

*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.*

*At the request of the hearing officer and to ensure student confidentiality, ODR has taken the rare step of redacting the LEA name and student initials.*

## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 27598-22-23**

#### **CLOSED HEARING**

**Child's Name:**

[Student]

**Date of Birth:**

[redacted]

**Parent/Guardian:**

[redacted]

**Counsel for Parent:**

Christian Colon, Esquire  
1650 Market Street, Suite 3600  
Philadelphia, PA 19103

**Local Education Agency:**

[redacted]

**Counsel for the LEA:**

Ned Nakles, Esquire  
1714 Lincoln Avenue  
Latrobe, PA 15650

**Hearing Officer:**

Cathy A. Skidmore, Esquire

**Date of Decision:**

03/16/2023

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, (Student),<sup>1</sup> is a mid-teenaged student residing in the School District named on the cover page (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) based on classifications of Other Health Impairment and Specific Learning Disability.<sup>2</sup>

Student moved to Pennsylvania from another state in early January 2023, having already been identified under the IDEA. Shortly after enrollment in the District, Student engaged in behavior that led to a disciplinary suspension, and a manifestation determination review meeting convened. The District subsequently completed an evaluation of Student in approximately mid-February 2023.

The Parent did not agree with the manifestation determination, and the District responded by filing a Due Process Complaint under the IDEA seeking to have that conclusion affirmed. The matter proceed to a very efficient expedited hearing.<sup>3</sup>

Following review of the record and for all of the reasons set forth below, the manifestation determination must be affirmed.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, 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). Detailed description of the behavior at issue is unnecessary for this decision but is well-documented in the record as cited below, and is clearly understood by the parties, counsel, and this hearing officer.

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Joint Exhibits (J-) followed by the exhibit number.

## **ISSUE**

Whether the District's manifestation determination is appropriate under the IDEA?

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student residing within the District and has been identified as eligible for special education under the IDEA based on Other Health Impairment (due to Attention-Deficit/Hyperactivity Disorder) and Specific Learning Disability. (N.T. 13; S-1; S-2.)
2. An evaluation of Student by another other state in September 2022 summarized records including prior evaluations. Historically, Student has presented as exhibiting difficulty with focusing and maintaining attention as well as impulsive behavior. (S-2.)
3. Student reportedly had five discipline referrals in the fall of 2022 in the other state. Those related to mild disruptive behaviors (talking to peers) and sleeping in class. Incidents from prior school years were similar, but also included one instance each of verbal aggression toward and physical contact with peers. (S-2 at 12-13.)
4. Teacher input into the September 2022 evaluation reflected lack of motivation, distractibility, and off-task behavior including sleeping in class, but generally not disruptive behavior. Student also exhibited difficulty with task completion. (S-2 at 14, 21-22.)
5. A Functional Behavior Assessment (FBA) conducted in the fall of 2022 in the other state identified off-task behaviors and distractibility as interfering with instruction, with some impulsivity. The resulting behavior plan provided for redirection, setting reasonable expectations, and conflict resolution skill practice. (S-1 at 26-30.)

6. An Individualized Education Program (IEP) in the other state also developed in September 2022 identified needs in the areas of mathematics problem-solving and task initiation/completion. This IEP contained a goal for each of those weaknesses. A number of accommodations across class settings were also identified including checks for understanding; frequent feedback; test and assignment accommodations; support for written expression; and a positive behavior support plan providing for frequent breaks, positive reinforcement, clearly defined limits, and redirection/reminders. (S-1 at 2, 10-12.)
7. Student moved to Pennsylvania in the fall of 2022 and enrolled in a different school district. The other school district issued a Permission to Evaluate form before Student moved into the District. (N.T. 21-23.)
8. Student enrolled in the District and began attending school there in early January 2023. The District elected to continue with the evaluation begun by the other school district. (N.T. 23.)
9. Ten school days after Student began attending school in the District, a number of students reported that Student engaged in certain behavior several times throughout the day. No reports about Student had been made to the District prior to that date. (N.T. 21, 23, 26, 81, 88-89; S-3.)
10. The Parent was contacted by the District on the day that the behaviors were reported, and the Parent immediately went to the school building and cooperated with District inquiries. The Parent was advised by an outside agency to take Student for a specific type of medical evaluation at a nearby hospital. (N.T. 93-94, 96-97; S-3.)

11. On the same date that the behavior occurred, Student reported feelings of social anxiety and depression to the District school psychologist. Student also noted distractibility. (J-1 at 7.)
12. The District conducted a thorough investigation following the reports of the behavior that included information from the school district in the other state. One incident from the 2021-22 school year appeared to be somewhat similar to the behavior in question and was described as attention-seeking. (S-3.)
13. The Parent took Student to the nearby hospital that same day, and Student was discharged without treatment but with instructions to follow up with the personal physician. Student was approved for return to school. (N.T. 97-98; J-2.)
14. The Parent provided the District with the hospital discharge report the following day, and Student was later seen by the personal physician. (N.T. 99, 101-03, 105; J-2; S-6.)
15. The District's investigation uncovered research that Student had conducted several days before the incident that related to the reported behavior. Student initially denied performing that research but later admitted to doing so. (N.T. 31-33; S-3 at 2; S-8.)
16. The Parent shared information during the investigation that Student had in the past conducted other similar research. (N.T. 38; S-3 at 2.)
17. The District suspended Student for ten days for the behavior and proposed a longer period of removal. (N.T. 58, 106-08; S-4; S-5.)
18. A manifestation determination review meeting convened approximately one week after the reported behavior. Student, the Parent, Student's regular education teacher, and several administrators attended the meeting. (N.T. 38, 40.)

19. The manifestation determination review worksheet completed at the meeting summarizes an FBA on an unknown date that targeted (a) disruptive and distractive behavior to gain attention, and (b) negative self-talk to gain social acceptance. (S-4 at 3.)
20. The manifestation determination team reviewed the conduct in question; the District's investigation; Student's disability; teacher input; Student's behavioral profile; and information provided by the Parent that included family and personal stressors. (S-4.)
21. The District members of the team concluded at the meeting that Student's behavior was not caused by, and did not have a direct relationship with, Student's disability, in large part because the conduct in question was preceded by related research several days prior. The team also concluded that the conduct was not a direct result of a failure to implement Student's IEP because all of the accommodations in the IEP were being provided. The Parent and Student did not agree with that conclusion. (N.T. 51-52, 55; S-4.)
22. The District developed a new IEP for Student in February 2023. Input into that IEP from previous and current teachers indicated that Student does engage in behaviors that are attention-seeking. The IEP provided for special education to address academic weaknesses as well as organizational and self-advocacy skills, with a number of program modifications similar to the accommodations in the prior state's IEP and other supports addressing the needs identified by the District. (J-1.)
23. Student was not permitted by the District to return to school following the period of suspension. (N.T. 106-08.)

## **DISCUSSION AND APPLICATION OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. 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 must rest with the District since it filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of 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 both of the witnesses who testified to be credible and supported by the documentary evidence. The findings of fact were made as necessary to resolve the issues and, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered.

### **IDEA Discipline Principles**

The Due Process Complaint relates solely to the District's manifestation determination, for which an expedited due process hearing is afforded. 20

U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c).<sup>4</sup> The IDEA provides important protections to eligible students when discipline is imposed.

A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a “change of placement.” 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A “change of placement” based on disciplinary consequences is met by a removal for more than ten consecutive school days. 34 C.F.R. § 300.536(a). “Any unique circumstances” of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

Once a decision is made to change the placement of a child with a disability for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct “was caused by, or had a direct and substantial relationship to, the child’s disability; or ... was the direct result of” the LEA’s failure to implement the child’s IEP. 20 U.S.C. § 1415(k)(E)(i); *see also* 34 C.F.R. § 300.530(e). The manifestation determination must be made within ten school days of any decision to change the eligible child’s placement, and must be made by “the

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<sup>4</sup> The regulations implementing the IDEA permit a parent to file a complaint challenging a manifestation determination. 34 C.F.R. § 300.532(a). Here, to its credit, the District filed the complaint in light of the Parent’s disagreement, and this hearing officer considers that filing to be on the behalf of the Parent. In any event, the outcome is not dependent on the burden of persuasion here.



LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA)." 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and the LEA must either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f).

If the team determines that the behavior was not a manifestation of the child's disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability remains entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.530(c) and (d). More specifically, the child shall continue to be provided educational services enabling him or her to participate in the general education curriculum, and to make progress toward meeting the IEP goals; and, where appropriate, have an FBA conducted and implementation of behavior interventions. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d). The student's IEP team determines the services to be provided during the period of removal as well as the setting. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530(d)(5).

### **The Manifestation Determination Review**

The manifestation determination team reviewed a variety of factors: the conduct in question; the District's investigation; Student's disabilities and how they are manifested; teacher and parent input; and Student's behavioral profile. The team first considered the nature of the behavior and its relationship to Student's disability, concluding that the conduct was not related to or caused by manifestations of Student's disability. The team found significant that Student had conducted research related to the behavior several days before. The conclusion on this prong is further

supported by the fact that Student reportedly engaged in the behavior several times over the course of a single school day, and was not a single isolated occurrence. Second, the team further found no failure to implement the then-current IEP. The record as a whole preponderantly supports both prongs of the manifestation determination. See *J.H. v. Rose Tree Media School District*, 2018 U.S. Dist. LEXIS 157803 (E.D. Pa. 2018) (upholding manifestation determination that conduct was not related to the student's disability when the team considered all available relevant information, including the student's disability-related manifestations, and agreeing there was no causal relationship); *Fitzgerald v. Fairfax County School Board*, 556 F.Supp.2d 543 (E.D. Va. 2008) (same).

The Parent pointed out that the reports on the day in question did not indicate the behavior of peers, so Student's behaviors were not placed into context. While that is true, the issue here is whether or not Student's behavior was caused by or had a direct relationship to Student's disability, and does not turn on what peers may have been doing at the time. The Parent also focused on the fact that Student at times engages in attention-seeking behavior. Even assuming that the behavior in question was attention-seeking, there is nothing in the record to suggest a link between the unique manifestations of Student's disabilities and the conduct at issue. Thus, the evidence supports the District's position.

Nonetheless, there are two significant aspects of this case that merit special consideration. First, as noted above, Student is entitled to continuation of special education services during any period of removal that amounts to a change in placement. Student must continue to participate in the general education curriculum and make progress toward IEP goals. It was not clear at the hearing the extent to which Student has been provided with such services. If the District has not already convened an IEP team

meeting to discuss Student's required services during the removal as well as the setting, it must do so promptly.

Second, it is extremely concerning to this hearing officer that the incident at issue occurred so close in time to Student's enrollment in the District, when Student was still getting acclimated to the school setting including peers and teaching staff. This is especially troubling in light of recent historical information shared by the Parent (S-4 at 2, final two sentences of the second paragraph under Considerations for Review) and newly acquired input into the February 2023 IEP with more insight into Student's behaviors in general. While the District's immediate response to the behavior in question was not inappropriate, its recent evaluation of Student was not made part of this record. The two significant factors in this paragraph strongly suggest that Student may need further evaluation as well as additional school-based supports such as social skills instruction and counseling.

## **CONCLUSION OF LAW**

The decision of the manifestation determination team was appropriate under the applicable law.

## **ORDER**

AND NOW, this 16<sup>th</sup> day of March, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's request to have the manifestation determination be affirmed is GRANTED. The District is not ordered to take any action.

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

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 27598-22-23