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: F.F.

Date of Birth: [redacted]

ODR No. 1661-1011 JS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Deborah G. DeLauro, Esquire Thalheimer & Palumbo, PC. 1831 Chestnut Street, Suite 300 Philadelphia, PA 19103
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Judith Baskin, Esquire Office of General Counsel 440 North Broad Street, Suite 313 Philadelphia, PA 19130
Date of Resolution Meeting:	April 8, 2011
Dates of Hearing:	April 28, 2011, May 3, 2011
Record Closed:	May 3, 2011
Date of Decision:	May 8, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible elementary school student; Student at all relevant times resided within the School District of Philadelphia (District). (NT 9-11.) The Student is identified with Other Health Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. Parents[1] requested due process to challenge the District's unilateral disciplinary removal of the Student to a disciplinary school for possession of a weapon. The District asserts that its action is justified by its manifestation determination and by the IDEA "special circumstances" rule permitting change of placement regardless of manifestation. The matter is bifurcated; I will address non-expedited additional allegations of a denial of a FAPE in a subsequent hearing.

The hearing was conducted on an expedited basis and concluded in two sessions. The record closed upon receipt of transcripts. I find that the unilateral change of placement was appropriate, but that the assigned interim alternative educational placement is inappropriate. I order the District to convene an IEP team as soon as possible to address new medical evidence and determine the appropriate placement and program for the Student.

ISSUES

1. Was the District's unilateral removal of Student from Student's neighborhood school authorized under the IDEA "special circumstances" rule?
2. Was the District's manifestation determination appropriate?

[1] In this decision, I refer to the parents together in the plural; however, because the Student's Father has been the chief spokesman for the student in the various meetings and actions that are part of the findings in this case, I refer to the Father as "Parent" in this decision, utilizing the singular to refer specifically to him.

3. Is the Student's pendent placement the neighborhood school or the interim alternative educational setting?

4. Is the interim alternative educational setting to which Student is assigned appropriate?

FINDINGS OF FACT

1. The Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD) and Tourette's Syndrome. Student's disabilities impeded Student's educational progress; Student is identified with Other Health Impairment and receives special education services. (J-2[2] p. 2, 4. J-4 p. 72, J-4 p. 142.)

2. Student's disabilities cause Student to be subject to irresistible impulses to take actions regardless of consequences. Student's psychiatrist was of the opinion that Student's behavior in bringing the knife into school was the product of such an impulse. (NT 357-360, 367-370, 383-388.)

3. Student has a history of repeated instances of angry behavior including profane and threatening language, walking out of the classroom, throwing objects at others, kicking and other assaultive behavior, taking the possessions of others, and fighting. (J-4.)

4. Student had a longstanding behavior pattern of taking things from home and bringing them to school. Parent identified that as a potential problem and tried to search Student's book bag every day to remove such items before Student went to school. The Student's IEP did not address this behavior, although District staff knew that it interfered with the Student's learning. It was not addressed through an FBA or behavior support plan. District staff addressed the behavior by attempting to secure any such items at the beginning of each school day. (NT 208-19 to 211-25, 341-343.)

5. In May and December 2008, Student was found to be in possession of a razor blade or other kind of blade. (NT 143-145; J-4 p. 28, J-6 p. 59.)

6. On January 11, 2011, Student threatened a teacher and threw books in the classroom. Student was suspended and a team of District staff and the Parents determined that the behavior was a manifestation of Student's disabilities. (J-2 p. 2, J-4.)

[2] The parties presented a joint exhibit book, and all exhibits here are designated "J" and the exhibit number. All documents were admitted into evidence by stipulation. (NT 520-521.)

7. On March 16, 2011, Student brought a Swiss Army style pocket knife to school in Student's back pack. (J-2 p.2, J-4 p. 114 - 129.)

8. The pocket knife had one blade measuring less than 2 ½ inches in length and two other blades that did not measure less than 2 ½ inches in length. (J-2 p. 6, J-4 p. 115, 117-129.)

9. On March 17, 2011, the District issued a Permission to Re-evaluate form to the Parents for a Functional Behavior Assessment. On March 18 Parent signed his consent. (J-4 p. 135-137.)

10. On March 18, 2011, a team composed of members of the Student's IEP team and the Parents met to conduct a manifestation review. The team was not in agreement. The District team members found that the Student's behavior in possessing a pocket knife in school was not a manifestation of Student's disability. The Parents dissented from that determination. (NT 166-170; J-2 p. 3, J-4 p. 131, 141, 147-155.)

11. The Parent was not aware of the purpose of the meeting and did not plan to bring any of Student's private clinicians. The purpose was not explained to Parent, nor was it communicated that Parent was permitted to bring a private clinician to the meeting. (NT 166-170, 212-1 to 213-8.)

12. Parent did not ask to bring a private clinician nor did Parent request the presence of the school psychologist. (NT 166-170.)

13. The District was aware that the Student had a private therapist, and that one symptom of Student's disabilities was that Student acts without regard to consequences. (NT 172, 320-328; J-4 p. 141, J-11 p. 9.)

14. The team did not include a school psychologist or any medical personnel from the private agency at which the Student and Student's family had been receiving psychiatric and counseling services, but the team did include the school counselor and the Student's special education teacher. (NT 98, 166-170, 133-135; J-4 p. 147-155.)

15. On March 18, 2011, the District prepared a Functional Behavior assessment. Despite the fact that the reason for referral was bringing a knife to school, the behavior of concern was "verbal aggression." This FBA was based upon an observation that was conducted on the day before the incident. (NT 93-96; J-4 p. 141.)

16. The District team members rested their finding against manifestation on grounds that the Student was not displaying any oppositional behavior or angry outburst when in possession of the pocket knife. Student had calmly and compliantly handed the pocket knife to the teacher who requested it when Student's

possession of it was discovered. District team members concluded that the Student was not behaving under the influence of an impulse when bringing the pocket knife to school and possessing it, and that the Student both understood the school rules and knew that Student's actions were wrong. On this basis, the District team members concluded that the behavior was not the product of impulsivity and therefore not a manifestation of Student's disabilities. (NT 98-99; J-2 p. 4, J-4 p. 116, 119, 144-146.)

17. The District members of the team did not view the behavior of bringing forbidden objects to school to be one that is commonly associated with ADHD. (NT 336.)

18. The District team members recommended the interim alternative educational setting to which the Student was eventually transferred by order of the discipline hearing officer on March 23, 2011. (J-4 p. 147-158.)

19. On March 23, the District held a disciplinary hearing and the hearing officer ordered the Student transferred from Student's neighborhood school to the behavior modification program of a District disciplinary school pending review for further disciplinary action. (J-2 p. 3, J-4 p. 157-158.)

20. The District has a single provider and model for all disciplinary placements into interim alternative educational settings. The IEP team recommends this model based upon the manifestation determination and its review of the student's individual records. The actual location is determined by the hearing officer based upon the IEP team recommendation. (NT 454-456, 461-462, 473-476; J-4 p. 147-152.)

21. The District had prepared a Positive Behavior Support Plan for Student prior to the incident of March 16, 2011, which expired prior to the incident without being reinstated or revised. The District re-issued a slightly revised behavior plan after the incident. Neither plan addressed the behavior of bringing things to school contrary to school rules. (NT 103-107, 324-326; J-5, J-14.)

22. On April 20, 2011, Parents provided to the District a report from the private psychiatrist who was providing treatment to the Student. The report indicated a combination of diagnoses including Tourette's Syndrome, Impulse Control Disorder, Obsessive Compulsive Disorder and ADHD. (J-11.)

23. The psychiatrist's report stated that the Student's combined disorders create disruptive behaviors that are not controllable by will power alone and cannot be brought into full remission. These impulses create an irresistible desire in the Student to carry out an action in a compulsive fashion without regard to logic. The report requested that the District not send the Student to a disciplinary school. (J-11.)

24. The reporting psychiatrist had diagnosed Tourette's Syndrome, Obsessive Compulsive Disorder and ADHD with poor impulse control previous to the incident. (J-11.)

25. The interim alternative educational setting to which Student was assigned has a school-wide program of behavior modification based upon a levels system, which is in turn dependent upon the student's compliance with school rules. The District expects that this levels system will be individualized by setting different point-attainment goals for each student, thus allowing some students to progress from level to level while not attaining the same degree of behavioral control that other students exhibit. (NT 477-481, 485-488.)

26. The levels system in the interim alternative educational setting to which Student was assigned is designed to transition students back to their neighborhood schools on a semester-to-semester basis; therefore, the Student is not likely to attain the highest level of reward and status at this setting within the forty five day limit required by law. There is no plan for transitioning the Student back to Student's neighborhood school. (NT 482-485, 489-497.)

27. The Parents declined to send the Student to the disciplinary school and have attempted to teach the Student at home until the date of the last hearing in this matter. (J-2 p. 3.)

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.[3] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

[3] 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).

There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence[4] that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", the Parents cannot prevail.

PROCEDURAL PROTECTIONS FOR STUDENTS SUBJECTED TO DISCIPLINARY EXCLUSION

The IDEA, 20 U.S.C. § 1415(k) and its implementing regulations, 34 C.F.R. §300.530 - 534, provide specific protections to eligible students who are facing a change in placement for disciplinary reasons. If a child is eligible, the school district cannot impose discipline or change the Student's placement unless it first holds a meeting and

[4] 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.

determines that the student's conduct in violation of the code of conduct was not a "manifestation" of a disability. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e). Conduct is a "manifestation" of a disability under the following circumstances:

> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k)(E)(i)(I), (II); 34 C.F.R. § 300.530(e)(1)(i), (ii).

If it is determined that the conduct in question had a causal relationship with the disability or was a result of the failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(E)(ii). Additionally, if the conduct is determined to be a manifestation of the child's disability, the District must take certain other steps, which include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. §532(b).

The IDEA provides for an exception to this rule in "special circumstances." 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g). When a child brings a weapon to or possesses a weapon in school, the LEA is permitted to change the child's placement by removing the child to an "interim alternative educational setting" without regard to whether or not the behavior was a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(G)(i); 34 C.F.R. §300.530(g)(1). This change in placement is limited to 45 days. Ibid. Parents must be notified immediately and provided with procedural safeguards. 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. §300.530(h).

The IEP team must determine the interim setting. 20 U.S.C. §1415(k)(1)(H)(2); 34 C.F.R. §300.531. The IEP team, 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. §300.530(d)(5), also must provide sufficient services to allow the child to participate in the general education curriculum and make progress on the child's IEP goals, and provide a functional behavioral assessment and behavioral interventions that are designed to address and prevent recurrence of the behavior violation that led to the change in placement. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. §300.530(d).

A weapon is defined by reference to the definition of "dangerous weapon" in 18 U.S.C. §930. 34 C.F.R. §300.530(h)(4). That section of the United States Code defines a "dangerous weapon" broadly to include anything that "is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length." 18 U.S.C. §930(g)(2).

WAS THE OBJECT THAT STUDENT BROUGHT INTO SCHOOL A WEAPON?

I ruled on this issue during the hearing of this matter, on the District's motion and in light of the expedited nature of the hearing and the outstanding request for a pendency determination, as to which I had declined to rule without hearing the evidence. (NT 392-435.) I ruled that the Parents, who have the burden of persuasion, had failed to show that the object was not a weapon. Because this object was plainly[5] one that is capable of

[5] There were four pieces of evidence as to the nature of the object. First, the District had the object produced, authenticating it through satisfactory evidence of a chain of custody. (NT 76-18 to 80-23, 430-8 to 431-1.) I viewed the object at close hand as it was being held and measured by a police officer. (NT 82-12 to 85-3.) Second, the police officer measured the object and testified under oath as to the officer's measurement, which found that two of three blades on the object measured over 2 ½ inches in length. Ibid. Third, admitted into evidence was a verbal description of the object by a school official, which recited that two of the three blades measured over 2 ½ inches. (J-4 p. 115.) Fourth was the picture of the object, with three obvious blades, (NT 427-15 to 428-9; J-4 p. 113), pointy and suitable for cutting, two of which appear to be over 2 ½ inches in length. (NT 428-1 to 9, 429-7 to 17, 431-2 to 6.)

inflicting serious bodily harm or death within the meaning of 18 U.S.C. §930(g)(2), the object was a weapon within the meaning of the law unless the blades measured less than 2 ½ inches in length. 18 U.S.C. §930(g)(2). I found that the Parents had failed to prove the applicability of this exception, because the evidence was at best in equipoise on that issue, and at worst preponderant that two of the blades were 2 ½ or more inches in length. (NT 431-2 to 432-18.)(FF 7, 8.)

Parent had argued that the measurements exaggerated the length of the "blades" because each blade is mounted on a "tang" – the definition of which I took judicial notice. (NT 404-411.) The tang is the unsharpened portion of the piece of metal extending from the handle that is sharpened into the blade. The tang is the end of that piece of metal that is attached to the handle. In other words, the tang, which is unsharpened, grows into the sharpened blade at some point along the piece of metal. Parents argued that the measurements of the blades on the Swiss Army style knife in question included the tang, thus exaggerating the length of the blades by the length of the tangs.

I ruled that nothing in the law suggests that the legal term "blade" is intended to exclude the tang. (NT 428-432.) Thus, there was no basis to dismiss the measurements that showed two blades of at least 2 ½ inches. My reason for this ruling is that the concern of the statute is the propensity of the knife to do serious bodily harm, that the total length of the metal that could be used to stab another person includes the tang, and that the penetration capacity of the knife is not reduced by the length of the tang. Since the statutory language is silent on whether or not the legal term "blade" includes the technical manufacturer's term "tang", and the purpose of the measurement is not really

affected by this technical distinction, I ruled that the measurements taken on the instrument in question did not have to be reduced by the length of the tang or discounted entirely. Moreover, it was the burden of parents to prove that the measurement of the blades was less than 2 ½ inches without the tang, and they had failed to do so. (NT 428-432.)

Thus, the "special circumstances" exception in the IDEA applies and, as discussed above, this authorized the District to remove the Student from Student's neighborhood school and place Student in an interim alternative educational setting for no longer than 45 days. It remains for me to determine whether or not the manifestation determination was appropriate, and whether or not the chosen interim placement was appropriate. (NT 432-435.)

PENDENT PLACEMENT

In consequence of the above determination, the pendent placement is the interim alternative educational setting to which the Student was assigned. This occurred before the Parents filed for due process. It is the filing for due process that fixes the pendent placement. Alternatively, the removal of the Student under the special circumstances rule triggered a statutory pendency, regardless of the appropriateness of the placement. 20 U.S.C. §1415(k)(4). That pendency is in the interim alternative educational setting to which the Student was assigned. Ibid.

MANIFESTATION DETERMINATION

Counsel for the District argued that my ruling that the 45 day placement was authorized under the special circumstances rule rendered moot the Parents' challenge to the manifestation determination. However, the manifestation determination is required regardless of the operation of the special circumstances rule. The IDEA provides that a manifestation determination must be made within ten days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct … ." 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. §300.530(e). Since the Parents have the right to request due process regarding a manifestation determination, 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. §300.531(a), I will decide this issue.

I find no procedural irregularity in the manifestation determination in this matter. The law does not require a full IEP team to decide on manifestation. Perhaps in view of the sometimes emergent nature of such decision making, the law requires only a group composed of the LEA, the Parent and "relevant members of the child's IEP team … ." 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. §300.530(e)(1). Thus, I am not persuaded that there was a procedural irregularity because a school psychologist did not participate. (FF 14.) I find no failure to notify the Parents or to accommodate their schedules in convening the meeting. (FF 9, 10.) Parents did not challenge the adequacy or thoroughness of the review of documentation that served as the factual predicate of the manifestation determination; however, it is clear that Parent did not know that this was permissible or that Parent could have brought experts of his choice to the meeting, or that this would have been desirable considering what was at stake. (FF 11, 12.) Nevertheless, I find that the record on this point is inadequate to prove a procedural irregularity.

Parents argue that the group should have included representatives of the private agency from whom the Student was receiving clinical treatment for Student's emotional and behavioral needs. While this may have been prudent and desirable in light of the Student's diagnoses, I find no explicit legal requirement to do so. The record is preponderant that the Parents did not even request such participation. (FF 9-14.)

Nevertheless, it is plain that the Parent did not have adequate notice of the nature and potential consequences of the manifestation determination meeting, or of the possible option of brining into that meeting a representative of the private treating agency that would be able to address the issue at hand: whether or not the Student's behavior was caused by or had a direct and substantial relationship to the Student's disabilities. 20 U.S.C. §1415(k)(1)(E)(i)(I). Nor did the District officials seek out such input, even though these officials had met with a representative of the agency, and even though they were aware that one of the symptoms of the Student's disabilities was impulsivity. District officials present at the meeting also were aware of the Student's penchant for bringing forbidden objects into school. (FF 3, 4, 5, 6, 13.) This had not been addressed in the IEP, in an FBA or in a behavior support plan, but the District was aware of it, having delegated a teacher to do what the Parent was doing already – trying to discover contraband items before classes should begin. Ibid. A preponderance of the evidence proves that the District officials simply believed that this behavior could not be and was not related to the Student's disabilities. (FF 16.)

I find that the District's analysis of the Student's behavior for manifestation purposes was thus flawed and inappropriate. Based on a preponderance of evidence I find that the team did not even consider whether or not the behavior of bringing in a knife

– the behavior that had led to the disciplinary removal from school - was caused by or substantially related to the impulsiveness that was a symptom of the Student's disabilities. (FF 16.) The team concluded that the behavior could not be a manifestation because the Student was not in an explosive emotional state at the time of possession, but this is a non-sequitur. Ibid. Impulsiveness is not synonymous with explosiveness; one can be subject to an irresistible impulse without being in a rage. (NT 383-385.) The team's finding that the Student's behavior could not have been a manifestation because the Student plainly knew that Student's behavior was wrong is similarly beside the point; the definition of an irresistible impulse has nothing to do with ability to tell right from wrong – it is about the ability to control one's behavior in the face of an impulse to do something, in this case to take a knife into school even if it is wrong to do so.

In retrospect, it would have been more prudent for the team to have included someone with a sufficient clinical background to keep the analysis focused upon the question at hand. I conclude that, perhaps due to the absence of "relevant members of the IEP team", 20 U.S.C. §1415(k)(1)(E), and certainly due to the failure of the team to seek adequate documentation to inform itself of the nature and symptoms of the Student's disabilities as they relate to impulsiveness, the team failed to conduct an appropriate manifestation determination meeting.

Thus, I conclude that the manifestation determination was inappropriate. I do not thereby conclude that the Student's behavior was a manifestation of disability, nor will I order another manifestation determination; neither conclusion is appropriate on the basis of the record before me. See, Letter to Yudian, 39 IDELR 242 (OSEP 2003)(IDEA does not require reopening of manifestation determination due to after-acquired evidence).

Nor does this invalidate the placement at the interim alternative educational setting, which I have ruled is authorized under the special circumstances provisions of the IDEA.

APPROPRIATENESS OF THE INTERIM PLACEMENT

I conclude that the placement is inappropriate in this matter, and I will order that the District convene an IEP meeting to determine an appropriate placement and program. I base this conclusion upon my finding that the placement is not structured educationally to address the needs of the Student for a program that will address the behavior in question effectively within the forty five day period permitted by law.

The District called its special education supervisor, who testified credibly that the interim setting to which the Student had been assigned provides a program based upon a school wide levels system and point structure for behavior intervention and support. (FF 25.) The offered program is provided by a single contracted provider that replicates identical programming in each of the disciplinary schools that the District operates for children removed from their neighborhood schools for disciplinary reasons. (FF 20.) While this setting is prescribed by the manifestation determination team (which includes members of the IEP team), students are assigned to a particular school by the disciplinary hearing officer, after individual review by the supervisor. (FF 18-20.) Thus, for a given grade level student, teams that recommend the interim setting in the disciplinary school have only one choice of program, which is the privately contracted program that the supervisor described in detail. (FF 20.)

While the supervisor testified that this singular program can be individualized for each student's needs, and I accept the testimony as credible, I conclude that the structure

of the program is not sufficiently individualized to meet the needs of Student, whose assignment to the setting is limited to 45 days by law. The testimony was clear that the program assumes that the assigned student will "transition" back to the neighborhood school from one semester to another – not on a 45 day timeline. (FF 26.) The program provides a point system in which students earn points for good behavior, which if sufficient enable movement to the next of five levels of privilege, with attendant amenities and honors at each level. (FF 25.) All students start at the lowest level for at least a week. Ibid. It takes more than a week to move out of the second level. Ibid. The student was not expected to complete the program within 45 days. (FF 26.) There was no plan for a student who fails to reach the highest level before the 45 days expires. (FF 26.) Rather, it was expected that either the parents would agree to a lengthier stay at the interim setting to enable completion, or an IEP team would be convened and make a placement decision. Ibid.

I find that this program simply does not address the needs of the Student, because it would predictably put the Student in a position of failing to attain the highest level in the program by the 45 day mark. It is hard to conceive how such a system could benefit the Student in terms of behavior modification; the modification program would terminate without delivering awards that it promises in terms of high level attainment. The Student is likely to see this flaw, with attendant negative consequences to Student's motivation, while in the program.

In addition to the above, I am skeptical that the point system could be successfully accommodated to behavior that is based upon an irresistible impulse of neurological origin rather than a characterological deficit that would be more amenable to a school

wide level system that is based upon the assumption that the student is able to take responsibility for behavior in order to receive appropriate rewards. (FF 25.) Although the supervisor assured me that the point system could be adjusted to account for lowered behavioral expectations, the supervisor was in no position to ensure that it could be bent as much as the Student might need if indeed Student's behavior is irresistibly generated by impulses. Ibid.

Given that the manifestation team did not even consider whether or not the behavior in question is driven neurologically and irresistibly, (FF 16, 17), the record is simply inadequate to judge whether or not the alternative school's program can be individualized meaningfully to meet Student's needs. Therefore, I will direct the District to address this based upon a more complete fact gathering than was conducted by the manifestation team.

I also find that the manifestation team failed to provide the FBA and behavior support plan that the IDEA requires. (FF 15, 21.) The IDEA requires that such behavior assessment and plan be "designed to address the behavior violation so that it does not recur." 20 U.S.C. §1415(k)(D)(ii). The behavior in question was bringing contraband into school, but the FBA and the behavior plan addressed the behaviors of angry outbursts and elopement from the classroom. Thus, the District failed to provide the services required by law. Consequently, the placement was not reasonably calculated to address the behavior of concern. For this reason also, the placement was inappropriate.

CREDIBILITY

In making the above findings and reaching the above conclusions, I have considered the credibility and reliability of the witnesses. I find completely credible and reliable the testimony of the Student's school principal, who testified clearly and without embellishment, often not giving the District's attorney the answer that would have helped the District, and readily admitting when a mistake had been made. I also credit the Parent's testimony; this witness answered directly, was modest in characterizing his knowledge, and admitted both mistakes and lapses of memory freely – I find no evidence of embellishment or dissembling in this testimony. I credit the testimony of the Student's psychiatrist for being forthright and within the scope of the psychiatrist's factual knowledge and expertise; however, I find that the psychiatrist exceeded the reasonable bounds of knowledge necessary to ground an opinion about the placement chosen by the District, and I do not rely upon that opinion testimony. Similarly, I credit the supervisor of special education who described that placement; I find that this witness's testimony was basically reliable and truthful, although I discount the witness' opinions as applied to Student's individual needs and the ability of the program to accommodate to them, based upon the implausibility of that occurring sufficiently and based upon the flaws in the manifestation determination and the lack of knowledge of the nature of the Student's disabilities and impulsiveness that is a consequence of the failure of the manifestation team to explore the correct analysis. While I have no doubt of the Student's therapist's sincerity and competence, I discount the weight attributable to this witness's testimony because the witness displayed a very poor recall of events.

CONCLUSION

Thus, I reach two conclusions that dictate prospective relief. First, the Student's removal from the neighborhood school was appropriate and authorized by law. Second, the placement recommended by the manifestation team was inappropriate. In these circumstances, Parents have simply kept the Student at home, trying to provide some educational services to the Student during the day with materials provided by the neighborhood school. (FF 27.) As the supervisor testified, the upshot is that the Student is deprived of a public education, and there is no plan for placement when the 45 day period expires in June.

Therefore I will order the District to convene an IEP team to consider the after-acquired information from the Student's psychiatrist, (FF 22 to 24), to directly confront the issue not confronted in the manifestation determination meeting – whether the Student's behavior of bringing contraband to school is driven by an irresistible impulse – and to determine both an appropriate placement for the Student and a transition plan to take advantage of that placement. Any claims regarding expedited issues that are not specifically addressed by this decision and order are denied and dismissed.

<u>ORDER</u>

1. The District's unilateral removal of Student from Student's neighborhood school for purposes of placement in an interim alternative educational setting was authorized under the IDEA "special circumstances" rule.

2. The District's manifestation determination was not appropriate.

3. The Student's pendent placement is in the interim alternative educational setting.

4. The interim alternative educational setting to which Student is assigned is not appropriate.

5. Within ten days of the date of this order, the School District shall convene an IEP meeting. The IEP team shall include a school psychologist, and the parents shall be permitted to bring with them a representative of their choosing from the private agency that currently provides evaluation and treatment to Student for emotional and behavioral concerns.

    a. The IEP team shall consider whether or not the Student's behavior of bringing contraband or forbidden objects to school – including the bringing of a knife to school in March of this year -- is or was caused by or related to irresistible impulses due to Student's disabilities.

    b. The IEP team shall obtain a functional behavior assessment that includes assessment of all of Student's behaviors that interfere with Student's educational progress, including the behavior of bringing contraband or forbidden objects to class.

    c. The IEP team shall obtain a Positive Behavior Support Plan that addresses all of Student's behaviors that interfere with Student's educational progress, including the behavior of bringing contraband or forbidden objects to class.

    d. The IEP team shall determine an appropriate placement and program for the Student and shall develop an appropriate plan for transition of the Student to the appropriate placement that it determines.

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HEARING OFFICER

May 8, 2011