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

DECISION

Child's Name: R.C.

Date of Birth: [redacted]

ODR No. 13124-12-13-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Pro Se
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Judith Baskin, Esquire Office of General Counsel School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130
Dates of Hearing:	November 1, 2012; November 7, 2012
Record Closed:	November 7, 2012
Date of Decision:	November 13, 2012
Hearing Officer:	William F. Culleton, Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is an eligible student enrolled in the District named in the title page of this decision (District). (NT 10.) Student is placed in an alternative disciplinary setting. Parent appeals the District's manifestation determination concerning Student's violation of the District's Student Code of Conduct, and its decision to place Student in an alternate school for disciplinary reasons, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The District asserts that the Student's behavior was not a manifestation of Student's identified disability, and that its plan to transfer Student to the alternate setting is appropriate.

The hearing was concluded in two sessions on an expedited basis, and the record closed at the second session. I conclude that the District's manifestation determination and placement decision were appropriate under the IDEA.

ISSUES

1. Was the District's manifestation determination appropriate?

2. Was the District's decision to transfer Student to an alternative school for disciplinary reasons appropriate?

FINDINGS OF FACT

1. Student is classified under the IDEA as a child with Specific Learning Disability, and with Other Health Impairment due to diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). (NT 10-11; S-30.)

2. On September 11, 2012, Student was caught bringing [a quantity[1] of a] controlled dangerous substance into the neighborhood school in violation of the District's Student Code of Conduct. (NT 73-75; S-3.)

3. Student declined to make a statement when requested to do so, and when asked why Student had [the quantity of a controlled substance], replied, [redacted]. Student also indicated a belief that there would not be any serious consequences for Student's behavior. (S-5.)

4. Student was not visibly upset, angry or anxious immediately after being detected with drugs and detained. (NT 46, 70-71, 79-80, 93, 119-122; S-5 p. 2, 10.)

5. The Student's behavior at school did not display substantial problems with impulsive behavior in classes. Student did have problems with lateness and absenteeism. (NT 51-57, 94-100.)

6. On September 11, 2012, the school's Dean of Students signed the EH-20 "Pink Slip", charging Student with possession of drugs with intent to distribute, a violation of the student code of conduct, and indicating disciplinary suspension for three days. (S-6.)

7. On September 11, 2012, the District sent Parent a Notice of Suspension. The Notice invited Parent to a meeting for reinstatement of Student to school after suspension. (S-1.)

8. On September 11, 2012, the District issued a Notice of Recommended Placement (NOREP), inviting Parent to a meeting on September 19, 2012, to determine whether or not the Student's behavior in violation of the code of student conduct was a manifestation of Student's disability. Procedural safeguards were enclosed, along with information for obtaining advice and legal assistance. Parent was aware that a due process remedy was available. (NT 40-42, 85-86, 149-150; S-7, 10.)

9. Parent was familiar with the procedure for manifestation determination because Parent had participated in previous manifestation meetings due to prior violations of the student code of conduct by Student. (NT 36-39.)

10. On September 18, 2012, District personnel, including a school psychologist, conducted a Functional Behavior Assessment (FBA) prior to the manifestation meeting. District personnel concluded that the Student's previous behavioral problems had improved, so that the only behavior of concern was ongoing attendance problems. The assessment concluded that the Student's behavior was not related to Student's identified disabilities or to Student's educational skill deficits. (NT 96-97, 101-112, 126, 136-138; S-8.)

11. The psychologist did not attend the manifestation meeting, but the FBA was made available to the participants. (NT 92, 122, 144-145.)

[1] The testimony differed as to [redacted]. (NT 133-134.)

12. At the meeting on September 19, 2012, District personnel included a regular education teacher, a special education teacher and the school principal. These staff discussed with Parent whether or not the Student's behavior was a manifestation of Student's disability, giving Parent an opportunity to provide information indicating some relationship between the Student's behavior and the Student's identified disabilities. (NT 44, 50-51, 122-127, 146, 153-155; S-7, 10.)

13. All District personnel concluded that Student's behavior was not a manifestation of Student's disability; Parent dissented from that determination. The determination was reported through a Discipline Case Report along with a recommendation to place Student in an alternative discipline setting. (NT 75-79, 147-148; S-2, 10, 11, 12.)

14. The District offered to continue providing special education services, including a supplemental learning support placement, to Student while at the remedial school. (NT 11; S-2, 16, 17, 18, 20.)

15. On September 19, 2012, the District offered Student a Positive Behavior Support Plan that addressed lateness, class cutting and truancy behaviors. The plan included as a replacement behavior weekly counseling sessions to discuss drug abuse and decision making skills. (S-9.)

16. On October 10, 2012, the District conducted a disciplinary hearing and the administrative hearing officer ordered the Student transferred to an alternate disciplinary school. (S-14, 15.)

17. The neighborhood high school personnel revised Student's IEP to address Student's current needs at the alternative disciplinary school. (NT 151-152.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[2] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests

[2] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent should fail to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under the IDEA.

MANIFESTATION DETERMINATION

The District argues that the validity of the manifestation determination in this matter is irrelevant, because the District would have been entitled to remove Student to an alternative disciplinary setting under the special circumstances rule of the IDEA. This rule allows removal to "an interim alternative educational setting" for "not more than" 45 days, regardless of whether or not the conduct was a manifestation of the child's disability, when a child violates the student code of conduct by knowingly possessing or selling a controlled substance at school. 34 C.F.R. §300. 530(g)(2).

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

I conclude that the validity of the manifestation determination is relevant, because the District is limited to removal for forty five days if the behavior is a manifestation of the child's disability. Parent specifically testified that the District would not commit to returning Student from the disciplinary school within forty five days, and that this was a major concern of Parent. (NT 61-62.)

The IDEA requires a local education agency such as the District to conduct a manifestation determination procedure if it seeks to change the placement of an eligible child for disciplinary reasons. 34 C.F.R. §300.530(c). The manifestation determination is made by the agency, 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)(1). These individuals are required to review all available information, including parental input. 34 C.F.R. §300.530(e)(1). The individuals must determine whether or not the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability … ." 34 C.F.R. §300.530(e)(i).

I conclude that the District met these procedural requirements. District personnel and Parent met to discuss and consider the manifestation issue prior to the decision to transfer Student to an alternative setting. (FF 6-9, 12.) District personnel determined that the behavior was not a manifestation, based upon sound reasons supported in the record, with Parent dissenting. (FF 12, 13.) Then the matter was referred to the ordinary disciplinary process of the District, where the formal decision to transfer was made.[4]

The role of the school psychologist gave me pause, but I conclude that it did not contravene the IDEA. The psychologist reviewed all available documentation and conducted an FBA before the manifestation meeting; however, the psychologist did not attend the meeting.

[4] Given that the decision of District personnel was contingent upon the disciplinary hearing that transpired subsequent to the manifestation meeting, I conclude that the meeting was timely within the intent and meaning of the IDEA.

(FF 10. 11.) If the Parent had requested that the psychologist attend, at least arguably the psychologist's absence may have been a violation of the procedures for manifestation determinations; likewise, if the personnel who did attend the meeting had felt themselves bound by the psychologist's conclusions, Parent might have made out a case of predetermination of the manifestation issue. However, I conclude that the Parent failed to prove either of these circumstances by a preponderance of the evidence.

While the persons to attend the meeting must be selected by the District and Parent, 34 C.F.R. §300.530(e), the IDEA does not require the school psychologist to be present at the meeting. I find no credible evidence of record that Parent requested the psychologist's presence. Therefore, there is no basis for finding a procedural violation due to the psychologist's absence from the meeting.

None of the District personnel who attended the meeting testified that they felt themselves bound by the psychologist's opinion that the behavior was not a manifestation of Student's disability. Parent generally asserted that it seemed as if the manifestation issue was a foregone conclusion, but I cannot give determinative weight to such a perception by the Parent, sincerely interested as Parent was in the Student's wellbeing, which may have been subject to the vagaries of an advocate's mind set and memory. Moreover, the Parent's general perception, even if credited, would not prove specifically that the participants' opinions were improperly influenced by the absent psychologist. Thus, the record does not support by a preponderance any finding that the District violated the IDEA due to the psychologist's forwarding of the FBA and subsequent absence from the meeting.

There was some evidence that vaguely suggested that one of the attendees may have predetermined the outcome before the meeting. The high school principal's testimony suggested

that the principal may have considered District policy for removal of students in possession of drugs to be binding on the principal. As noted above, the Parent perceived that the District personnel had already made up their minds. However, two of the District personnel who attended the meeting testified credibly that they gave Parent every opportunity to bring facts to their attention that would suggest that the behavior was a manifestation of disability, and that they were open minded to the possibility of finding a manifestation based upon information that the Parent brought to their attention. (FF 12.) Weighing these somewhat contradictory pieces of evidence, I conclude that the Parent did not prove by a preponderance of the evidence that the manifestation determination was pre-determined.

I was also concerned that there was no evidence to indicate that the meeting attendees had reviewed all available records of the Student as part of the manifestation meeting. However, Parent did not raise this as an issue and the participants did evidence familiarity with the available documentation. (NT 73, 77, 124, 126, 131, 143, 148-149, 153.) Weighing the very scant evidence available on this point, I cannot conclude by a preponderance of the evidence that the meeting participants failed to review the available documentation.

Parent asserts that the District's consulting psychologist related to Parent that Student was "irate" at or near the time of apprehension. Parent asserts that being irate is a symptom or associated emotion with ADHD. However, this hearsay statement was not corroborated by the contemporaneous records of interviews with Student; rather, student repeatedly was described as calm and cooperative. (FF 3, 4.) Weighing this conflicting evidence, I give less weight to the hearsay because it is by its nature less reliable than documents written at the time of the events in question. Parent may have misunderstood what was said to Parent. The psychologist, who did not witness the events at the time of apprehension, could not have characterized Student's

behavior from personal knowledge. The psychologist, in testimony, did not corroborate parent's account. On balance, I conclude that parent did not provide preponderant evidence that Student was irate at any time during or after apprehension for possession of [the contraband].

Parent suggested that the Student's ADHD and the effects of [the drug] use combined to make Student impulsively bring the drug to school. (FF 1.) Parent pointed to previous incidents in which Student was aggressive toward staff or other students. I cannot draw the same conclusion, for two reasons. First, there is no evidence in the record that the Student's previous behavior was related to bringing drugs to school; these are two different types of behavior and there is no link between the two. Second, the District pointed out that in the previous incidents, Student's behavior had been found not to be a manifestation of Student's disability. (NT 38-40, 71-72.) So, the previous behavior cannot raise an inference that the disability was causing or related to the bringing of drugs to school. Thus, the evidence shows that previous behavior by Student is not evidence that Student's bringing [the drug] to school was a manifestation of Student's ADHD.

Parent argued that the Student's actions demonstrated poor judgment and that poor judgment is a symptom of ADHD. While ADHD may affect judgment, not every poor judgment is a symptom of ADHD. Parent's argument cannot be accepted, because every violation of the code of student conduct is a poor judgment. If Parent were right, every violation would be a manifestation of disability for any child with ADHD. I do not believe that the ADHD definition of "manifestation" was ever intended to absolve all students with ADHD of responsibility for their violations of the student code of conduct. The IDEA requires a "direct and substantial relationship to, the child's disability … ." 34 C.F.R. §300.530(e)(i). This clearly does not mean that every bad judgment is automatically a manifestation of ADHD.

Parent argued that the Student's behavior was a continuing problem and that the District prematurely removed goals from the IEP designed to address behaviors other than attendance problems. Parent suggests that the District thus failed to implement the IEP appropriately, triggering the application of 34 C.F.R. §300.530(e)(2) (behavior is to be found a manifestation of disability if due to failure to implement the IEP). District officials, corroborated by the documents of record, testified credibly to the contrary – that the only behavior impeding learning (at the time of the creation of the IEP prior to the Student's possession of [drugs] with intent to distribute) was poor attendance – the behavior addressed in the IEP. (FF 5.) I give more weight to the District's witnesses, who dealt collectively with Student in school daily, than to Parent's statement as to Student's behavior in school. The District witnesses are more likely than Parent to know what is happening in school. Therefore, Parent has failed to prove by a preponderance of the evidence that the District failed to implement the Student's IEP properly, and this is not an appropriate reason to invalidate the manifestation determination.

PLACEMENT

Parent asserted that the alternative placement ordered by the District was inappropriate because Student would be with other students whose behaviors were worse than Student's and Student would learn from imitating those students. (FF 16, 17.) However, while this is a legitimate concern and Parent will no doubt be vigilant for signs of it happening, there was no evidence that this would happen. Parent expressed a fear of it happening but did not show that it would happen. Thus, I find that there is no preponderant evidence that this harm will befall Student due to the alternative placement.

Parent's primary concern was that there was no time limit on Student's stay in the alternative placement. However, the IDEA does not mandate a time limit where the placement is due to a disciplinary decision for behavior found not to be a manifestation of a student's disability. Thus, the length of time of the alternative school transfer is not something that violates the IDEA.

Similarly, Parent felt that Student would regress if taken out of the neighborhood high school. Yet Parent did not provide any evidence that that would be likely. While Parent's concerns are to be honored, fear alone cannot provide preponderant evidence that a student is likely to do poorly in a new setting.

CONCLUSION

I conclude that the District's manifestation determination and change of Student's placement were appropriate. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's manifestation determination was appropriate.
2. The change in placement to an alternative disciplinary setting was appropriate.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

November 12, 2012