

*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

ODR No. 16099-1415KE

Child's Name: Z.B.

Date of Birth: [redacted]

Dates of Hearing: 5/4/15

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

Representative:

Parent Attorney  
Charles Weiner Esq.  
Cambria Corporate Center  
501 Cambria Avenue  
Bensalem, PA 19020

School District  
Bristol Township  
6401 Mill Creek Road  
Levittown, PA 19057

School District Attorney  
Suzanne Pontious Esq.  
Seven Neshaminy Interplex  
Suite 200  
Trevose, PA 19053

Date Record Closed:

May 11, 2015

Date of Decision:

May 18, 2015

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

This case arose from a disciplinary incident at the District high school late in the school day on March 17, 2015. Student, who is IDEA eligible and has an IEP, was admittedly engaged in roughhousing with two friends in the hallway between classes and did not obey a teacher's directive to stop the mock fighting conduct. Student's physical reaction to the teacher's restraining or admonishing touch resulted in an immediate suspension from school and consideration of additional discipline, including expulsion.

After a manifestation determination review by Student's IEP team, and the team's conclusion that the conduct in question was not a manifestation of Student's disability, the Special Education Director referred Student to the School Board for an expulsion hearing, which has not been held pending the outcome of this case. Student returned to the educational placement designated in Student's then current IEP and NOREP soon after the manifestation determination review, and has remained there without further incident.

Parents challenged the manifestation determination via a due process complaint, followed by a hearing on May 4, 2015. Because the evidentiary record disclosed significant flaws in the manifestation determination process that strongly suggests the outcome was predetermined, or at least that the District's procedures were insufficiently thorough, the District's conclusion must be overturned. There are, however, facts relating to the incident and to Student's condition that were not and could not be fully explored via the due process hearing, and, therefore, there is insufficient evidence to conclude that the District's manifestation determination was definitely incorrect. Accordingly, the District is directed to repeat the manifestation determination review before determining whether Student is subject to a disciplinary change of placement to the same extent as a non-disabled District student.

## **ISSUES**

1. Did the School District's manifestation determination review properly conclude that Student's conduct during the incident in question was not a manifestation of Student's disability, in that:
  - a. The School District appropriately considered all relevant facts concerning the incident;
  - b. There were no procedural defects in the manifestation determination review process that interfered with the IEP team's ability to reach a proper and accurate decision, including
    - 1) The timing of the manifestation determination review;
    - 2) Predetermination of the outcome before the manifestation determination review occurred;
  - c. There was no defect in implementation of Student's IEP that had any bearing on Student's conduct during the incident or on the outcome of the manifestation determination review?
2. Is the School District permitted to proceed with a hearing before the School Board to consider additional discipline, including possible expulsion of Student?
3. Is the School District required to provide compensatory education to Student due to suspension from school in excess of the amount of time permitted before the exclusion from school is considered a disciplinary change of placement for an IDEA eligible student?
4. If compensatory education is due, in what amount and for what period should the District be required to provide it?

## **FINDINGS OF FACT**

1. Student, a [late teenaged] child, born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 12)
2. Student has been identified as IDEA eligible in the disability category of Other Health Impairment (OHI) in accordance with Federal and State Standards, based upon a diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD). 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 13)
3. Student's latest reevaluation report, dated March 18, 2013 (9<sup>th</sup> grade), noted that Student had received "several discipline referrals, resulting in suspensions (physical aggression, disregard for school rules and misconduct.)" Parent noted that Student has severe ADHD, was participating in a medical treatment plan consisting of medication and

therapy, and needed “to learn to take criticism and to obey authority figures respectfully.” J-3 pp. 1, 3)<sup>1</sup>

4. Teacher input for the reevaluation report was varied, with all teachers noting distractibility, off task behaviors and lack of engagement in the learning process, but good interpersonal skills and peer relationships. (J-3 p. 2)
5. The IEP in effect for Student throughout March 2015 was dated February 20, 2014. Teacher input for present levels of functional performance noted generally good behavior, good peer relationships and respect toward teachers. Although all teachers noted distractibility and focus difficulties, two teachers described Student’s class participation and work habits as good, two teachers described those characteristics as fair and one teacher noted poor class participation. (J-4 p. 4)
6. The March 2014 IEP included annual goals in math (computation, estimation, problem solving and communication), transition (finding jobs, careers of interest), reading, writing, speaking and listening (learning to read independently with fluency and comprehension.) J-4 pp. 8—11)
7. Specially designed instruction consisted of co-taught science, social studies and math classes; modified self-contained English class; instruction in Read 180; extra time for assignments/tests upon request; high interest, low readability materials; use of a calculator to verify math answers; questions to assure understanding. (J-4 p. 12)
8. Student’s placement was supplemental learning support, although the Penn Data indicates that Student was in the regular classroom for 99% of the school day. The February 2014 IEP included no related services and no behavior plan. (N.T. p. 173; J-4 pp. 14, 16)
9. Student’s teachers for the current school year have reported generally good classroom behaviors, respectful treatment of teachers, and overall compliance with academic demands after the first marking period. Student’s most common disability-related classroom behaviors are inattentiveness and lack of focus (N.T. pp. 166, 168, 201—204, 374, 375; J-19 p. 5)
10. On March 17, 2015 Student was engaging in roughhousing in a hallway of the high school between the 7<sup>th</sup> and 8<sup>th</sup> period classes (approximately 1:15—1:30 p.m.) while walking to the next class with Student’s dating partner and another peer friend.<sup>2</sup> Student

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<sup>1</sup> Commendably, the parties agreed to submit primarily joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter “J” followed by the exhibit number.

<sup>2</sup> In keeping with standard hearing officer procedures for maintaining the confidentiality of students involved in due process hearings, which extends to non-disclosure of any personally identifiable information, including gender, the term “dating partner” substitutes for the more common--and far less clumsy—designation “boyfriend” or “girlfriend” in order to accurately describe his/her relationship to Student. To simplify subsequent reference to that person, the “dating partner” will be referred to as Student’s “Friend” throughout the remainder of this decision. The other peer friend initially involved in the incident will hereafter be referred to as “Peer.”

suggested to Peer that they pretend to fight with Student's Friend, and then pushed or pulled the Friend against a locker and pretended to hit him/her. (N.T. pp. 49, 50, 86, 87; J-6, J-13, J-14)

11. A male teacher who did not know any of the participants directed them to stop, and told Student to release the Friend. Although the Peer left, Student did not immediately stop the mock fighting, but after the second directive from the teacher to stop, began walking the Friend to the next class, with Student's arm around the Friend's upper arms/shoulders as they walked. The teacher described Student's physical contact with Student's Friend during the incident as a "headlock," and "squeezing" the Friend's neck between Student's forearm and elbow. The teacher again directed Student to let go of the Friend, but Student did not comply, telling the teacher that they were dating. (N.T. pp. 50, 66, 81, 87, 103, 287, 289, 290; J-6, J-7 p. 1, J-12, J-13, J-14)
12. The teacher then placed his right hand on Student's arm. Student verbally objected and physically reacted to the teacher's touch. Student's Friend described Student's action as pushing the teacher's hand away. Student described it as pulling Student's arm down and to the right to get free. The teacher reported that he was not in physical contact with Student, but his arm was extended when Student twisted it. A female teacher ran up and stepped between Student and the male teacher. Student's Friend pulled Student away to continue walking to class and told Student to calm down. Student walked the Friend to class and then continued to Student's own class before a security guard arrived to take Student to the office. (N.T. pp. 50, 52, 53, 54, 56, 66, 67, 82, 87, 88, 104, 105, 112, 287, 288, 292, 293, 296; J-6, J-13, J-14, J-15)
13. Although Student denied being angry about the incident, Student's Friend described Student as "angry upset" as he/she was attempting to pull Student toward the next class. (N.T. pp. 52, 53, 115)
14. In describing the incident in a discipline referral form after the incident, the male teacher wrote that Student twisted his arm and stated "Let's go! Right now!" The teacher interpreted the words as an indication that Student wanted to fight. The written description concluded with the statement that "several" teachers arrived to move Student and others to class. The written statement did not describe a threatening stance by Student. In testimony at the hearing, the teacher described Student as backing up and squaring Student's shoulders while saying "right here, right now." Student described the aftermath of the incident as the two of them (Student and teacher) standing and looking at each other. (N.T. pp. 69, 288, 295; J-7 p. 1)
15. Surveillance cameras in the high school hallways did not capture the incident, but did show two views of the male teacher after the incident approaching and then waiting outside of Student's classroom before Student arrived at the classroom. The teacher spoke with three men and two women before a security guard arrived to escort Student out of the classroom and down the hallway. The teacher also spoke to the man who accompanied the security guard. (J-28, B Hall Woodshop to B-24; B Hall Woodshop to Gym)

16. During the conversation between the teacher and the two women before the security guard arrived, one of the women and the teacher engaged in actions that appeared to reenact, with gestures but no actual contact, Student's physical interaction with the male teacher. The teacher initially showed the women a push upward and to the right. One of the women initially repeated that motion, then engaged in a more forceful motion that appeared to be a twisting push, down and toward the left. Several seconds later, the teacher engaged in an apparent demonstration of the incident with the man who accompanied the security guard to Student's classroom. The teacher's movement was similar to the forceful twisting motion the woman had previously demonstrated at least twice. (J-28, B Hall Woodshop to B-24; B Hall Woodshop to Gym)
17. Student's Friend observed teachers talking about and reenacting the incident from the Friend's eighth period classroom. (N.T. p. 92)
18. The teacher stated that he took the day after the incident off and visited his family doctor for a shoulder sprain. Written medical records also include the report of a visit to the occupational health doctor on March 26 two days after the incident, for treatment of a shoulder sprain and a prescription for physical therapy. The teacher testified that Student "torqued" his outstretched arm, placing all the pressure on his shoulder, that he felt pain in his shoulder during the night that interfered with his sleep, and had "never experienced anything like that before." (N.T. pp. 293; J-18)
19. The teacher stated that he had to have six weeks of physical therapy, two to three times/week, to recover fully from the incident. The 3/26 occupational health doctor visit report and physical therapy prescription provided for three PT sessions/week for two weeks, with a follow-up visit two weeks later. (N.T. pp. 298, 299; J-18)
20. On the District videos, a few minutes after the incident, the teacher was freely moving his right arm in several directions and swinging it as he walked toward Student's classroom and then followed Student and the security guard. The teacher also acknowledged arm wrestling another student approximately two weeks after the incident. (N.T. p. 307; J-28, B Hall Woodshop to B-24; B Hall Woodshop to Gym)
21. The teacher involved in the incident stated that he did not ask Student's name during the incident, but the teacher who confirmed the other teacher's account of the arm twisting wrote that the teachers had to find someone who knew Student "because Student would not tell us [his/her] name." (N.T. pp. 293, 294; J-15)
22. After the security guard and an assistant high school principal removed Student from class, Student was escorted to the office of another high school assistant principal, who was assigned to investigate the incident and determine an appropriate consequence. (N.T. p. 319)
23. The assistant principal directed Student to write an account of the incident, after which he asked some questions and made additional notations on the statement. At that point, he determined that a one day automatic suspension was required for refusing to follow an adult directive. Another staff member then entered the office and told the assistant principal that a teacher had been assaulted. (N.T. pp. 320—322, 327—329; J-6)

24. The assistant principal did not speak to the teacher involved in the incident at that time. Since it was the end of the school day, Student was sent home at the regular dismissal time. (N.T. pp. 328)
25. The next day, the assistant principal asked any staff member who witnessed the incident to submit a written statement. In response, the female teacher who stepped between the male teacher and Student wrote that the male teacher was asking Student to get to class and gently tapped Student's hand or arm. She described Student as "all of the sudden" grabbing the teacher's arm and twisting it, followed by a stance suggesting that Student wanted to fight the teacher. (N.T. pp. 329, 330, 331; J-11, J-15)
26. Another teacher reported seeing Student in the hallway with Student's arms around the Friend and the Friend's back to Student while the male teacher was standing behind and speaking to Student. She did not hear the words or witness anything else. (J-12)
27. The assistant principal also received and reviewed the discipline report summary prepared by the teacher involved in the incident, submitted in lieu of a written statement from the teacher. (N.T. p. 330; J-7 p. 1)
28. After reviewing the incident report and the report of the teacher who also stated that Student had twisted the male teacher's arm, the assistant principal did not believe that much further investigation was needed, since he had the statements of two adults who observed the incident. He generally does not base conclusions upon evidence from students, which he considers less credible than adult statements. Nevertheless, on March 19, the assistant principal also took a written statement from Student's Friend. (N.T. pp. 331, 333—335; J-13)
29. The assistant principal stated that he asked the Friend whether Student "put [his/her] hands" on the teacher and whether Student faced the teacher "as if to box him," and that the Friend answered yes to both questions. The assistant principal added that information to the Friend's statement in his handwriting. Student's Friend denied answering those questions, denied that Student squared off on the teacher and that the Friend told the assistant principal Student had done so. (N.T. pp. 91, 98, 335, 336, 338; J-13)
30. Based upon the two written teacher statements, which the assistant principal concluded made sense because the statements came in at different times but were similar in their description of the incident, he concluded that Student should be suspended from school due to simple assault and not permitted to return until a hearing was held. (N.T. p. 332; J-8)
31. Parents received the suspension notice, dated March 17, 2015, the following Saturday. In response to an inquiry to the school on March 19, Parents were told that Student could not return to school until a hearing was held. (N.T. pp. 379, 380; J-8)
32. On March 18, the high school administration notified the District Director of Special Education that an informal hearing, or superintendent's hearing, needed to be scheduled for Student due to a significant behavior incident. (N.T. p. 118)

33. The purpose of an informal hearing is “To protect the parents’ and student’s right to due process.” During the informal hearing, the administrator conducting the hearing, who is either the special education director or a special education supervisor for an IDEA eligible student, reviews the record of the student in question, along with the behavior, to determine whether there was a breach of school policy that requires action in addition to the initial discipline imposed for the conduct. Parents and student also have an opportunity to ask questions. (N.T. pp. 118—120, )
34. If the administrator decides that further action should be taken, there is a referral to the School Board for a hearing, which could result in expulsion, a period of suspension, or other disciplinary consequence determined by the School Board. (N.T. pp. 131—133)
35. When relevant, depending upon the nature of the incident, a manifestation determination review may be conducted along with the informal hearing. The informal hearing is the means for determining the facts relating to the behavioral violation, since it is necessary to determine whether an infraction occurred and to identify the behavior in question in order to determine whether it is disability-related. (N.T. pp. 120, 154 )
36. The District sent a letter to Parents dated March 18, 2015, but not mailed until March 23, stating that an informal hearing was scheduled for March 25, and that if a manifestation determination was necessary, it would be conducted at the informal hearing. Prior to receiving the letter, Parents had been informed by a telephone call on or about March 23 of the date and time of the informal meeting, but were not told of the possibility of a simultaneous manifestation determination. (N.T. pp. 381,383; J-9)
37. When Parents arrived for the hearing on March 25, the special education director informed them that the hearing would include a manifestation determination review and gave Parents a copy of the March 18 letter. Parents stated that they had insufficient notice of the manifestation determination and did not want to proceed with it at that time. (N.T. pp. 120, 382)
38. The special education director postponed both the manifestation determination and the informal hearing, re-scheduling the manifestation determination to March 31, to assure that it would occur within 10 school days of the date Student had been suspended. The informal hearing was rescheduled to April 8. (N.T. pp. 121—123, 143, 384; J-24)
39. Parents, Student, a school psychologist, two teachers and the special education supervisor assigned to conduct the review met for the manifestation determination on March 31. Although the supervisor noted that it was scheduled after the informal hearing, it actually occurred prior to the informal hearing. An IEP meeting for Student was held on the same day, prior to the manifestation determination review. (N.T. pp. 224, 225, 389; J-19, J-21)
40. To prepare for a manifestation determination review, the special education supervisor reviews the student’s computerized records file (iCampus), which includes, attendance, discipline reports, and other relevant information to gather as much preliminary information as possible in order get a picture “of the child as a whole.” Although all disciplinary records are “slightly” reviewed, she focuses on the current school year and



possibly the prior school year, since the discipline records can be extensive, particularly for high school students. (N.T. pp. 226—228)

41. Although the manifestation determination worksheet completed for Student includes a section that provides for a description of the behavior in question, including setting events, antecedents, all relevant details of the incident, immediate consequences and a list of witnesses, on both the preliminary and final worksheet, the special education supervisor included only a) a statement of the infraction that led to the manifestation determination, *i.e.*, Assault on a Teacher and Refused Directive of Administrator; b) identification of the District policy that Student violated, Aggravated Assault on an Employee; c) a statement that the teacher sustained an injury; d) a statement that Student had been suspended and e) that the local police had been notified. (N.T. pp. J-20 p. 2, J-21 p. 2)
42. The special education supervisor learned of the behavior incident in question from reviewing the computerized disciplinary reports that are part of Student’s educational record and from a conversation with the special education director. The manifestation determination team does not typically determine the facts of the incident for which an eligible student is subject to discipline, and did not permit discussion of the March 17 incident at Student’s manifestation determination review meeting. (N.T. pp. 133, 224, 250, 251, 395—397)
43. Both the preliminary and final manifestation determination worksheets include a description of the results of Student’s latest reevaluation report, current IEP, current grades, parent and teacher input and discipline referrals for the current school year. (J-20 pp. 2—6 , J-21 pp. 2—6)
44. At the manifestation determination review meeting, the special education supervisor reviewed the manifestation determination worksheet in great detail, including other disciplinary referrals from the current school year, and made some handwritten changes to the form, noting *e.g.*, that there had been some adjustments to Student’s medication “in the last month.” Parent clarified at the due process hearing that she actually stated that Student had been switched from the brand name to the generic form of Student’s secondary medication. (N.T. pp. 235—237, 391; J-21 p. 7)
45. Prior to the meeting, the special education supervisor’s preprinted comments included no reference to medication in the section of the manifestation determination worksheet that provides for review of medical, psychosocial, academic and disciplinary records as factors to consider in determining whether the behavior was a manifestation of disability. (J-20 pp. 7, 8, J-21 pp. 7, 8)
46. The special education supervisor’s preprinted answer to the question whether the student has a history of voluntary control over the behavior in question, stated that “[Student]has the ability to control [his/her] behavior in regards to the behavior in question.” (N.T. pp; J-20 p. 8, J-21 p. 8)
47. The last factor to consider in determining whether the conduct in question was caused by or had a direct and substantial relationship to the disability is whether “in an escalated

emotional state, [the student] can recall the knowledge to produce the ability to perform the skill.” The special education supervisor initially answered that “[Student] can recall the skill.” At the March 31 meeting, Parent added that Student can recall needed skills “When on a medication Plan.” (J-20 p. 8, J-21 p. 8)

48. Student takes the primary ADHD medication at 6:00 a.m. on school days. Parent had previously discussed with Student’s doctor difficulties Student has in the late afternoon, as the ADHD medication is wearing off, which resulted in the addition of the secondary medication, recently changed to the generic form. Parent also noted that mornings can also be difficult because Student has just taken the medication. (N.T. pp. 401—404)
49. The District members of the manifestation determination review team agreed that the conduct in question was not a manifestation of Student’s disability, confirming the pre-printed “XX” on the preliminary worksheet that the supervisor brought to the meeting. District staff did not believe that Student’s behavior on March 17 was a manifestation of Student’s disability because physical aggression is not a symptom of ADHD, no one had observed aggressive behaviors in Student during the current school year and the behavior in question, aggressive assault, was not typical of Student. (N.T. pp. 177, 236, 239—242, 248, 251, 253, 259, 260; J-20 p. 8)
50. Although the special education supervisor stated that Parents also agreed that the conduct was not a manifestation of Student’s disability, Parent did not check either the box agreeing or the box disagreeing with the team determination, and hand wrote next to her signature, “I feel that some portions of this were due to [his/her] Disability.” (N.T. pp. 392, 393, 395, 397, 418, 419, 422; J-21 pp. 10, 12)
51. The special education supervisor acknowledged that hyperactivity and impulsivity are ADHD symptoms and that failure to follow teacher directions could be related to those traits. (N.T. pp. 239, 240)
52. The question whether Student’s disability includes impaired judgment or reasoning was not discussed at the manifestation determination meeting, but Student’s ability to make good behavior choices was discussed. The consensus of the team, including Parents, was that Student can generally identify appropriate and inappropriate behaviors. The special education supervisor believed that Parents agreed with the determination that the behavior in question was not a manifestation of Student’s disability because Parents were asked directly, and agreed, that Student can make appropriate behavior choices. (N.T. pp. 240, 241, 263, 276)
53. Student and one Parent attended the April 8 informal hearing, along with the assistant principal and the special education director. Although information was reviewed concerning Student’s educational records, including attendance, grades, teacher anecdotal reports and disciplinary history, and Student spoke at the informal hearing, the facts relating to the incident that the special education director considered in determining whether Student should be referred for a School Board hearing were the two teacher statements provided to the assistant principal, the disciplinary incident report and the assistant principal’s oral statements to the special education director concerning what the

- teacher involved in the incident had told him about it. (N.T. pp. 126, 144, 145, 399; J-7 p. 1, J-12, J-15 )
54. Parents presented no evidence at the April 8 informal hearing. Student's Mother forgot to bring written statements from Student and Student's Friend that she had asked them to write, separately, immediately after the March 17 incident, while it was fresh in their minds. Mother provided the statements to the special education director via email on April 8, after the informal hearing. The special education director stated that he reviewed the statements, but they did not affect the decision to proceed with a School Board hearing because a teacher was injured during the incident. (N.T. pp. 126, 127, 137, 138, 140, 146, 148, 154, 386, 387, 412, 413; J-14, J-25)
  55. The special education director learned of the injury to the teacher from the assistant principal. He did not review the teacher's medical records prior to the informal hearing. (N.T. pp. 153, 154)
  56. At the end of the informal hearing, the special education director informed Parent that he would refer Student to the School Board for an expulsion hearing, and offered Parent the option of accepting homebound instruction pending further proceedings or having Student return to the current educational placement. Parent first agreed to the home instruction, but later changed her mind and asked that Student return to school. (N.T. pp. 399, 400; J-25)
  57. Student was suspended and not permitted to attend school on March 18, 19, 20 (possible weather-related school closing), 23, 24, 25, 26, 27, 30, 31, and April 1, 2, 7, 8, 9. School was not in session on April 3 and 6. (N.T. pp. 426, 427)
  58. Student returned to school on April 10 and has been attending school since that date with no further disciplinary incidents. Student began receiving two hours of replacement instruction on April 10. (N.T. p. 425; J-27)
  59. In the past, Student occasionally engaged in defiant and disrespectful "acting out" behaviors with teachers when they made demands or denied requests. Discipline referrals and suspensions were frequent during Student's first year in high school, lessened during the next two school years, but arose occasionally during both the 2013/2014 and 2014/2015 school years prior to the March 17 behavior incident. (N.T. pp. 370—373; J-7 pp. 4, 5, 6)
  60. Because of Student's difficulties remaining in detention due to ADHD symptoms, Student served in-school suspensions in half-day segments. (N.T. p. 184; J-7 p. 4)
  61. At home, Student often engages in immature behaviors, including the type of roughhousing with Student's Friend that triggered the March 17 incident, and does not immediately respond to adult directives to stop. Student is particularly affected at night, when not medicated. (N.T. pp. 371, 372, 376, 377, 429)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Discussion

#### Disciplinary Authority, Changes of Placement

The federal regulations implementing IDEA provide that an LEA is permitted to remove a child with a disability from his/her regular education setting for violation of a code of student conduct to the same extent as nondisabled students for a period of no more than 10 consecutive school days within the same school year. 34 C.F.R.

§300.530(b). In addition, an LEA is permitted to implement disciplinary removals for separate incidents of misconduct for fewer than 10 consecutive school days, provided that such removals do not constitute a “change of placement.” §300.530(b) A “change of placement” based on disciplinary removals from the regular education setting is defined as removal for more than 10 consecutive school days, or a series of removals during the same school year that a public agency determines constitutes a “pattern”

§300.536(a)(1),(2) The federal regulations list several factors that an LEA should use to determine on a case by case basis whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement, *i.e.*, removals for more than 10 non-consecutive school days, or for conduct substantially similar to the conduct that precipitated prior removals, or additional factors, such as the length or proximity of other removals and the total amount of time the student has been removed. §300.536(a)(2), (b). Pennsylvania law explicitly defines one “pattern” that constitutes a disciplinary change of placement as exclusion from the regular educational setting that exceeds fifteen (15) days in the same school year. §300.536(a)(2)(i), 22 Pa. Code §14.143(a)

If an LEA’s disciplinary procedures for a violation of the code of student conduct provides for more than 10 consecutive school days of removal, or a series of disciplinary

removals of a student within the same school year would effect a change of placement, the LEA must conduct a manifestation determination review to determine whether the violation of the code of student conduct that led to the proposed discipline “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 IEP.” 34 C.F.R. §300.530(e)(1)(i), (ii). Such determination must be made within 10 school days of any decision to change an eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA).” §530(e)(1). The participants in the manifestation determination meeting “must 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.” §300.530(e)(1).

If, after conducting an appropriate review in compliance with the applicable regulatory standards, the IEP team concludes that the behavior at issue was not caused by the student’s disability, had no direct and substantial relationship to the student’s disability, and/or was not a direct result of the LEA’s failure to implement the IEP, the LEA may take the same type of disciplinary action that it would take with respect to a student without a disability, provided that if an eligible student is removed from his/her current educational placement, the school district must ensure that the Student is provided with a free, appropriate public education (FAPE), continues to participate in the general curriculum, although in an alternative setting, and continues to make progress toward achieving his/her IEP goals. §300.530(c), (d)(1)

If the outcome of the manifestation determination review permits the LEA to proceed with a disciplinary change of placement, the student’s IEP team determines

appropriate services, as well the alternative educational setting for delivery of FAPE. §§530(c), (d)(5), 531 A parent who disagrees with the results of the manifestation determination, or with the alternative placement decision, is entitled to appeal the LEA's actions by means of a due process hearing. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511, 532(a). If the hearing officer determines that the LEA violated the procedures required by §530, or that the behavior was a manifestation of the child's disability, the hearing officer may return the child to the original placement or order a change of placement to a 45 day alternative placement upon determining that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others." §532(b)(1), (2)

#### District's Manifestation Determination

The record in this case strongly suggests that from the moment the assistant principal who conducted the investigation into the March 17 incident received information that a teacher had been assaulted, the school administration was determined to have Student expelled, regardless of the circumstances. The cursory investigation of the incident by the assistant principal and the complete disregard of any facts contrary to the conclusion that Student assaulted and injured a teacher are not matters directly at issue in the context of a special education due process hearing reviewing the District's manifestation determination.<sup>3</sup> Nevertheless, it is quite clear from the record that the District's view of the incident and Student's culpability for assault on a teacher substantially and negatively affected the

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<sup>3</sup> Student will have recourse in another forum if an expulsion hearing is held and the School Board unquestioningly accepts the school administration's view of the incident at issue without an actual hearing to consider all of the facts.

manifestation determination process. Student is entitled to a manifestation determination review that considers all relevant circumstances, which did not occur in this case, primarily because no one from the District was willing to determine the facts and circumstances relating to the March 17 incident, Student's behavior during the incident and why the behavior may have occurred.

In this case, the essential inquiry for the manifestation determination was whether, "the conduct in question was caused by or had a direct and substantial relationship to the child's disability."<sup>4</sup> The record discloses, however, that although the manifestation determination review team spent a considerable amount of time reviewing Student's educational records, including the last reevaluation report, teacher input and Student's disciplinary records, it gave short shrift to the "relationship" question as it applies specifically to Student. The District members of the manifestation determination review team concluded that the behavior in question was not a manifestation of Student's disability based on the broad, general determination that Student's conduct in this case did not fit within the general characteristics/usual symptoms of ADHD. The District members of the manifestation determination review team, led by the special education supervisor who conducted the manifestation determination review, considered only whether aggressive behavior is a characteristic of ADHD, and whether Student had engaged in aggressive behaviors during the current or prior school year.

Although aggressive behavior is not a characteristic symptom of ADHD, the IDEA statute and regulations do not limit a manifestation determination review to consideration of whether the behavior in question is commonly associated with the symptoms and characteristics

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<sup>4</sup> Although Parents attempted to suggest IDEA violations with respect to the timeliness of Student's IEP and its implementation, there was no evidence that the IEP was in any way related to Student's conduct that led to the disciplinary infraction. There is no basis for considering whether the incident or Student's conduct had any relationship to a failure to properly implement Student's IEP.

of the disability category of an eligible student, and/or to symptoms and common characteristics of a diagnosed condition such as ADHD. If that were the case, there would be no need to conduct a manifestation determination review for every IDEA eligible student whose violation of code of student conduct may result in a disciplinary change of placement. Such reviews, at least with respect to aggressive behaviors, would only need to be conducted for students who are IDEA eligible based upon such behaviors or who regularly exhibit negative behaviors in the school setting that adversely affect educational progress. That, however, is not what the IDEA statute and regulations provide. Rather, when a disciplinary change of placement is involved, IDEA requires that specific consideration be given to whether the behavior that amounted to a serious and significant violation of the code of student conduct arose from, or was substantially related to the particular student's disability, *i.e.*, whether the violation is related to how that student **manifests** the disability.

Here there is evidence in the record sufficient to suggest, although not to conclusively establish, that Student may exhibit more uninhibited behaviors, including aggression, when Student's ADHD is not well controlled by medication. A more in-depth review of Student's medications, including side effects, how long the medication is expected to effectively control ADHD symptoms and how Student reacts to negative stimuli when the medication begins to lose its effectiveness, none of which were considered here, might provide additional information for the District to make a reasoned and truly individualized determination with respect to whether Student's behavior during the March 17 incident was related to Student's disability.

It is by no means certain that Student's behavior during the March 17 incident was related to Student's disability by virtue of lessening effectiveness of Student's medications near the end of the school day, but it was a lapse of proper procedures during the manifestation



determination review not to consider that possibility. It is unclear from the record whether Parents attempted to have the manifestation determination team consider the lessening effectiveness of Student's medication during the afternoon and evening hours, but the evidence concerning how the manifestation determination review was conducted suggests that Parents were not given a real opportunity to make that point.

#### Facts and Circumstances Relating to the March 17 Incident

The District's position with respect to consideration of the details of the behavior incident is the major problem with the manner in which the manifestation determination review was conducted. The report of Student's physical contact with the teacher, and the report of the teacher's injury played a significant role in the manifestation determination. The assistant principal's unexamined conclusion that Student assaulted a teacher on March 17 was the entire basis for the special education supervisor's conclusion that the team should focus solely on whether aggressive behavior is a symptom of ADHD in reaching the conclusion that the behavior in question was not a manifestation of Student's disability. The manifestation determination review team refused to consider anything other than the conclusion that the behavior in question was an aggressive assault, and would not examine the details of the incident. The District contended that the facts underlying the assault conclusion are irrelevant to making the manifestation determination, but the part such details should play in a proper manifestation determination review is complicated in this case.

On the one hand, the District is correct in stating that the School Board has the ultimate responsibility for determining the facts of the incident, including the circumstances under which it occurred, what Student actually did, in terms of either trying to get free of the teacher's touch or grabbing and twisting the teacher's arm, and the nature and extent of the teacher's injury that

purportedly resulted from the incident. In this case, however, although there is no question that an incident occurred involving physical contact between Student and a teacher, the circumstances surrounding the incident, the details and result of the physical contact could be related to whether the conduct was substantially related to Student's disability. If the conduct occurred as described by the teacher involved in the incident and the teacher who provided a written statement of what she observed, along with consideration of the effects, if any, of the effectiveness of Student's medication at the time of the incident may lead to the conclusion that Student engaged in gratuitously aggressive conduct that is not disability related.

It is also possible, however, that when the manifestation determination review team considers all of the circumstances related to the incident, including setting events, antecedents and the details of what occurred, it may conclude that Student's conduct was more of an impulsive overreaction to the negative stimuli of being repeatedly directed to stop a preferred activity, physical contact with Student's Friend, and to the teacher's touch, and conclude that Student's conduct was related to ADHD symptoms.

Without attempting to resolve all of the contradictory details of what actually occurred, and regardless of the effect of Student's behavior in terms of the nature and extent of the injury to the teacher, the manifestation determination team should have carefully considered the facts and circumstances of the incident to determine whether the manner in which the incident occurred affects the determination whether Student's conduct on March 17 arose from, or was substantially related to Student's disability. As noted above, there was no real administrative investigation of the facts of the incident either prior to or in connection with the informal hearing conducted on April 8. The assistant principal flatly stated that he always credits adult accounts and disregards student statements. Consequently, he not only accepted the teacher accounts,

both he and the special education director failed to see, or refused to acknowledge,, and made no or attempt to resolve, inconsistencies and discrepancies between the three teacher's accounts of the incident.<sup>5</sup> In addition, apparently neither he nor the special education director reviewed the video clips of the post incident conversation and reenactment of the incident by the teacher involved and other staff almost immediately after the incident, much less consider or attempt to determine whether that conversation had any bearing on the written accounts of the incident provided by the teacher involved in the incident, or the other teacher witness.

In short, the questions and facts presented by this case are far different and more complex than the simple question whether Student violated the District's code of student conduct by engaging in aggressive behavior. There is no question that Student initially refused to comply with the teacher's directive and physically reacted to the teacher's touch. The extent and nature of the reaction, however, may be relevant to whether the conduct was related to Student's disability.

It is unclear why the special education supervisor appears to believe that consideration of the facts of the incident is not a matter for the manifestation determination team. It appears, however, that the intention of District policy with respect to combining a manifestation determination review and an informal hearing conducted by a special education administrator is to develop the relevant facts for a manifestation determination review while providing IDEA eligible students the same due process rights available to nondisabled students subject to expulsion. Here, the intent of the policy was clearly not fulfilled. The manifestation

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<sup>5</sup> For example, the teacher involved in the incident described Student's physical contact with Student's Friend after being told to release him/her as a "headlock" but both students and the teacher who saw only a conversation between teacher and Student, described Student as having his/her arm(s) around the Friend. Although the details of how that looked varies between the second teacher observation (J-12) and the students' accounts, the "arms around" description is far more benign than the "headlock" description. Other discrepancies are described in FF 14, 21, 25.

determination review preceded the informal hearing that is intended to provide the manifestation determination review team with relevant facts. Consequently, the manifestation determination review was based essentially, only on the conclusion that Student committed a violent act, resulting in a teacher injury. In any event, since the outcome of the informal hearing amounted to a “rubber stamp” acceptance of the assistant principal’s conclusion that Student committed an assault, the District’s failure to follow its own procedures caused no additional or greater substantive effect on manifestation determination process itself—the facts available to the review team would have been identical had the informal hearing been conducted before or simultaneously with the manifestation determination.

Although the District did not conduct a proper manifestation determination review in that it failed to consider specific circumstances relating to both Student’s disability (effectiveness of Student’s medication at the time of the incident) and the circumstances of the incident, the record of this case is insufficient to conclude with confidence that the outcome of the manifestation determination was wrong. Consequently, there is no choice but to direct the District to engage in another manifestation determination review that takes into account all relevant information. That will include documentation of Parents’ belief that lessened effectiveness of Student’ medication at the time of the incident affected Student’s behavior. It will also include a reasonable consideration of the facts and circumstances surrounding the incident, not to determine whether Student’s conduct was an assault that may warrant expulsion, but to determine whether those circumstances preclude a change of placement for Student as a result of the incident because the behavior in question was a manifestation of Student’s disability.

### Excessive Disciplinary Exclusion from School

The District's decision to postpone the informal hearing to a date more than ten (10) consecutive school days after Student was suspended for the March 17 incident, and to continue to exclude Student from school and any other educational services until the informal hearing was conducted violated the IDEA requirement relating to a disciplinary change of placement, since there has not yet been a proper determination with respect to whether the conduct in question was a manifestation of Student's disability.

The District appears to believe that conducting the manifestation determination review within 10 days of the behavior incident is sufficient to meet statutory/regulatory discipline requirements. That would be true if the eligible student is not suspended from school for the amount of time that constitutes a disciplinary change of placement prior to the manifestation determination, and if the manifestation determination review results in the conclusion that the conduct in question is a manifestation of an eligible student's disability, and, therefore that the student may return to his/her educational placement.

Here, however, taking out a one day suspension for a cell phone violation, a potential school closing for snow on 3/20, and two days that school was not in session (April 3 and April 6), Student was excluded from school for at least 14 consecutive school days between 3/19 and 4/10, when Student was permitted to return to school. That is several more days than the 10 consecutive school days that constitutes a change of placement under the IDEA regulations. Not only did the District fail to conduct a substantively proper manifestation determination review, which nullifies the outcome, it violated its own disciplinary policy that provides for an automatic 10 day suspension for aggravated Assault of Employees. (J-10 p. 2) Consequently, the District's delay in conducting the informal hearing also had the effect of treating Student less favorably

than non-disabled students by scheduling the informal hearing a week after the manifestation determination review. No reason was given for the District's decision to initially schedule the informal hearing and manifestation determination at the same time, but then separate the proceedings after Parents declined to proceed with the manifestation determination on March 25 and schedule the informal hearing two weeks later.

Student will be awarded compensatory education for the number of school days for which Student received no educational services due to the disciplinary exclusion from school in excess of ten consecutive school days.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Conduct a thorough review of the behavior of Student during the disciplinary incident that occurred on March 17, 2015, including the setting events, antecedents and relevant details of the incident in order to determine whether Student's conduct at that time was caused by or had a direct and substantial relationship to Student's disability
2. Consider, specifically, whether the waning effects of Student's medication affected Student's ability to exercise appropriate judgment and control at that time, including requesting medical documentation from Parents;
3. Provide Student with full days of compensatory education for every school day over ten (10) consecutive school days that Student was suspended from school and receiving no educational services in March and April 2015.

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

*Anne L. Carroll*

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Anne L. Carroll, Esq.

HEARING OFFICER

May 18, 2015