1989

### CLOSED HEARING

#### Parties to the Hearing:

Parent

#### Representative:

Pro Se

School District of Philadelphia  
440 N. Broad Street, 3<sup>rd</sup> Floor  
Philadelphia, Pennsylvania 19130

Mimi Rose, Esquire  
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Date Transcript Received:

November 22, 2005

Date of Decision:

November 24, 2005

Hearing Officer:

Linda M. Valentini, Psy.D.

### Background

Student is a [teenaged] eligible student enrolled in the School District of Philadelphia (hereinafter District). Student was involved in a behavioral incident at school to which the school responded by holding a manifestation determination meeting. The team determined that the incident was not a manifestation of Student disability. Student mother, Parent (hereinafter Parent) requested this expedited hearing to challenge that finding.

### Issue

Did the manifestation determination team correctly determine that Student actions were not a manifestation of his disability?

### Findings of Fact

1. Student is a [teenaged] eligible student who is a resident of the School District of Philadelphia. (S-8)
2. Student is enrolled in the High School and is in the 10<sup>th</sup> grade. (NT 25; S-1)
3. On October 20, 2005 Student was involved in an incident at school when he was “goofing around” in the lunchroom [redacted]. NT 71-72; S-4)
4. When the school police officer who supervises the lunchroom told Student to get up Student was slow in doing so, and the officer raised his voice, repeating the direction to get up. The officer then pulled Student up, put him in a lock and put him on the ground. Student cursed at the officer. (NT 28, 71)
5. Student then left the lunchroom, held by the arm by the officer, but agreed when the officer asked if he wanted to see the school counselor since he seemed so upset. (NT 28, 71)
6. After starting to walk down the hallway Student [made a verbal remark to the officer [redacted]]. (NT 71)
7. The officer then raised his voice, [and a physical incident occurred]. (NT 28, 71-72)
8. [Redacted.]
9. The offense is considered a Level II offense. (NT 29)

10. Student was suspended for three days after the incident with the recommendation to put him in an alternative educational setting. Notice of this recommendation was given to the Parent by letter dated October 21, 2005. (NT 29; S-2)
11. This was the only incident of its kind in Student school record. Prior to this incident Student had no pink slips or suspensions for the current academic year, received no suspensions for the 2004-2005 school year, and received four days of suspensions during the 2003-2004 school year. (NT 56; S-1, S-4, S-5)
12. Student has an after-school job tutoring children at [redacted]. (NT 62, 69-70)
13. A manifestation determination meeting scheduled for October 25<sup>th</sup> was rescheduled due to the Parent's work obligations and held on October 31<sup>st</sup>. (NT 29-31; S-3, S-4)
14. The manifestation determination team was composed of the Parent, the principal, the disciplinary liaison from the regional office and the special education liaison. A few of Student teachers came in briefly as well. It appears from the FBA signature page that when the FBA was done, the disciplinary liaison had left and the guidance counselor had joined the meeting. (NT 31-32; S-5)
15. The school-based members of the manifestation determination team determined that Student's behavior was not a manifestation of his disability and a NOREP was issued that recommended that Student be disciplined consistent with the District's code of conduct. The NOREP continued to recommend Resource Room Level Learning Support. (S-4, S-7)
16. The Manifestation Determination introduced into evidence at the hearing is missing the last page. (S-4)
17. The Functional Behavioral Assessment done as part of the manifestation determination notes that "Student has a current IEP and is supported in a Res. Rm. (sic) program". (S-5)
18. At the due process hearing the school-based special education liaison was asked if Student was receiving special education services at High School. She testified in response, "Yes. He was receiving learning support services *in a resource room program, which meant that he was attending regular classes. And we had special education teachers going into some of his regular education classes to give him support if he needed it*" (emphasis added). (NT 52-53)
19. The special education liaison testified that she spoke with Student teachers. Although she named and quoted the regular education teachers, she named but did not quote two special education teachers. (NT 53-55)

20. On the Manifestation Determination document the team checked “Yes” to the question: “In relationship to the behavior subject to disciplinary action, the student’s IEP and placement were appropriate”. (S-4)
21. There is a current IEP dated June 16, 2005. The Parent testified that she did not know there was an IEP and thought that her son was no longer in special education.<sup>1</sup> At the manifestation determination, the school principal recalls, the Parent was “adamant that Student was not in special education and had not been since middle school”.<sup>2</sup> In the margin of the IEP team signature page there is a handwritten notation “3 attempts were made w/no parental response”. There is no supporting documentation of these attempts (dates, nature of the attempts, by whom the attempts were made). There is likewise no indication of who made the notation or when the notation was made.<sup>3</sup> (NT 38-39; S-8)
22. At the bottom of the same page, outside the margins of the form, there is another handwritten notation, unsigned and undated that says, “Procedural safeguards sent”. Again there is no supporting documentation such as a date, a responsible individual or a transmittal letter. (S-8)
23. The IEP notes that Student has behaviors that impede his learning. These behaviors are noted in the IEP to be poor attendance and poor punctuality. The IEP contains a Functional Behavioral Assessment and a Behavior Support Plan. It is notable that the FBA reports that “phone calls, pink slips” were previously used as interventions but that “student continued prior behavior”. However, the Behavior Support Plan (again) lists “phone calls, pink slips” as interventions. (NT 57-58; S-8)
24. The IEP of June 16, 2005 reports Present Levels of Educational Performance from June 18, 2003. (S-8)
25. Under the June 16, 2005 IEP summary information, there is a notation that the date of the last review/re-evaluation/ER was “5-11-01”. The review cycle is listed as “3 years”. The projected date for IEP Team review/re-evaluation review to begin is listed on the June 16, 2005 IEP as “2/04”. (S-8)
26. The June 16, 2005 IEP, under Present Levels of Educational Performance, reports that as of June 18, 2003 (end of 7<sup>th</sup> grade) Student Reading level was “a beginning

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<sup>1</sup> Although she cannot find it in the record, and the impression may have been conveyed non-verbally by the student, this hearing officer believes that Student himself did not know that he was receiving special education.

<sup>2</sup> In fact, so earnest and credible was the Parent that the principal issued a NOREP exiting Student from special education. There is an entire side-story to this aspect of the situation involving the principal’s not knowing proper special education procedures, being instructed by the regional special education director, and rectifying his error. This is not directly germane to this decision however. (NT 40-44; S-6)

<sup>3</sup> There is, again, a separate but related issue as to whether or not Student requires special education services, and/or whether or not the Parent wants him tested and/or whether or not she and the student would accept the services if services were indicated. (NT 61—62, 64-70)

- 4<sup>th</sup> grade level” and math was at a 2<sup>nd</sup> grade level. The date(s) these levels were actually measured is not indicated; it appears that the citation is to a June 2003 IEP. (S-8)
27. The level of progress noted under English is “From 4<sup>th</sup> to 4<sup>th</sup>”. The annual goal and the accompanying objectives are not distinguishable from the goals and objectives of any regular education student. The expected level of achievement is 65%. (S-8)
  28. The level of progress noted under Math is “None noted”. The annual goal and the accompanying objectives are not distinguishable from the goals and objectives of any regular education student. The expected level of achievement is 65%. (S-8)
  29. The level of progress noted under History is reported as “N/A”. The annual goal and the accompanying objectives are not distinguishable from the goals and objectives of any regular education student. The expected level of achievement is 60%. (S-8)
  30. The level of progress noted under Science is reported as “none noted”. The annual goal and the accompanying objectives are not distinguishable from the goals and objectives of any regular education student. The expected level of achievement is 60%. (S-8)
  31. Despite an attendance problem that is referenced in various places in the IEP, the notation under Related Services is “considered but not needed”. Specifically counseling services are not listed. (S-8)
  32. Under Least Restrictive Environment, the Type of Support is “Learting (sic) support”, the total hours per week were originally “28”, but this was crossed out and “0-5” was written over it. The Type of Service was originally written as “Part T (sic)” but “Resource” was written over it. This section of the IEP notes “student is learning disabled and in need of individualized instruction”. (S-8)

### Discussion and Conclusions of Law

If a District wishes to discipline an eligible student in such a way that changes the student’s current educational placement, it must first determine whether or not the action in question was a manifestation of the student’s disability. Section 615(k)(1)(E)(i) of the Individuals with Disabilities Education Improvement Act (IDEIA), 118 STAT. 2726-2727 provides that

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP team (as

determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine

- (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (II) If the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

Section 615(k)(3)(A) and (B) and (4)(B) of the IDEIA provides that if a student's parent disagrees with any decision regarding placement or the manifestation determination the parent may request an expedited hearing at which a hearing officer will hear, and make a determination, regarding the appeal. In the instant matter, the Parent is exercising her rights under the statute.

#### Discussion

Having heard the testimony and having read the documents presented, at the end of the hearing this hearing officer ruled that as of the date of the incident in question Student was still considered an eligible student and that therefore this matter is properly under her jurisdiction. (NT 73) That ruling is reiterated here.

This hearing officer notes at the outset of this discussion that neither of the District's witnesses knew Student more than superficially, that neither was witness to the incident that led to this hearing, and that neither was familiar with the special education program, if any, being implemented for Student. This hearing officer has scrutinized the documents and finds that Student special education program was poor to non-existent on the basis of 1) implementation; 2) content; 3) level of intervention. These are addressed as follows:

Implementation. This hearing officer has grave doubts that Student was being provided with any special education services at all at High School, and the credibility of the special education liaison was undermined by her characterization of the manner in which the specially designed instruction (SDI) was being delivered (see Finding of Fact #18) and by her failure to quote the special education teachers she named despite quoting the regular education teachers (see Finding of Fact #19). Particularly telling is that Student genuinely seemed unaware that he was receiving special education services, despite the provisions of the June 2005 IEP being "preferred seating" (English), "extended time" (Math), "small group instruction" (History), and "small class size" (Science) among other less easily observable SDI's. (See S-8) The failure to implement the IEP, given the SDI's of small group instruction and small class size, can be directly inferred by reading the special education liaison's description of the services (See again, Finding of Fact #18). This hearing officer found the Parent to be credible in her testimony that she thought that

Student no longer received special education and believed that she had not received copies of the June 2005 IEP as the notations on this IEP regarding attempts to contact the Parent and provision of Procedural Safeguards were spurious and unsupported by documentation or testimony. On this basis alone, as provided in the IDEIA, the Manifestation Determination team's conclusion is patently incorrect.

Content. Assuming for a moment, just for the sake of argument, that the IEP was being implemented, the document on its face is woefully inappropriate, and is in fact one of the most deficient IEP's that this hearing officer has seen from this or any other school district in recent years ("recent" being roughly 2001, post implementation of the regulations for the 1997 IDEA). Rather than re-hash the details, the reader's attention is invited to Findings of Fact numbers 23 through 32 and to the original document, S-8. Inadequacies include probable lack of the opportunity for parent participation, lack of evidence of mandatory tri-annual reevaluation and subsequent lack of accurate present educational levels. Lacking accurate present educational levels, the goals and objectives are *de facto* inappropriate, even if they were not in and of themselves merely reciting expectations for any 10<sup>th</sup> grader, whether in special or regular education. Levels of expected achievement are 60% to 65%, an unacceptably low standard. The reader is urged to read the IEP (S-8) carefully and to note the myriad flaws therein.

Level of Intervention. Assuming, finally, just for the sake of argument, that the IEP was being implemented and that the goals and objectives and specially designed instructions were appropriate, the level of intervention is not even close to appropriate. If the present levels reported as of June 2003 in the June 2005 IEP are anywhere near correct, even granting a 2-year margin of error (i.e. if Student had somehow ("undocumentedly") progressed from a 4<sup>th</sup> to a 6<sup>th</sup> grade level in reading between June 2003 and June 2005, and progressed from a 2<sup>nd</sup> grade level to a 4<sup>th</sup> grade level in math during the same time period) he would still be three to four years behind in reading and six to seven years behind in math. Giving a student with needs that great "resource room" one hour per day (and the reader must bear in mind that the most this student received in 10<sup>th</sup> grade according to the special education liaison was actually "itinerant" services – the special education teachers "*going into some of his regular education classes to give him support if he needed it*") is blatantly inadequate and inappropriate.

For all the reasons put forth herein, the District (who is the party proposing to change the educational placement of this student and who was the moving party in this matter)<sup>4</sup> has failed to establish its burden of proof and this hearing officer finds in favor of the Parent.

As the District well knows, if this had been a parent represented by counsel this matter likely would not have come to hearing, as an attorney representing the Parent would have found the failure of implementation and all the IEP deficiencies that this hearing officer found, and more. If the Parent were represented there would be major compensatory education issues, and there certainly would have been an independent educational evaluation issue. Should the Parent wish to pursue these issues in another due process hearing she is not precluded from doing so, as long as her complaint is filed within two

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<sup>4</sup> See the IDEIA and *Schaffer v. Weast*, 1005 WL 3028015 (November 14, 2005).

years of the date she receives this decision, as the day she reads this decision may be the first time this Parent realizes that her son was denied a free appropriate public education. In the meanwhile, District counsel is urged to ensure that a very experienced and skilled evaluator is assigned to this case, and that Student receives the appropriate offer of FAPE that he deserves, even if ultimately he and his mother decline it.



## ORDER

It is hereby ORDERED that:

1. The manifestation determination team incorrectly determined that Student actions were not a manifestation of his disability.
2. The District may not place Student in an alternative educational setting.
3. The District must return Student to High School, unless the Parent and Student agree to a lateral transfer to another regular (non-disciplinary) District high school and the District provides transportation or reimburses the Parent for transportation.
4. Within 60 calendar days of the date of this order, or within 60 calendar days of the date the Parent signed a Permission to Evaluate if she has already signed one, whichever date is earlier, the District shall perform a complete, comprehensive evaluation of Student to determine whether he continues to be eligible for special education services and the specific needs to be addressed if he is eligible. The evaluation must include, in addition to the requirements specified in the IDEIA, a full WISC-IV, a full WAIT-II, an assessment of visual-perceptual-motor functioning, an assessment of short and long-term memory, and the BASC or Achenbach (student, parent and teacher versions). Although Student speaks English fluently, if the evaluator is not bi-lingual ([redacted]) he or she must consider whether the fact that [another language] is spoken at home impacts on his educational needs.

November 24, 2005  
Date

*Linda M. Valentini, Psy.D.*  
Linda M. Valentini, Psy.D.  
Hearing Officer