

*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**

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**Child's Name:**

A.B.

**CLOSED HEARING**  
ODR Case #20467-1718KE

**Date of Hearing:**<sup>1</sup>

April 26, 2018

**Parents:**

Parent(s)

Phillip A. Drumheiser, Esquire – 2202 Circle Road  
Carlisle, PA – 17013  
*Counsel for Parents*

**School District:**

Wyoming Area School District – 20 Memorial Street – Exeter, PA – 18643

Sharon Montanye, Esquire – 331 Butler Avenue – P.O. Box 5069  
New Britain, PA – 18901  
*Counsel for the School District*

**Date of Decision:**

May 10, 2018

**Hearing Officer:**

Michael J. McElligott, Esquire

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<sup>1</sup> The hearing was held in one session and, as set forth below, largely procedural in nature, as the parties agreed that the record would comprise stipulated exhibits and no testimony.

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”)<sup>2</sup> is a [late teenaged] student residing in the Wyoming Area School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations as a student with a health impairment.<sup>3</sup>

Parent’s complaint at this file number is brought as the result of the District seeking a disciplinary change in placement for behavior it alleges was engaged in by the student. (34 C.F.R. §300.532(c); 22 PA CODE §14.162(q)(4)). The student denies any involvement in the alleged behavior. Given the fact that the issue focuses on a disciplinary change in placement, the hearing proceeded on an expedited timeline. One hearing session was held on April 26, 2018. The decision is due within ten school days of the hearing. (34 C.F.R. §300.532(c)(2)). District personnel confirmed at the hearing session that, based on the District’s school calendar, the 10<sup>th</sup> school day is May 10, 2018.

As a result of behavior that the District alleges was engaged in by the student, the District conducted a manifestation determination review, finding that the behavioral incident was not caused by, or did not

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<sup>2</sup> To protect the confidentiality of the student, the generic use of “student”, rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.

<sup>3</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 24 PA Code §§14.101-14.163.

have a direct and substantial relationship to, the student's disability under the IDEIA, and was not a result of the failure to implement the student's individualized education program ("IEP"). Parent disagreed with the manifestation determination result and filed a special education due process complaint on April 3, 2018. Parent's complaint also claimed denial of a free appropriate public education ("FAPE") for alleged deficiencies in the student's special education program over the 2017-2018 school year. Those claims are proceeding on a non-expedited timeline under a separate ODR file number.

For the reasons set forth below, an order will be crafted that addresses the student's placement in light of the unique procedural circumstances in this matter, described herein.

### **ISSUE**

As a result of the unique procedural circumstances in this matter, what is the student's educational placement in light of the manifestation determination process?

### **PROCEDURAL BACKGROUND & FINDINGS OF FACT**

1. The student had previously attended District schools, in 8<sup>th</sup> grade, the 2015-2016 school year. Halfway through 8<sup>th</sup> grade, the student

- moved to a nearby school district. (School District Exhibit ["S"]-1, S-2).<sup>4</sup>
2. In 9<sup>th</sup> grade, the 2016-2017 school year, the student was still attending the nearby school district. (S-1).
  3. In December 2016, in the midst of 9<sup>th</sup> grade, the school district the student attended at that time evaluated the student and found the student to be eligible under the IDIEA as a student with a health impairment, specifically based on a previous diagnosis of attention deficit hyperactivity disorder and needs in attention, organization, problem-solving, initiation. (S-2).
  4. In November 2017, in the fall of the current school year, the student enrolled in the District. (S-1).
  5. In December 2017, the District utilized the December 2016 evaluation report from the nearby school district to design the student's IEP in the District. (S-3, S-4, S-5).
  6. In approximately mid-March 2018, someone had written a message on a wall at the District school where the student attended. The written message was perceived as a threat. (S-9).
  7. The District asserts that the student was the author of the writing and, based on that assertion, it sought to implement an out-of-

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<sup>4</sup> The parties stipulated to the production of exhibits for this hearing. Certain exhibits were prepared for submission but were not accepted into the record by the undersigned hearing officer.

school suspension which would amount to the 16<sup>th</sup> day or more of such exclusion in the 2017-2018 school year. (S-9).

8. The family's position is that the student was not the author of the written message. (Hearing Officer Exhibit ["HO"]-1; Transcript at 9-13).<sup>5</sup>
9. On March 26, 2018, the student's IEP team met for a manifestation determination review. (S-9)
10. The manifestation determination review worksheet indicated that the school-based members of the team felt that the alleged behavior was not a manifestation of the student's disability, or was not substantially related to the student's disability, and that the behavior was not the result of a failure to implement the student's IEP. (S-9).
11. The District concluded from the manifestation determination review that the student's special education status would not enter into, or impact, its handling of the proposed discipline of the student. The student's mother disagreed. (S-9).
12. On April 3, 2018, the parent filed the complaint which led to these proceedings with a hearing date scheduled for April 25, 2018. (P-3).

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<sup>5</sup> The parent sought to make part of the record for this decision evidence [of] handwriting analysis. That evidence (handwriting samples and the written opinion of a reviewer of the samples) was not received into the record as the student's authorship, or not, of the handwritten message is a question, with potentially significant implications, presently pending before another tribunal.

13. On April 20, 2018, the undersigned hearing officer held a conference call with counsel for the parties to discuss hearing planning. (HO-1).
14. In the conference call, it became clear that the parties held diametrically opposed positions over whether the student even engaged in the underlying behavior. (HO-1; Transcript at pages 9-20).
15. In the conference call, for the first time, it became clear that criminal charges related to the student's purported involvement with the written message are being considered by the office of the district attorney for the student's county of residence. (Parent's Exhibit ["P"]-2).
16. In the conference call, it became clear that, understandably, counsel for the family shared that he would likely advise his client not to testify under oath, on any level, as to the written message. Counsel for the District shared that it was her understanding that the District's investigation of the written message was conducted by a school security officer and that her further understanding was that, while the district attorney's office considered its position on the criminal charges, the school security was being advised (to be clear, not by District counsel herself but by someone else) that he should not testify in these proceedings. (HO-1; Transcript at pages 9-20).

17. Over the course of the conference call, then, it became clear that—questions of the appropriateness of the manifestation determination review under IDEIA aside— the two most important witnesses with the most material evidence to offer about whether or not the student engaged in the alleged behavior would not provide that evidence. (HO-1; Transcript at pages 9-20).
18. In the conference call, the parties shared that, pending the resolution of the manifestation determination review question and, consequently, the student’s educational placement, the student was receiving daily one-on-one instruction at a mutually agreed-upon community setting. (HO-1; Transcript at 20-31).
19. In the conference call, the undersigned hearing officer shared with counsel that he was being presented with an untenable, indeed impossible task: He was being asked to determine, as a matter of fact-finding, whether or not the student’s behavior was a manifestation of the student’s disability when the parties dispute, at the very outset, whether the student engaged in the behavior at all. And, further, that both material witnesses whose testimony would be the most important in answering the fundamental factual questions would not testify. (HO-1; Transcript at 9-20).
20. In the conference call, the undersigned hearing officer indicated, then, that this decision would not address the

manifestation determination review but that this decision would address the student's educational placement because that issue, over the medium-to-long term, was in flux and needed to be addressed. (HO-1; Transcript at 21-31).

21. Counsel stipulated to the exhibits of record and, on April 26, 2018, the hearing concluded in one session to bring those exhibits into the record and to memorialize the procedural events outlined above. (HO-1; S-1, S-2, S-3, S-4, S-5, S-7, S-8, S-9, S-10; P-1, P-2, P-3; Transcript at 3-49).

### **DISCUSSION AND CONCLUSION OF LAW**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.163)). In certain circumstances, a school district seeking to impose an out-of-school suspension on a student with disabilities is viewed as changing the student's special education placement by virtue of the exclusion from school, and an intricate series of protections must be observed before that school district can impose the out-of-school suspension. (34 C.F.R. §300.530; 22 PA Code §14.102(a)(2)(xxxii)).

This series of protections involves a meeting of the student's IEP team to "review all relevant information in the student's file, including

the child's IEP, any teacher observations, and any relevant information provided by the parents". (34 C.F.R. §530(e)(1)). The IEP team is tasked with determining whether the behavior underlying the discipline/disciplinary change-in-placement is a manifestation of the student's disability. (34 C.F.R. §300.530; 22 PA Code §14.102(a)(2)(xxxii)). This process is referred to as a manifestation determination review. A parent who disagrees with the results of the manifestation determination review is entitled to appeal by means of a due process hearing. (34 C.F.R. §532(a); 22 PA Code §14.102(a)(2)(xxxii)).

Procedurally, this is the genesis of the parent's complaint and the foundation of this decision. Given the unique procedural circumstances outlined above, namely that the parties hold diametrically-opposed views as to whether the student even engaged in the underlying behavior but that neither party was prepared [with] the material witnesses as to that purported behavior, this decision will not address the manifestation determination review as to the student's placement.<sup>6</sup> It is understandable that those witnesses choose not to testify under oath as part of a fact-finding process while the question of potential proceedings, and analogous fact-finding, may take place before a tribunal with jurisdiction over alleged criminal activity. But it clearly renders impossible the fact-

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<sup>6</sup> Whether there are any denial-of-FAPE implications for the manifestation determination review is a matter that may, or may not, be an issue in the retrospective denial-of-FAPE claims proceeding under the separate ODR file number.

finding necessary to answer the question presented in parent's complaint as to the disciplinary change in placement under the terms of the IDEIA.

Just as clearly, however, the student's educational placement is in flux, and special education due process must speak to that issue.

Therefore, the order below follows to provide clarity to the parties on the student's placement going forward.

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### **ORDER**

In accord with the foregoing, the issue of the appropriateness of the manifestation determination review is not addressed in this opinion and order. Considerations as to whether the School District retrospectively met its substantive and procedural obligations to the student under the IDEIA will be taken up, if necessary, at ODR file #20601-1718.

Through the end of the 2017-2018 school year, the student's placement shall continue to be, by agreement of the parties, daily one-to-one instruction in a community-based setting.

Within 20 days of the date of this order, the student's IEP team shall meet to discuss placement options for the student for the 2018-2019 school year ("18-19 placement IEP meeting").

If the IEP team's deliberations at the 18-19 placement IEP meeting include placement of the student outside of the District, whether it be at

a private placement, a tuition-based placement at another school district, or some other out-of-District placement, and the IEP team is unable to agree to a structure for identifying and exploring such placements, the following structure is hereby ordered:

- Within 10 days of the 18-19 placement IEP meeting, the student's parent shall provide to the District, through written communication between the parties' counsel, a list of up to six out-of-District placements that the parent would like to be considered by the IEP team.
- Within 5 days of being provided with the list, again through written communication of counsel, the District shall provide consent-to-share-information forms to the parent, seeking consent to provide educational documents and information with the potential placements.
- Within 5 days of being provided with the consent forms, again through written communication of counsel, parent shall provide the signed consent forms to the District.
- The District shall then contact the placements identified by the parent and inquire and/or make arrangements as to whether the identified placements are willing and able to enroll the student.
- Thereafter, any application or enrollment process shall be undertaken in conjunction with, and under the auspices of, the IEP team and shall be consummated with, and solely by, an

agreed-to notice of recommended education placement (“NOREP”) exchange between the parties.

If the student’s IEP team at the 18-19 placement IEP meeting, at any time before or after, decides that placement of the student outside of the District is not appropriate, or if the out-of-District placement structure outlined above does not yield an agreed-to out-of-District placement by NOREP, or the student’s IEP team is unable to agree to any change in the program/placement of the student, the student’s program/placement on the first day of school for the 2018-2019 school year shall be the student’s placement under the terms of the December 2017 IEP.

With the sole exception that without an agreed-to change in the student’s program/placement via NOREP exchange as of the first day of school for the 2018-2019 school year, the student’s placement on the first day of school for the 2018-2019 school year shall be the student’s placement under the terms of the December 2017 IEP, nothing in this order shall be read to interfere with the parties’ ability to modify any provision of this order to the extent the parties agree thereto in writing.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

May 10, 2018