

*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**

**Child's Name: N.S.**

Date of Birth: xx/xx/xx

Date(s) of Hearing: 2/27/06; 2/28/06; 3/1/06

**CLOSED HEARING**

**ODR NO. 6289/05-06**

Parents

Parents' Representative:

Parent

Lilian Akin, Esq.  
428 Connor Street  
Pittsburgh, PA 15207

School District:

District Representative:

Mars Area School District  
116 Browns Hill Road  
Valencia, PA 16059

Thomas Breth, Esq.  
Dillon, McCandless, King, Coulter  
128 W. Cunningham St.  
Butler, PA 16001

Date of Decision: 3/12/06

Hearing Officer: Margaret Drayden, Esq.

## Précis

This expedited hearing was requested by Parent after Student, an identified child in need of special education, violated School District Board Policy Nos. 730 (entitled: Discipline) and 735 (entitled: Terroristic Threats/Acts) twice within the space of approximately six weeks. Student, currently a 6<sup>th</sup> grade student, was initially evaluated (the Evaluation Report is hereafter referred to as an “ER”) on 1/27/01, while in 1<sup>st</sup> grade, as eligible as a student with Other Health Impairments (“OHI”) due to his symptoms of Attention Deficit Hyperactivity Disorder (“ADHD”). However, when re-evaluated during the 4<sup>th</sup> grade, due to the results of the 3/31/04 ER, his eligibility was changed to Learning Disability: Written Expression with a secondary disability category of Speech and Language (“S/L”).

On Wednesday, December 14, 2005, students were discussing activities for a student government day and Student [made a remark]. A Manifestation Determination team determined that Student’s behavior was not a manifestation of his disability. Student was suspended for 10 days.<sup>1</sup>

On Friday, January 27, 2006, Student broke school rules again by [making another remark]. Yet another Manifestation Determination team found Student’s behavior was not a manifestation of his disability. Parent contends Student’s impulsivity due to his ADHD interferes with his ability to control his inappropriate behaviors and thus the Manifestation Determination team should have found his behaviors stemmed from his disability and he should not face a School Board disciplinary meeting, with the possibility of being expelled from school.

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<sup>1</sup> This was subsequently shortened to 7 days.

### **Stipulations**

1. Student's date of birth is [redacted]..
2. Student is currently eligible for special education as a child identified as having a specific learning disability in written expression and a speech and language impairment.
3. Student currently attends Middle School in the 6<sup>th</sup> grade.

### **Findings of Fact**

1. Mr. G, school psychologist, evaluated Student on 2/18/06. This psychologist tests approximately 130-150 students per year and works with many ADHD children and learning disabilities and is qualified to interpret the impact of a child's ADHD on his education. In preparation for Student, he reviewed records from pre-school to present, including teacher's reports, IEPs and evaluations. (NT at 35, 37-40, 84.)<sup>2</sup>
2. Mr. G's evaluation took some 3 hours and he administered a battery of tests, including: Wechsler Intelligence Scale for Children – Fourth Edition ("WISC-IV"), various sub-tests from the Woodcock-Johnson, the Integrated Visual and auditory Performance test ("IVA"). (NT at 37.)
3. Student's performance on the WISC-IV was very similar to past evaluations, such as the 3/24/04 evaluation conducted by the School District. His overall score was "solidly in the average range, as was his score in the perceptual reasoning." (NT at 40)
4. Student's working memory index fell within the extremely low range and is a significant weakness for Student, just as it was the last time Student was evaluated. This is highly significant because "it's certainly susceptible to attention. It's susceptible to that specific parameter as far as working memory goes, as to holding on to a sequence of information that's presented." (NT at 41-42, 94-95.)
5. Student's processing speed – which is the ability to compare and contrast information quickly and efficiently – was slightly below average; again, equivalent to his last evaluation. (NT at 42.)
6. The Woodcock-Johnson generally showed math skills as a strength; basic reading skills were slightly below average, and oral language skills were "on the cusp of average/low-average." (NT at 42-43.)

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<sup>2</sup> Parents' exhibits are noted as "P-"; District exhibits are noted as "SD-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

7. The IVA is a computer test that lasts 15 minutes after a 5 minute training and Student had to click a mouse whenever he saw or heard the number “1”. The purpose is to see if the Student can inhibit the urge to click the mouse when the alternate number (“2”) is seen or heard. If overly impulsive, Student will click on the wrong number – and gives the evaluator “a good idea of how well a child is able to basically be self-motivated to sit and focus.” Student’s scores were from very low to just below average. (NT at 44-45.)
8. Mr. G defined ADHD as “a network of highly interactive controls or processes over conscious mental functioning...it’s the ability to regulate and monitor those parts of the brain that are directly involved in the performance of any specific task...mental energy control, processing controls and production controls, and the 3 control systems themselves are highly interactive. They’re not selective. They don’t operate independently of one another....They would affect cognitive functioning, academic functioning, social functioning and behavioral functioning. (NT at 50-52.)
9. Mr. G opined that Student’s ADHD “has a direct relationship with his inability to respond appropriately in a classroom setting or a social situation.” And Mr. G disagreed with the School District’s position that Student’s behavior was not a manifestation of his disability because part of ADHD is his “poor ability to preview and inhibit his impulses to answer inappropriately or say inappropriate things.” (NT at 55-56.)
10. Mr. G opined that since Student has attention deficits and memory weaknesses and that since Student had a second incident so shortly after the first, that suspension is not an effective means of helping him. (NT at 57.)
11. In viewing Student’s IEP, Mr. G found numerous recommendations consistent with the needs of students with ADHD. (NT at 58-61.)
12. Mr. G opined that based on Student’s having had a lengthy suspension followed by the same behavior, that Student needed a functional behavior analysis and then a behavior plan. (NT at 61-62.)
13. Mr. G opined that – looking at Student’s recent history – there is a good probability that “he will regress and do so again,” that “without behavioral interventions as part of his IEP, he’s going to be a child who is going to be lost.” (NT at 63.)
14. Mr. G testified that due to impulse control difficulties children with ADHD have a “proclivity for such incidents [such as threatening violence]”. (NT at 73, 75.)
15. Mr. G opined that threats of violence are not a manifestation of a learning disability in written expression with speech and language services. (NT at 82-83.)
16. Mr. G testified that a child does not need to be identified as emotionally disturbed (“ED”) or OHI to receive a behavior plan and that an IEP for this Student requires a behavior plan in order to be appropriate. (NT at 90-93.)

17. Student currently sees both a therapist and a psychiatrist. He sees the therapist every other week and the psychiatrist once a month. He has seen his psychiatrist since he was 4 years old; Student is currently [pre-teenaged]. (NT at 103.)
18. Student is currently on Desipramine, Clonidine and Valproic Acid. He takes these medications for ADHD, depression, appetite, sleeplessness, and migraines. (Id., 166-68, 272-374.)
19. Psychiatrist diagnosed Student as ADHD at age 4. (NT at 104, 193-94.)
20. Student currently has a resource coordinator; he had wraparound services starting at the age of 4-5, which requires a mental health diagnosis. (Id.)
21. Parent is currently reapplying for wraparound services. (NT at 105.)
22. Student has had behavioral issues since infancy and he had 13 broken bones as a baby before coming to Parent at the age of 10 months. Student was born prematurely at 29-week gestation in [redacted]. Premature children have a greater tendency for ADHD, learning difficulties, and various “brain problems”. (NT at 106, 211.)
23. Due to emotional issues, Student needs Parent to lay out his clothes daily; he experiences frustration easily and “goes over the edge” if his things are moved. (NT at 108.)
24. Student is highly distractible at home – even a piece of lint can sidetrack him; and he requires assistance with anything that requires research, writing, or putting things in an order. (NT at 109.)
25. Student is easily upset and either gets angry or will yell, scream or cry; he’ll throw, hit, stomp, and has difficulty with anger management. (NT at 110, 113-15.)
26. Student has difficulty with social situations and is unable to distinguish between other children being mean to him and showing friendship – he confuses the two. (NT at 111.)
27. Student is physically quite small for his age; he weighs approximately xx pounds and is shorter than most children his age. (NT at 112, 169-70, 210.)
28. Student’s psychiatrist treats Student on a regular weekly basis and opined that Student needs a behavior plan, “otherwise [Student] will keep having these sorts of issues.” (NT at 103, 219-200, 219-20.)
29. There’s difficulty in ascertaining whether Student’s actions were or were not the direct result of his ADHD because no adult witnessed either incident – all reports came from children. (NT at 215-217.)

30. Student's psychiatrist described the two school incidents as "seem[ing] very impulsive", but that these are not isolated behaviors – Student is having problems at home and this is part of a "general pattern". (NT at 215, 217.)
31. The psychiatrist noted that Student's IEPs appear to address some of Student's attentional needs. (NT at 217-18.)
32. Student's psychiatrist is certain Student has ADD and Student has been on a variety of medications over the years. (NT at 193-94.)
33. Psychiatrist reported Student has been working on coping strategies for issues of (1) impulsivity re losing his temper, wanting to hurt people, wanting to hurt himself, getting upset; (2) adoption issues; and (3) family issues. (NT at 201-02.)
34. Student admits to psychiatrist his problems with impulsivity, conflicts with other children, how he hasn't thought about his actions before he acted, and how bad he feels afterward. He discussed conflicts and problems with other students and his frustration, as well as his difficulties with being bullied. (NT at 202, 209.)
35. Student's psychiatrists opined that now that Student is in middle school and students are required to accept more responsibility, that his problems with inattention and concentration can pose additional problems. (NT at 207-208.)
36. While medications help approximately 75% of children with ADHD, Students falls into the other 25%. Student still exhibits ADHD-type behaviors despite medication. (NT at 232, 254-56, 271.)
37. Student would exhibit more ADHD-type behaviors if he was not on medication. (NT at 275.)
38. Students with ADHD are more prone to impulsively threaten people. (NT at 260-61.)
39. Student needs coaching to enable him to learn to handle his behaviors. (NT at 251.)
40. Impulsivity can be exhibited with humor, not just anger, but it is still part of ADHD. (NT at 275-76.)
41. Attempts at disciplining Student through suspensions aren't working because Student's actions are the results of his impulsivity. (NT at 280-81.)
42. Student is getting good grades in school.<sup>3</sup> (NT at 294, 313; P-7, P-13, D-1.)

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<sup>3</sup> There were 2 exceptions in the first marking period: Technology Ed. – a grade of 49 because Student did not complete his project due to exhibiting "behavior [which] interferes with learning potential" and

43. Student's Computer Applications teacher ("C.A. teacher") testified that Student is "a pleasant young man. He's polite. He's eager to please. He likes to help others." And she has not seen any areas of concern behaviorally that is any different than with any other student. (NT at 294.)

44. This same C.A. teacher then testified Student "has trouble following directions and following steps in a sequence....[he] has trouble completing that activity without asking a question. And when I prompt him, he has trouble then following those same steps. He needs prompted through almost the entire sequence on newly learned subjects." She needs to redirect him more with independent work than when there's more structured, direct teaching. Teacher sees these behaviors about once a week, and has Student in class every other day – so approximately ½ to 1/3 of the time. (NT at 296-97.)

45. The C.A. teacher completed an IEP team Conference Report, dated 1/9/05, where she listed one "x" for "Difficulty in maintaining attention" and being "Easily influenced by others"; two "x's" for being "Easily distracted" and having "Difficulty retaining information over time"; and three "x's" for "Difficulty recalling details/facts". She also wrote that Student "struggles to keep up with the pace of the class. On independent activities, [Student] often needs assistance in executing commands. Nonetheless, I enjoy having [Student] in computers. He is a wonderful student to work with." (P-6 at 4.)

46. The C.A. teacher doesn't have opportunities to observe Student in social settings. (NT at 306.)

47. Student's Social Studies teacher ("S.S. teacher") has not observed Student outside of class but has not observed any behavior difficulties in class; the S.S. teacher has a highly structured class setting with only 14 students. (NT at 309, 314-15, 318.)

48. The S.S. teacher reported that he checked off "Difficulty retaining information over time" and "difficulty recalling details/facts" on the IEP team Conference Report, dated 1/10/06, because "even though the work was finished, he had some difficulty recalling a lot of those facts." His handwritten comment was Student "really is not a problem in class." (NT at 311; P-6 at 5.)

49. The Technology Ed. teacher ("T.E. teacher") had Student for the first 9 weeks of school and never saw any untoward behaviors, but he would redirect Student "quite often", explain that Student needed to "stay on task", and while it appeared that Student understood what he was told, Student still didn't follow instructions. Consequently, because he would repeatedly get off task by helping other students, Student failed to complete his class project. (NT at 321-22, 325-28, 330-31, 337.)

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Language Arts – a grade of 70, which is a "D". Other grades are Chorus: 94; P.E.: 83; Computer Applications: 88; Math: 83; Science: 89; and Social Studies: 90, which reflect a low (83) of C+ to a high (94) of A-. (P-13.)

50. The T.E. teacher testified that Student had difficulty with multi-step projects, needed reminders and redirection, but didn't find that to be unusual. (NT at 333.)

51. The IEP Team Conference Report form was also completed by the P.E. teacher who noted Student was "progressing well" but checked off "Difficulty maintaining attention" and "Easily distracted". (P-6 at 1.)

52. The IEP Team Conference Report form was completed by the Language Arts teacher who checked many areas of "problems frequently observed." The checked areas were: Listening comprehension: difficulty following verbal directions; under Reading: difficulty with basic skills, difficulty with comprehension, difficulty reading assigned text(s) or material presented; under Written expression: difficulty spelling, difficulty with mechanics of writing, difficulty organizing sentences and ideas into paragraphs; under Daily Work: incomplete homework assignments, poor test grades, does not complete class assignments; under Memory: difficulty retaining information over time, difficulty recalling details/facts. In her handwritten comments she wrote: [Student] failed to turn in an assignment worth 100 points. He was reminded of it on several occasions, yet did not do the work." (Id. at 2.)

53. This same form was completed by the Science teacher who checked the following frequently observed problems: Oral expression: difficulty expressing thoughts and ideas; Reading: difficulty with comprehension; Written expression: difficulty spelling; Attention/Organization/Activity Level: Easily distracted at times. The handwritten comment was: [Student] works hard in Science class. (Id at 3.)

54. On 1/10/06, which was after the first 12/14/05 incident, and before the second on 1/27/06, the Educational Diagnostician observed Student in his Language Arts class for approximately 45 minutes. She observed (1) to see if he was attending and (2) to help the teacher begin to collect information on Student's attention/inattention issue. (NT at 420-24.)

55. The Educational Diagnostician informally noted for approximately 5 minutes at the beginning, the middle, and the end of the class whether or not Student was attending and found nothing of concern. Based on that single observation, she agrees that Student's behavior was not a manifestation of his disability. (NT at 424-26, 433.)

56. The Educational Diagnostician made no written report of the observation for the record; she has never met or spoken to Student. (NT at 426, 433.)

57. The Educational Diagnostician chose to observe Student in his Language Arts class because his IEP identifies him as having a disability in written expression and speech and language, and she believed that to be the appropriate place to get baseline information. (NT at 427.)

58. The School Psychologist has never met Student nor conducted a clinical interview, but is familiar with Student through coordinating the 2004 reevaluation while



Student was in 4<sup>th</sup> grade. (NT at 444, 454-55, 477.)

59. The School Psychologist participated in both Manifestation Determination team meetings and agrees that Student's behavior was not a result of his currently identified disabilities; and, his opinion is that Student's ADHD does not prevent Student from accessing his education (NT at 452-54, 472.)

60. No child at the Middle School has a behavior plan (NT at 392, 415.)

61. The Speech and Language Support Evaluation Report, dated 9/5/03, concluded that Student continued to need S/L support. The ER also reported that scores indicated "impaired short term memory abilities for verbally presented information." (P-1.)

62. Initial ER, dated 1/27/01, when Student was in first grade reported, *inter alia*: Student took Ritalin (Concerta) for his ADHD; that Student had significant difficulty sustaining attention and following directions, needed frequent prompts and teacher assistance to remain on task; and was found eligible as a student with "Other Health Impairments" because his ADHD adversely impacted his educational performance. (P-2)

63. The 3/31/04 Reevaluation Report observed Student's interaction with the school psychologist as "easy to establish and to maintain...he made appropriate efforts towards the testing however, was easily distracted and sometimes demonstrated inattention and poor concentration. [Student] repeatedly looked at the clock and asked how much more time was left until lunch." It noted that Student was currently taking medication for ADHD and found that he was eligible as a student identified as learning disabled in written expression. (P-3)

64. The 5/3/04 Addendum to the 3/31/04 reported the additional data collected due to Parent's concern about Student's ADHD and perceived academic needs in the areas of reading and math. It concluded that Student's behaviors associated with ADHD were within average range and he did not meet the criteria as a student identified as OHI. (Id.)

65. Student's 5/16/05 IEP provides Itinerant level of support for Learning Support and S/L; the specially designed instruction ("SDI") included various modifications that are often used with children with attention deficits, such as: redirecting to task; individual assistance to begin tasks; monitor tests read on his own – direct to take a second look at specific questions as needed; additional time for testing or in-class assignments; having him repeat directions before beginning tasks, preferential seating; use of assignment book, and creating an enhanced listening environment. (P-4.)

66. The IEP Team Conference Report, dated both 4/13 and 5/18 (for Student's 5<sup>th</sup> grade), listed Student's weaknesses as: organization of materials, focusing on tasks." (P-5.)

67. The Nurse's Report dated 12/11/00, noted that Student was taking Concerta for his ADD. (P-14.)

68. Correspondence from Student's treating psychiatrist dated 7/20/04, states that Student has been in treatment since 3/3/98 and is diagnosed with ADHD. (P-15.)

69. Correspondence from Student's treating psychiatrist dated 12/14/05 to School District states a DSM-IV, Axis I diagnosis of ADHD, Rule out Depression; Axis IV: of Moderate; and an Axis V: GAF score of 50.<sup>4</sup> Doctor states Student can be impulsive, disorganized and unfocused, that he has anger issues and gets easily frustrated. (P-16.)

70. The 12/15/05 Memo from Mr. C and Mr. M to Dr. P described Student's homeroom comment [redacted]. Student was suspended for 10 school days, referred to the SAP team, and referred to the Superintendent for an expulsion hearing. The pupil had reported Student's statement to the principal and when asked, "Did you feel threatened?" the pupil replied, "Yes." Student told Parent his comment was a joke. (P-8; NT at 139, 355, 361-62, 364.)

71. The 12/20/05 Manifestation Determination Worksheet concluded that Student's behavioral incident was not a manifestation of his disability.(P-9)

72. On 1/2/06 the Board had a disciplinary hearing; Student's suspension was limited to 7 days and he returned to school on 1/3/06. Parent requested the IEP team meet; the Team met on 1/18/06 but refused to add ADHD to the IEP and refused a Behavior Plan. (NT at 126-27. 364-65.)

73. The 1/30/06 Memo from Mr. C and Mr. M to Dr. P described Student's comment on 1/27/06 while in Chorus. After a pupil falsely accused Student of [taking a specific action, and Student made a remark]. Pupil wasn't sure if Student was serious or not. Parent was informed that Student was suspended for 10 days, that there would be a manifestation determination meeting the following Tuesday afternoon or Wednesday morning. District didn't want to violate Student's rights by being suspended more than 15 days, so felt that the manifestation determination hearing had to be held quickly because the Board disciplinary meeting was scheduled for 2/6. Parent stated she wanted legal representation. Student was referred to the SAP team, and referred to the Superintendent

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<sup>4</sup> The Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), published by the American Psychiatric Association, uses a multi-axial approach. Axis I lists clinical (mental) disorders; Axis II – developmental disorders and personality disorders; Axis III – physical conditions; Axis IV – severity of psychosocial stressors; and Axis V – global assessment of functioning, which is the level of functioning at the present time and the highest level within the past year.

Axis IV represented the clinician's estimation of the client's overall severity of life stress in the past year. There are six categories/scores associated with this Axis: 1. No stress; 2. Mild stress; 3. Moderate stress; 4. Severe stress; 5. Extreme stress; and 6. Catastrophic stress.

Axis V (Global Assessment of Functioning) has scores ranging from 1 to 100, with 100 being optimal. A score in the 91-100 range shows no symptoms impairing functioning. The DSM-IV lists a score of 41-50 as "Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)."

for an expulsion hearing. (P-10; NT at 365-72)

74. On 1/27/06, Mr. C and Mr. M wrote to Parent informing her that there would be a Board of School directors meeting on 2/6/06 at 9:00 a.m. to determine whether or not Student's suspension should be continued and/or whether he should be expelled on a permanent basis. (P-11)

75. On Monday, 1/30/06, the District called and left word on Parent's phone that the manifestation determination would be held on Wednesday at 9:00 a.m. Parent called and explained that neither she nor her attorney could attend that day, that it needed to be on 2/6/06. The District's position was that the Parent is invited to attend, but not a required member. (NT at 123-24, 152-54, 518.)

76 The 2/1/06 Manifestation Determination Worksheet concluded that Student's behavior was not a manifestation of his disability. Parent was called and told that the meeting was going on and she didn't need to be present. Parent never received any call from the District asking for her input. (P-12; NT at 124-25, 154, 432-33.)

77. The [redacted] School District Board Policy No. 735, entitled "Terroristic Threats/Acts defines "Terroristic Threats" as: "Terroristic Threats" shall mean a threat to commit violence communicated with the intent to terrorize another, to cause evacuation of a building, or to cause serious public inconvenience, in reckless disregard of the risk of causing such terror or inconvenience. (18 PA C.S.A. Sec. 2706)" (D-2)

78. The [redacted] School District Board Policy No. 730, entitled "Discipline" lists "Verbal Abuse" as "Using statements which threaten or harm another person." The three levels of punishment for this infraction are: (1) and (2) Suspension and Notify Police; (3) Suspension, Notify Police, Board Hearing. It is District policy to go to a Board hearing for any statement that is a threat. (D-3; NT at 370.)

79. Written statements by Student and the two pupils involved in the 1/27/06 incident. (D-4)

80. No adults heard Student's comments made on either occasion. (NT at 158, 355-58, 368.)

81. Student told Parent he's had other incidents which were not reported. (NT at 158-59.)

82. Student has had similar incidents at home over the past 6 months. (NT at 218-19.)

83. Student says things impulsively – he's unable to stop. (NT at 159.)

84. Neither Parent nor Parent's school psychologist know of any other pupil Student's age who has had 2 expulsion hearings for such behavior in such a short time. (NT at

160.)

85. Principal testified that no other student in his school has had 2 or more expulsion hearings. (NT at 404-05.)

86. Psychiatrist testified that he knows of no typical [same age] boys that have faced 2 expulsion hearings within a 2-month period; rather it was “much more likely that [Student] did what he did because of the combination of other problems that he has.” (NT at 254.)

87. While I found all witnesses credible, the Student’s treating psychiatrist was particularly credible not only due to the long-standing relationship he has with Student, but also his 15 years of practice as a child and adolescent psychiatrist, he is the director of the Div. of Child & Adolescence Psychiatry at Allegheny General Hospital in Pittsburgh, he is the psychiatric consultant for the Armstrong-Indiana IU, and provides psychiatric care in the elementary unit for 40-45 severely emotionally disturbed children at the Wesley Highland School, which is an approved private school, he teaches at Allegheny General Hospital for the residency program of the Child & Adolescent training program, and maintains a caseload of approximately 500 patients with 1/3 to 1/2 having ADD. (NT at 184-89.)

88. I found the Parent’s school psychologist exceptionally credible as well because he had actual face-to-face time with Student as well as having reviewed all of Student’s records; and his academic background is at the ABD (“all but dissertation”) stage; professional background includes being certified nationally with the National Assoc. of School Psychologists as well as having PA State certification as a school psychologist; his work experience includes approximately 19 years experience as a school psychologist. (NT at 32-26.)

### **Issues**

1. Did the School District violate Parent’s procedural rights by failing to obtain parental input into the manifestation determination?
2. Was Student’s behavior a manifestation of his disability?
3. Does the latest IEP appropriately address Student’s behavior, impulsivity and attentional difficulties emanating from ADHD?

### **Discussion and Conclusions of Law**

#### **Jurisdiction**

A due process hearing is a hearing authorized through special education laws of

both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined perimeters. Thus, any concerns parents may have regarding education services which concern matters beyond those perimeters are beyond the purview of this process and this hearing officer. Within the context of the special education arena, however, “[h]earing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included ‘findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.’”<sup>5</sup> Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence of facts which concern a child’s special education experience.

### **Burden of Proof**

Neither the IDEA nor the IDEIA addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden of persuasion in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 546 U.S. \_\_\_\_ (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held:

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<sup>5</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f).

“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” However, the Pennsylvania Special Education Dispute Resolution Manual states, in pertinent part, in Section 810 – Burden of Proof – that “[d]espite this general rule, a Hearing Officer has discretion to change the order of presentation if he or she believes it is warranted. An example of where that may occur would be where a school district seeks to change a student’s placement, and a parent initiates a due process hearing to challenge the change of placement. In that instance, a hearing may be more efficiently conducted by commencing with the district’s explanation of the rationale for the change.” This case did not warrant such a change of presentation of evidence.

**Issue One:** Did the School District violate Parent’s procedural rights by failing to obtain parental input into the manifestation determination?

While the District framed this issue as “whether the School District is obligated to risk violating state and federal regulations so that the parent and the parent’s attorney can attend the manifestation determination”,<sup>6</sup> the issue is more correctly stated as: “Can the District, in its efforts to conduct the manifestation determination before its scheduled disciplinary hearing, proceed to hold the manifestation determination with no regard to Parent’s attendance?” The immediate answer to this question is “No.”

The District correctly pointed out that the IDEIA changed the manifestation determination criteria from the 4-prong analysis to one which limits inquiry to just 2 questions. However, long before those questions can be considered, the question of “who comprises the manifestation determination team?” must be addressed. The District made

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<sup>6</sup> District’s Closing Statement, at p.5.

much of the fact that it was difficult to arrange everyone's schedules – which this Hearing Officer finds no reason to discount. However, while the District placed great value on District personnel attendance, absolutely none was given to Parent's participation in this critical meeting. The District, through testimony provided by the Director of Special Education, posited that “[t]he parent is entitled to participate, but the parent is not a required member. If they're not there, you still have to move on to the team process.”<sup>7</sup> This is, quite simply, incorrect. Looking to the previous IDEA via the federal regulations, 34 C.F.R. Section 300.523 (b), we find Congress stated that the manifestation determination team was to be comprised of “the IEP team and other qualified personnel”. The composition of the IEP team is set forth at 34 C.F.R. Section 300.344(a):

*General.* The public agency shall ensure that the IEP team for each child with a disability includes –

- (1) **The parents of the child;**
- (2) At least one regular education teacher of the child...
- (3) At least one special education teacher of the child...
- (4) A representative of the public agency...
- (5) An individual who can interpret the instructional implications of evaluation results...
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child... and
- (7) If appropriate, the child.

(Emphasis added.)

In Special Education Opinion No. 1652, the appeals panel held that while a failure to provide a procedural safeguards notice may be harmless error, “failure to provide the parent with notice of an **an opportunity to participate in the M[manifestation] – D[etermination] . . . . is a more serious matter.**” (Emphasis added.)

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<sup>7</sup> FF # 75, (NT at 518.)

Surely it follows that if “the IEP is the ‘Primary Vehicle’ of the IDEA’s implementation,”<sup>8</sup> then the IEP team, collectively, is the chauffeur and the vehicle will not run without that individual at the steering wheel. It is important to note that the IDEA listed “Parents” first – not last, not as merely “invited”, but as an integral, necessary part of the team. However, those regulations are no longer controlling. Thus, we look to the IDEIA, which has supplanted the IDEA. 20 USC 1415, Sec. 615(k)(E) addresses the composition of the manifestation determination team as:

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...** (Emphasis added.)

Thus, instead of Parent’s position being weakened under the new law, it is strengthened because “the parent” is now stated as an equal member of the manifestation determination team – on the same footing as the LEA, and separate and apart from Parent’s being a part of the IEP Team. Nonetheless, Parent cannot conduct a manifestation determination without the presence of the LEA and the LEA is equally bound by the same limitations.

Additionally, while the District needed to hold the manifestation determination hearing before the 2/6 Board disciplinary hearing, the District did not show that it could not have rescheduled the Board meeting for later that same day or evening and held the manifestation determination sometime earlier in the day when Parent advised that she and her legal counsel were available.

Further, addressing the right of Parent to be accompanied by legal counsel to the manifestation determination, Section 615(h) provides:

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<sup>8</sup> Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 597 (1988).



Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

“(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;”

Parent did not waive her participation by invoking her right to have legal counsel attend the manifestation determination with her. She clearly stated she planned to attend with her attorney and she took every step possible to advise the District. It appears there was some confusion in the Director of Special Education getting one of Parent’s messages; human error happens. However, Parent cannot be faulted, nor Student’s rights violated or abrogated because of human error committed by the District’s personnel or by the District’s sincere efforts to conduct the manifestation determination in a timely fashion before the School Board’s expulsion hearing.

The manifestation determination was not conducted as required by law, it violated Student’s rights, and the determination which was the outcome of that meeting is void.

**Issue No. 2:** Was Student’s behavior a manifestation of his disability?

Certainly the testimony which Student’s treating psychiatrist and Parent’s school psychologist gave is weighty. The psychiatrist has treated Student for several years. The school psychologist, while meeting Student just once, had some 3 hours of one-on-one contact with Student, as compared to the District’s school psychologist who has never even spoken to Student and testified that he wouldn’t, in all likelihood, be able to pick Student out in a room. But, while personal interaction is valued, it is not the only criterion this Hearing Officer considered. Both psychiatrist and school psychologist have extensive experience with children with Student’s disabilities; both spoke

knowledgeably about ADHD and how it affects children generally and how it affects Student, individually. Both professionals weighed their words and gave very well-reasoned statements – neither one was strident, but both exhibited extraordinary reasonableness.<sup>9</sup>

The District – through testimony of the Director of Special Education and Student’s teachers - attempted to explain why the IEP Team Conference Reports did not mean what the teachers who filled out the forms said they meant. The directions on the form are clear: “Based on your observations, please evaluate the student in comparison to other classmates by checking problems frequently observed.” As an example, one teacher even marked her form with varying numbers of “x”s – up to 3 per problem observed – and made a handwritten comment stating Student “struggles to keep up with the pace of the class.” Yet, while testifying, she attempted to mitigate the information on the form by saying he’s not any different than any of her other students; however, she contradicted that by going on and saying that he has trouble following directions or completing an activity without asking a question.<sup>10</sup>

The truly puzzling question, however, is Why is the District so reluctant to address Student’s increasing ADHD needs? While the District could argue with some success that before the 12/14/05 incident, it had no notice that Student’s ADHD was again impacting his educational experience as it had when Student was initially identified as a first grader, after Student returned to school and recommitted the same type of behavior in the same type of classroom environment (one where there is less structure [redacted]) within a matter of days, it should have reconvened the IEP team and

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<sup>9</sup> See, for example, FF ## 9, 10, 12-15, 29-31, 35, 36, 38, 40, 41.

<sup>10</sup> FF # 43-45.

addressed his behavior issue(s).

While Student is performing well in structured, academic classes, that cannot be the sole criterion for finding that his behavior did not emanate from his well-acknowledged and long-documented ADHD. For the District to focus on Student's academic grades and say that since his misbehaviors manifest themselves – for the moment – only in the less formal classes and since it does not impact his academic grades at this juncture that it has no bearing on his educational experience is missing the point. If these behaviors – wherever they occur – end up being the basis for expulsion, how can Student be said to not have his academic career adversely impacted by a long-standing, identified disability when the doors to education are barred to him? The evidence is not only preponderant but clear and convincing that Student, in addition to having a specific learning disability and speech and language needs, also has impulsivity issues which stem from his ADHD. These needs must be addressed in order for this child to have a free, appropriate public education. Therefore, the IEP team must reconvene within 10 school days, conduct a functional behavioral assessment and implement a behavioral intervention plan.

As a matter of dicta, I am also concerned that Student has been charged with Terroristic Threats. On the one hand, the District appears to believe that Student was joking, yet they charge him with a crime which has as a requisite element of the crime: Intent. And, more specifically: Intent to terrorize.

18 PA C.S.A. Sec. 2706 states:

A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

- (1) Commit any crime of violence **with intent** to terrorize another;
- (2) Cause evacuation of a building, place of assembly or facility of public

transportation, or

(3) Otherwise cause serious public inconvenience, or cause terror or serious public inconvenience **with reckless disregard** of the risk of causing such terror or inconvenience.

The term “communicates” means, conveys in person or by written or electronic means, including telephone, electronic mail, internet, facsimile, telex and similar transmissions.

No adult heard these statements made by Student. Therefore, it seems that it is left to the pupils who heard Student to be called upon to make this legal determination: Was it said with intent? The testimony showed that pupil wasn't sure if Student was serious or not.<sup>11</sup> While I appreciate the rigorous demands placed on District personnel in assuring our students have a safe environment for their education, one must wonder if there is room for exercise of personal judgment at a school level, rather than at a Board expulsion meeting.

**Issue No. 3:** Does the latest IEP appropriately address Student's behavior, impulsivity and attentional difficulties emanating from ADHD?

No. Student's treating psychiatrist and Parent's school psychologist both testified credibly to the need for a behavior management plan to specifically address Student's ADHD needs. Additionally, the IEP team must address, in light of Parent's additional evidence presented by Student's psychiatrist and school psychologist, the extent Student's ADHD impacts his total educational experience and, in light of the past two incidents, craft an IEP which meets Student's current needs.

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<sup>11</sup> FF # 73.

**Order**

For the reasons hereinabove discussed, It is hereby ordered that:

1. The Manifestation Determination dated 2/1/06 is void;
2. The IEP team must reconvene within 10 school days, conduct a functional behavioral assessment and implement a behavioral intervention plan; and,
3. The IEP team must address, in light of Parent's additional evidence presented by Student's psychiatrist and school psychologist, the extent Student's ADHD impacts his total educational experience and craft an appropriate IEP which meets all of Student's needs.

*Margaret Drayden*  
Margaret Drayden, Esq.  
Hearing Officer

Dated: March 12, 2006.