

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 20320-17-18

Child's Name: R. T. **Date of Birth:** [redacted]

Dates of Hearing:
3/19/2018 and 3/20/2018

Parent:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 4/5/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student, (hereafter Student),¹ is a nearly teenaged student residing in the Penn Hills School District (hereafter District). Student is a protected handicapped student under Section 504 of the Rehabilitation Act of 1973² and Pennsylvania Chapter 15³ and has had a Section 504/Chapter 15 Service Agreement/Accommodation Plan (hereafter Service Agreement) since the spring of 2016.

In February 2018, disciplinary consequences amounting to a change in placement were imposed following Student's physical contact with a teacher in a classroom. The conclusion of the manifestation determination process was that the behavior was not related to Student's disability or the result of a failure to implement Student's Service Agreement. Following Student's expulsion from school, the Parent filed a Due Process Complaint that required resolution within expedited timelines. A two-session hearing convened on March 19 and 20, 2018.⁴ The Parent asserted that the conclusion reached through the manifestation determination process was not correct; she sought Student's immediate return to school. The District maintained that the manifestation determination was appropriately made and that no remedy should be ordered.

For the reasons set forth below, the Parent's claims must be granted.

¹ In order to provide confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information that are part of this decision, including details appearing on the cover page, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

³ The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Joint Exhibits (J-) followed by the exhibit number, Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Parent in the singular is used to refer to Student's mother who filed the Complaint.

ISSUES

1. Whether Student's behavior on [the date in question] in February 2018 was a manifestation of Student's disabilities;
2. Whether the District properly implemented Student's Service Agreement in connection with that February 2018 incident; and
3. Whether Student should be immediately returned to the District.

FINDINGS OF FACT

1. Student is a resident of the District. Student is nearly teenaged and qualifies for a Service Agreement/Accommodation Plan pursuant to Section 504 and Chapter 15 on the basis of a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD) and symptoms of Oppositional Defiant Disorder (ODD). (N.T. 17-18)
2. Student exhibits impulsive and hyperactive behaviors. Student has difficulty maintaining focus and attention and with remembering multi-step directions. (N.T. 199, 246-47)
3. Student exhibits defiant behaviors at school and can be argumentative with staff. (N.T. 263; J-2, J-3, J-4, J-5, J-6)

EDUCATIONAL BACKGROUND

4. In April 2016, the Parent provided the District with a letter from a pediatrician that sought a Section 504 Service Agreement based on a diagnosis of ADHD with "significant oppositional-defiant symptoms" (J-7). (N.T. 136-37, 160, 194-95; J-7)
5. Student was provided with school-based counseling following the pediatrician's letter. (N.T. 198, 214)
6. The District did not conduct any evaluation before proceeding to create, with the Parent, a Service Agreement for Student. (N.T. 161)
7. In mid-April 2016, an initial Service Agreement was developed. The impairment listed was the ADHD diagnosis. The document described how the disability affected a major life activity as difficulty focusing and following class routines and a high energy level with significant physical movement. (N.T. 136-37; J-1)
8. The accommodations in the April 2016 Service Agreement were for an assigned role during recess due to difficulty with the unstructured period; a daily behavior chart; preferential seating to limit distractions; positive reinforcement and encouragement; a code word for when Student needed to take a break; and a "cool down" period outside of the classroom when Student exhibited defiance. (J-1)

9. The Parent approved the April 2016 Service Agreement. (J-1)
10. Student's Service Agreement was revised in September 2016 (fifth grade). The description of how Student's disability affects a major life activity added forgetfulness and a tendency to become argumentative with staff. (J-2)
11. The accommodations in the September 2016 Service Agreement were for time with the counselor or principal due to energy or aggression on request of Student and agreement of a teacher who would provide a pass; graphic organizers and manipulatives; nonverbal cues; and daily breaks in the afternoon. None of the specific accommodations from the April 2016 were retained. (J-2)
12. The Parent approved the September 2016 Service Agreement. (J-2)
13. Student's Service Agreement was again revised in October 2016 to add accommodations for a checklist in the locker; use of an agenda; and placement in line during transitions. (J-3)
14. The Parent approved the October 2016 Service Agreement. (J-3)
15. In March 2017, the District sought the Parent's permission to conduct a special education evaluation due to behavioral concerns. The Parent did not provide consent. (N.T. 142-44, 212-13; S-3, S-4)

2017-18 SCHOOL YEAR

16. Student was in sixth grade for the 2017-18 school year. (N.T. 19, 194; J-9 p. 1)
17. Student had the same sixth grade teacher for mathematics and social studies. An aide was present in the classroom. (N.T. 19, 30, 78-79; S-11 p. 71-72)
18. The door to the mathematics and social studies classroom opened into the hallway. (N.T. 41)
19. Student's schedule included a mathematics class in the morning followed by language arts, lunch, an extension period, then social studies. (N.T. 34-35, 209)
20. The aide took data on Student's behaviors for completion of the behavior chart. Sometimes the mathematics and social studies teacher took that type of data. (N.T. 30-31)
21. Student's mathematics and social studies teacher attended a meeting at the start of sixth grade with several District representatives, the Parent, and Student, to discuss Student's needs. The teacher also reviewed Student's Accommodation Plan prior to the start of the 2017-18 school year. (N.T. 19-21, 26, 65; J-4)

22. The previous Service Agreement was revised in August 2017. The description of how Student's disability affects a major life activity added refusal to complete work and difficulty with transitions. (J-4)
23. The accommodations in the August 2017 Service Agreement were a scheduled daily break with the counselor or principal to let off energy; a weekly check-in with a behavior specialist; small group testing for class assessments; availability of an additional break as needed; an extra set of materials at home; communication with the Parent about incomplete assignments; nonverbal cues when off task; a checklist in the locker; placement in line during transitions if supervision appeared to be necessary; and an escort or early dismissal from class for certain transitions. (J-4)
24. The Parent approved the August 2017 Service Agreement. (J-4)
25. The Service Agreement was revised in October 2017 to limit the daily scheduled break to five minutes and to add that notes would be provided when available. (J-5)
26. The Service Agreement was revised again in November 2017 to add a behavior chart. (J-6)
27. The Parent approved the November 2017 Service Agreement. (J-6)
28. Student has attended all of the meetings to develop and revise the Service Agreements. (N.T. 140-41, 154, 202)
29. Student's mathematics and social studies teacher expected that Student would request a pass to leave the classroom to take a break. The teacher or the aide could provide the pass when requested. (N.T. 39, 55-56, 67)
30. All students in the building who leave a classroom are required to ask for permission before doing so. (N.T. 108-09)
31. Student understood during the 2017-08 school year that Student needed to ask for permission before leaving a classroom. (N.T. 127-28, 182-83, 218-19; S-11 pp. 84, 88)
32. In the experience of Student's mathematics and social studies teacher, Student could be argumentative with staff. (N.T. 27)
33. Student was referred for discipline on 37 occasions during the 2017-18 school year through [the date in question] in February 2018. The physical incidents included unsafe behavior (2 instances) [and physical aggressions towards peers (a total of 15 additional instances)]. A number of referrals were for defiance toward teachers and staff, and Student also cut classes on several occasions. (N.T. 111, 113, 116; J-9)
34. Thirteen of the disciplinary referrals occurred in January and February 2018. (J-9)
35. In late January 2018, the District again sought the Parent's permission to conduct a special education evaluation because of Student's increased disciplinary referrals and

declining grades. The Parent did not provide consent. (N.T. 144-46, 201-02, 213; S-5, S-6)

FEBRUARY 2018 INCIDENT

36. In the morning of [the date in question in] February 2018, Student had a mathematics test. Student took that test in a separate room with a small group of students and an instructional aide. Student had difficulty with and did not complete the test during that period or during the period after lunch. (N.T. 32-33, 72-75, 79, 86-87; S-11 pp. 72-74)
37. When Student went to social studies class, Student sat at a table rather than in Student's assigned seat. Student had the incomplete mathematics test on the table and tried to finish completing it. (N.T. 35-36; S-11 pp. 75)
38. The social studies teacher removed the mathematics test from the table and redirected Student to Student's assigned seat for social studies class. (N.T. 37; S-11 pp. 75-76)
39. Student became frustrated and upset after the test was removed, and was in need of a break. (N.T. 253; S-11 pp. 78, 81-82, 88-89)
40. Student did not ask to take a break and leave the classroom after the mathematics test was removed because Student was frustrated and upset. (N.T. 39; S-11 pp. 84-85)
41. The social studies teacher walked toward the closed classroom door to begin instructing the class when Student told the social studies teacher that Student was leaving the room. The teacher again redirected Student to Student's assigned seat. (N.T. 40-41, 82; S-11 pp. 76-78)
42. Student ignored the direction and [redacted]. (N.T. 42, 82; S-11 pp. 77-79, 87)
43. [Redacted.] (N.T. 42, 82)
44. [Redacted.] (N.T. 44-47)
45. [Redacted.] (N.T. 46-48, 53; S-11 pp. 79-80; S-13)
46. Student entered the hallway behind the teacher and met the security guard who was just arriving to the area of the classroom. The security guard then escorted Student down the hall. Student did not touch or attempt to touch the security guard or anyone else, or anything in the hallway, after leaving the classroom. (S-13)
47. The Parent was called to pick Student up after the [redacted] incident, and Student was given three days of out of school suspension. (N.T. 203-04)
48. The District completed an Alternative Education for Disruptive Youth (AEDY) referral form on or about [the date of the incident]. In that referral, District staff provided a number of behaviors that had been observed that school year, including instances of

verbal aggression, inappropriate touching of peers, physical aggression, non-compliance with directions and task completion, and skipping classes. (P-2)

49. A manifestation determination meeting convened on February 19, 2018. Student and both Parents attended the meeting. (N.T. 97-98, 104, 151, 204-05, 222; J-8)
50. A District school psychologist who was responsible for overseeing Student's Service Agreement completed the Manifestation Determination worksheet. (N.T. 135, 150-51; J-8)
51. The school psychologist made the determination that the behavior in question was not a manifestation of Student's disability. The Parents did not agree, but none of the other District representatives at the meeting expressed disagreement with that conclusion. (N.T. 187-88, 205-06; J-8)
52. The building principal agreed with the manifestation determination in part based on her experience with other students with ADHD. (N.T. 106-07)
53. The school psychologist agreed with the manifestation determination conclusion in part based on her understanding of ADHD and her belief that Student chose to act aggressively toward the teacher. Part of that conclusion was based on [redacted]. She also concluded that Student knew right from wrong at the time [redacted]. (N.T. 154-56, 167, 175-77, 189, 191-92; J-8)
54. The school psychologist did not consider Student's ODD symptoms for the manifestation determination review. (N.T. 186)
55. Sometime after the [redacted] incident, the Parent consented to a special education evaluation of Student. (N.T. 229)
56. At the time of the due process hearing, Student was attending an alternative educational setting. (N.T. 18)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly,

the burden of persuasion in this case rests with the Parent who filed the Complaint.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible on matters that were necessary to a determination of the issues, all testifying to the best of his or her recollection and from his or her perspective. It should be noted that there was some discrepancy in the testimony on whether the mathematics and social studies teacher had previously denied Student the opportunity to take a break (*compare* N.T. 58 (testimony of the teacher) and S-11 pp.84-85 (transcript of testimony of Student at expulsion hearing)); however, there was no opportunity for the hearing officer to observe Student testifying and make a meaningful credibility determination, but the inconsistency is not material to resolving the dispute. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties’ closing statements.

IDEA PRINCIPLES – DISCIPLINARY PROVISIONS

Since the District opted to comply with the IDEA disciplinary provisions, that statute and its implementing regulations will be applied to and guide discussion of the issues. The IDEA provides a number of important protections when a Local Educational Agency (LEA) seeks to

impose discipline on a student with a disability. Specifically, when an eligible student is facing a change in placement for disciplinary reasons,⁵ a meeting must convene to determine whether or not the conduct in question was a manifestation of the student's disability:

(E) Manifestation determination

(i) In general. Except as provided in subparagraph (B), 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.

20 U.S.C. § 1415(k)(1)(E)(i) (italics added); *see also* 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii); *see also* 34 C.F.R. § 300.530(e)(2). Additionally, if the conduct is determined to be a manifestation of the child's disability, the LEA must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F); *see also* 34 C.F.R. § 300.530(f).

By contrast, if the team determines that the behavior which resulted in discipline was not a manifestation of the student's disability, the LEA may apply the same disciplinary procedures

⁵ A "change of placement" based on disciplinary removals is defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a "pattern". 34 C.F.R. § 300.536. There is no dispute that Student's expulsion from school is a change of placement.

applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education (FAPE). 20 U.S.C. §§ 1415(k)(1)(C) and (D); 34 C.F.R. §§ 300.530(c) and (d).

Before turning to the issues presented, it merits mention that there was significant testimony about the District's consideration or lack of consideration of the "symptoms of ODD" in determining Student's eligibility under Section 504 and resulting accommodation needs. Section 104.35 of the applicable regulations implementing Section 504 requires that an evaluation "shall" be conducted "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 C.F.R. § 104.35. An initial evaluation under Section 504 must assess all areas of educational need, be drawn from a variety of sources, and be considered by a team of professionals. *Id.* Had the District undertaken an evaluation process rather than simply elect to rely on a brief letter from Student's pediatrician, any confusion over Student's disability and how it impacted Student's education may have been averted long before [the date of the incident].

THE MANIFESTATION DETERMINATION

The unambiguous language in Section 1415(k)(E)(i)(I) requires a determination of whether the conduct was "caused by" or had a "direct and substantial relationship to" the child's disability. The second, alternative inquiry is whether the conduct was direct result of a failure to implement the educational program, in this case the Service Agreement. If the answer to either of those questions is yes, the conclusion must be that the behavior was a manifestation of the student's disability.

Here, the conclusion on the first query was flawed in a number of respects. First, and quite significantly, one important reason for the conclusion reached was that the school

psychologist, and evidently others, believed that Student knew right from wrong. That is not the standard. The law requires that the first inquiry focus on whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. While an understanding that a behavior is wrong does appear as part of one question on the manifestation determination worksheet (J-8 p. 5), it is but one consideration. *See, e.g., Osceola County (FL) School District*, 115 LRP 19292 (OCR 2014)(explaining that a manifestation determination should not “simply [be] a reflection of the Student's special education classification or a determination that the student knew right from wrong.”). A second erroneous factor upon which the decision was based was the school psychologist’s belief that Student [redacted,] suggesting choice and a recognition of opportunity. That assumption was only partially correct; the evidence in this record was uncontradicted that [redacted]. Third, and critically, the team did not consider in any meaningful way the relevant characteristics of how Student’s specific disability affected Student’s conduct on that date. The team had available substantial information to aid in that consideration, including what was documented in the most recent Service Agreement relating to accommodations needed to address refusal to complete work and a tendency to be argumentative with staff. The team was aware that Student had school-based counseling and also met regularly with the counselor at other times. In addition, Student’s behavior and disciplinary referrals through February 2018 reflected numerous instances of physical aggression and defiance with increasing frequency and severity as the school year went on, prompting the District to again seek a special education evaluation to investigate the need for more disability-related supports. All of this information was and is crucial to a determination of whether a behavior was caused by or had a direct and substantial relationship to the disability, and

unfortunately was not adequately considered. Moreover, all of these factors point to a conclusion opposite of that reached.

The Parent's expert, a private psychologist, provided very persuasive testimony, rendering an opinion that Student's low frustration tolerance, impulsivity, and defiance toward those in authority were characteristics of Student's ADHD as well as possible ODD symptoms (N.T. 252-56, 271). The record as a whole supports a conclusion that each of those symptoms were present at the time of the [redacted] incident and, further, that the behavior in question bore a direct and substantial relationship to Student's disability.

Though not necessary to decide, the evidence is also preponderant that the conduct was a direct result of a failure to implement a component of the Service Agreement, specifically the provision that Student had the opportunity to take a break when needed. Though there was evidently an understanding that Student was required to ask permission for a break, the Service Agreement no longer included that condition in February 2018. Furthermore, Student's failure to ask permission was just as attributable to the frustration and impulsivity that were present at the beginning of the social studies class on [the date of the incident] as was the ultimate conduct that led to expulsion.

Where, as here, a behavior was a manifestation of the student's disability, an FBA must be conducted in order to develop a behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). An FBA is unambiguously warranted and necessary in this case, to provide important information to the team for identification of behaviors of concern, to seek an understanding of their function, and to lead to the development of an intervention plan. The District will be ordered to seek permission to conduct an FBA if not already part of the current special education evaluation.

Finally, because the manifestation determination must be reversed, Student will be ordered to be returned to the placement from which Student was removed as a result of the [redacted] incident as provided by 20 U.S.C. § 1415(k)(3)(B) and 34 C.F.R. § 300.532(b).

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's manifestation determination must be reversed and Student must return to the District placement.

ORDER

AND NOW, this 5th day of April, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The determination made on February 19, 2018 that Student's conduct on [the date in question in] February 2018 was not a manifestation of Student's disability was erroneous and is REVERSED.
2. Within three school days of the date of this decision, the District shall invite the Parent to a meeting to consider whether Student's Service Agreement should be revised for Student's return to the placement from which Student was removed as a result of the [redacted] incident.
3. Student shall return to the placement from which Student was removed not later than the first school day after the meeting described in Paragraph 2, or by April 16, 2018, whichever first occurs, unless all members of the team including the Parent otherwise agree.

4. Within five school days of the date of this decision, if not already included in the current special education evaluation, the District shall provide the Parent with a Permission to Evaluate form to conduct an FBA.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
20320-1718KE