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: M.H.

Date of Birth: [redacted]

Dates of Hearing: 10/27/2016

Closed HEARING

ODR File No. 18325-16-17

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Tiffany E. Sizemore-Thompson Esq. Tribone Center for Clinical Legal Education Duquesne University School of Law 600 Forbes Avenue, Tribone Building Pittsburgh, PA 15282 412-396-5694
Local Education Agency Propel Charter Schools 3447 East Carson Street, Suite 200 Pittsburgh, PA 15203	LEA Attorney Jordan Lee Strassburger Esq. Four Gateway Center, Suite 2000 444 Liberty Avenue Pittsburgh, PA 15222 412-281-5423

Date Record Closed:	October 31, 2016
Date of Decision:	November 4, 2016
Hearing Officer:	Charles W. Jelley Esq. LL.M.

Introduction and Overview

The Student[1] is eligible for specially-designed instruction (SDI) as a person with a Specific Learning Disability, in Math and Reading, under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The Student attends the Propel Charter School (Charter School). The Parents requested due process to challenge the Charter School's unilateral disciplinary removal of the Student to an interim alternative educational setting (IAES) for possession of an alleged weapon on school property.

The Charter School asserts that the student possessed a weapon, more specifically a knife, on school property. The Charter School also contends the knife blade measures 2 ½ inches in length. The Charter School next asserts its actions are justified by the IDEA weapon "special circumstances" rule. The Charter School argues that the "special circumstances" rule permits the Charter School to unilaterally change the Student's pendent placement for 45 days, regardless of whether the possession of the knife is a manifestation of the Student's disability.

The Parents do not dispute the fact that the Student possessed the knife on school property. The Parents do not dispute the fact that the Student showed the knife to other students. The Parents do not contest the determination that the possession of the knife on school property was not a manifestation of the Student's disability. The Parents do however dispute the Charter School's decision to place the Student at an Interim Alternative Educational Setting (IAES). The Parents contend the Charter School made three fundamental errors in disciplining the Student and changing the Student's placement. First, they argue, the Charter School erred in measuring the length of the knife blade. Second, they contend the Charter School erred in accurately reporting the events in the summary of the manifestation meeting. Third, they contend the IAES selected is inappropriate. More specifically, they contend the IAES is a specialized school for students with Emotional Disturbance, and therefore, the IAES cannot implement the Student's Individualized Educational Program (IEP).

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[1] In this decision, I refer to the parents together in the plural; the generic use of Student, rather than a name and gender-specific pronoun, is employed to protect the confidentiality of the student.

The hearing was conducted on an expedited basis and concluded in one session. The Parties participated in a prehearing conference call, wherein, the Parents first asserted the alleged error in measuring the length on the knife blade. The hearing officer instructed both Parties to file a prehearing memorandum on the issue of how to measure the knife blade.

The Parents and the Charter School both submitted timely memoranda and made timely disclosure of all exhibits and witnesses. Neither Party in the prehearing memoranda identified any specific case law about how to measure the length of the knife blade as described in the IDEA.

During the hearing, the Parties offered two Joint Exhibits. Joint Exhibit 1 is a photo of the knife, with the tip of the blade at the end of a standard 12-inch ruler. When viewed in this fashion, the length of the blade is measured from the tip of the blade to the point the blade meets the handle. When the blade is measured in this fashion, the blade measures 2 ½ inches.

The Parents contend the photo display exaggerates the length of the blade. The Parents further contend the proper way to measure the length of the blade is to place the tip of the blade at the end of the ruler and then stop the measurement at the end of the edge of the cutting surface. Using the Parents' frame of reference, the blade then measures 2 ¼ inches. The factual dispute over the measurement centers on the ¼-inch variance between the end of the cutting surface and point the blade meets the tip of the handle. The second Joint Exhibit is the knife at issue. The knife is similar to a multi-purpose Swiss Army knife.

The record closed upon receipt of the transcripts. I find the Charter School properly calculated the length of the blade. I find that the unilateral change of placement was appropriate; I also find the IAES is an appropriate placement for 45 days. I do however order the Charter School to convene an IEP team meeting 10 days before the Student returns to the Charter School to determine if the Student needs additional specially-designed instruction, goals or supports to make prospective meaningful educational progress.

Issues

1. Was the Charter School's unilateral removal of the Student from the Student's placement authorized under the IDEA "special circumstances" rule?
2. Was the District's manifestation determination procedurally and substantively appropriate?
3. Is the interim alternative educational setting to which Student is assigned

appropriate?

Findings of Fact

1. The Student is a person with a Specific Learning Disability (NT pp.48-49).
2. On September 21, 2016, the Student brought a knife to school and showed the knife to other students [redacted] (NT p.27).
3. [Later in the day, other] students told the special education teacher about the knife (NT p.36).
4. Upon learning of the allegation about the knife, the Student was sent to the guidance counselor's office (NT p.47).
5. While sitting outside the guidance counselor's office, the assistant principal asked the Student what was in the Student's pocket; the Student reached in and gave the knife to the assistant principal (NT p.47).
6. The assistant principal then gave the knife to the principal. Upon receipt of the knife, the principal called the mother at which time the Student told the mother about the knife (NT pp.47-48).
7. The father left work and went to the school to pick up the Student. Consistent with the Charter School's policy, the building principal made the decision to suspend the Student for three days (NT p.99).
8. When the father arrived at the Charter School, he was provided with a document describing the violation of the code of conduct and informed of the need to meet within three days for an informal disciplinary hearing (NT pp.99-100).
9. Three school days later, the Parents and the Student attended a combined informal pre-hearing conference and a manifestation determination meeting (NT p.99-100).
10. Upon entering the meeting, the Charter School informed the Parents that during the investigation into the incident [other] students reported the Student made gestures [redacted] (NT p.27).
11. When asked, the Student denied using or displaying the knife in an inappropriate fashion (NT pp7-28).
12. Recognizing the severity of the incident, the Parents suggested the Student receive a 10-day suspension (NT pp.29-30). The manifestation determination team decided the possession of the knife on school property was not a manifestation of the Student's disability. The Charter School then unilaterally decided the Student should receive a 45-day IAES (NT pp.29-30). The manifestation determination meeting adjourned, when the Parents took the Student home. When the Parents returned, the Charter School offered the Parents the choice of three different IAES. When the Parties could not agree on an IAES, the Charter School made a unilateral IAES placement at an all-

handicapped private school for students with Emotional Disturbance and Autism (NT pp.62-6).

13. At the conclusion of the manifestation meeting, the Charter School provided the Parents with their procedural safeguards and a Notice of Recommended Education Placement (NOREP) (NT pp.89-90).
14. The Charter School provides transportation to and from the IAES (NT p.42).
15. At the Parent's request, the Charter School provided the IAES with workbook pages currently used in the Student's regular education and special education classrooms (NT p.87).
16. The IAES does not use the same reading and math program used at the Charter School (NT pp.87-89). The IAES does not issue report cards at the same time as the Charter School (NT pp.87-88; NT pp.98-99).
17. The Parents testified that the Student volunteered to participate in the IAES [sports] program (NT p.42).

Discussions and Conclusion 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. The United States Supreme Court has addressed this issue in IDEA administrative hearings. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

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 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. 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.[2]

IDEA Procedural Protections when Students violate the Code of Conduct

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

School must conduct a "manifestation determination" 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 the manifestation determination 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 Charter School is permitted to change the child's placement by removing the child to an "interim

[2] 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.

alternative educational setting" (IAES) 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 interim change in placement is limited to 45 days. *Id.*

Once the school makes a decision to place the Student in a 45-day placement, the 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 alternative setting. 20 U.S.C. §1415(k)(1)(H)(2); 34 C.F.R. §300.531; 20 U.S.C. §1415(k)(1)(D)(i); 34 C.F.R. §300.530(d)(5). The IEP team 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). Section 18 U.S.C. §930 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).

Application of applicable legal principles

Was the knife the Student possessed in school a weapon within the meaning of 18 U.S.C. §930 or 34 C.F.R. §300.530(h)(4)?

The length of the blade

The Parents make two nuisance arguments. First they argue the Charter School measurement of the length of the knife blade is exaggerated. To support this contention, the Parents argue that applying a plain language analysis a knife blade is limited to the measure from the tip of the blade to the end of the sharpened cutting edge of the blade. Therefore, any measurement beyond the end of the sharpened cutting edge of the knife blade is a misapplication of 18 U.S.C. §930(g)(2), as incorporated by reference at 34 CFR 300.530(i). To support the reading, the Parents rely on *United States v. Harris,* 705 F.3d 929, 930 (9th Cir. 2013). Next, the Parents argue, even if the blade measures 2 ½ inches, the knife blade is not capable of inflicting serious bodily injury. Both arguments are misplaced and are borderline

frivolous.

In *Harris*, a Transportation Security Administration (TSA) officer during a security check told a passenger that the pocketknife was a weapon within the meaning of 49 U.S.C.A. §46505 and therefore not permitted on the plane. The officer instructed the passenger to return to the check-in counter and place the knife in his checked luggage. When the passenger returned to the check-in, it was too late to place the knife in the checked-in luggage. At that point, a Jet Blue employee *Harris* agreed to carry the knife through security and return it to the passenger before boarding the plane. The plot to circumvent the TSA ruling was discovered which in turn led to the criminal prosecution of *Harris*. *Harris* entered a conditional guilty plea with the right to challenge the constitutionality of the weapon restriction found at 49 U.S.C.A. §46505 contending the statute was void for vagueness. Unlike 18 U.S.C. §930(g)(2), 49 U.S.C.A. §46505 does not include an exception for knife blades who measure less than 2 ½ inches.

On appeal, the court rejected *Harris'* void for vagueness argument. Despite the court's holding the different statute at issue in H*arris*, and the absence of any language in *Harris* about how to measure the length of the blade, the Parents argue that *Harris* is somehow persuasive. The Parents point to a photo of *Harris'* knife next to a ruler, arguing by inference, that the proper method to measure the knife blade begins at the tip of the blade and ends with the sharpened edge, thereby excluding the distance from the end of cutting edge to the tip of the handle. The knife blade in *Harris*, like here, is made up of a single piece of metal that includes an additional ¼ inch from the end of the cutting edge before the blades attaches to the nearest point of the handle. The Parents argue, by inference, the *Harris* photo excludes the portion of the knife blade that is not part of the sharpened cutting edge; therefore, they contend the Charter School erred.

The Parents relying on *Harris* now argue that the plain language of the knife blade length exception found at 18 U.S.C. §930(g)(2), incorporated by reference at 34 CFR 300.530(i), is limited to the sharpened cutting edge of the blade like the photo in *Harris*. The Parents concede the *Harris* court did not discuss how to calculate the length of the blade. They also concede the length of the blade did not factor into *Harris's* void for vagueness argument or the court's decision. Further, they acknowledge that the weapon restriction in *Harris* is not the weapon restriction at issue here.[3]

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[3] In the Parents' prehearing memorandum, the Parents wrote "As an initial matter, it bears noting that there is essentially no case law in this circuit or other circuits that specifically gives guidance on that [measurement of knife blade length] issue." (Parents' Memorandum p.3).

The Charter School, on the other hand, relies on *State v. Harmon*, 800 A.2d 1289, 2002 Del. LEXIS 399 (Del. 2002) to support their position. In *Harmon,* the court held "In the context of what constitutes a deadly weapon for the crime of possession of a deadly weapon by a person prohibited, the "blade" of a knife should not depend upon how much of the knife blade is sharpened, but should encompass the length of the blade to the nearest point of contact with the handle excluding only the handle". Next, the Charter School argues that the holding in *People v. Sito*, 2013 IL App (1st) 110707, 994 N.E.2d 624, 2013 Ill. App. LEXIS 477, 373 Ill. Dec. 855 (Ill. App. Ct. 1st Dist. 2013) supports the method the school used to measure the length of the knife blade. In *Sito,* like here, the court encountered the identical argument about how to measure the length of a knife blade. Also like here, the state statute did not provide a definition of a "blade". To resolve the dispute, the court used the dictionary to ascertain the plain meaning of a knife and a blade. Relying on Webster's Dictionary, Merriam-Webster Collegiate Dictionary and the American Heritage Dictionary, the court concluded that a knife has two components, a handle and a blade. *Sito* 994 N.E.2d 629. The court relying on the dictionary definition concluded that a blade is either "the cutting part of an implement" or "[t]he flat-edged cutting part of a sharpened tool or weapon". The court then concluded the proper way to measure a knife blade begins with the tip of the blade and ends with the nearest point of contact with the handle. While these decisions are not controlling, the logic is however quite persuasive.[4]

What I do find controlling; however, is Hearing Officer Culleton's analysis of the "special circumstance" blade measurement rule in F.F. ODR No. 1661-1011 JS (Culleton May 3, 2011). In F.F., the parent made the same argument found here. In F.F., Hearing Officer Culleton concluded the measurement of the blade begins at the tip of the blade and ends at the point the blade reaches the nearest point of contact with the handle. Hearing Officer Culleton also concluded that the nearest point of the handle is called the tang. He then opined that "…because each blade is mounted on a 'tang' … 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."

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[4] *Rosenthal v. United States*, 1998 U.S. Dist. LEXIS 8667 * 25, 1998 WL 312118 (N.D. Ill. May 29, 1998) the court held "Thus the blade on a knife is everything except for the handle. The definition of a blade does not exclude the part nearest the handle of a knife. There is nothing that is vague or overbroad in the statute. There is consensus among the dictionaries as to the definition of the word "blade". Any person of ordinary intelligence would clearly understand and be on notice that a pocket knife with a blade, the part that is not the handle, that is longer than two and one-half inches in length cannot be brought into a federal facility."

In reaching this conclusion, consistent with F.F., *Sito, Harmon*, and *Rosenthal*, I am rejecting the Parents' argument. I agree with Hearing Office Culleton, that the measurement of the knife blade in question includes the portion of the blade nearest to the handle. Finally, applying common sense like Hearing Officer Culleton, I find "… that nothing in the law suggests that the legal term "blade" is intended to exclude the tang". Giving the word "blade" its ordinary meaning,[5] I agree with Hearing Officer Culleton, the proper way to measure the blade extends from the tip of the blade to the nearest point the blade reaches the handle. Reading the statute, as suggested by the Parents, creates ambiguity and borders on absurdity. Accordingly, I find the Parents failed to meet their burden of proof.

The knife could cause serious bodily injury

The Parents next contention that the knife is not able of causing significant bodily injury is also rejected. While the father stated he did not believe that if someone stabbed a person in the neck with a 2 ¼ or a 2 ½-inch knife blade, the victim would suffer a serious bodily injury. The principal, on the other hand, testified to the contrary. The Parents could have produced expert testimony about the knife or for that matter made a live demonstration that the blade was dull and the tip of the knife could not cut or cause any injury. Absent such proof, I find the Parent did not meet their burden. In the alternative, I find the evidence in equipoise, therefore, under either circumstance, I find the Parent failed to produce preponderant evidence on the serious body injury contention. *Rosenthal,* 1998 U.S. Dist. LEXIS 8667 * 25; *Pittsburgh School District Pennsylvania*, State Educational Agency 15919-14-15 KE, 115 LRP 17342 (Skidmore March 21, 2015). Because this knife is a weapon within the meaning of 18 U.S.C. §930(g)(2), it is axiomatic that the knife blade here could cause serious bodily within the meaning of the IDEA. 18 U.S.C. §930(g)(2).

Manifestation Determination

Counsel for the Charter School argued that if the 45-day placement was legally authorized under the "special circumstances" rule, such a ruling would obviate the Parents' challenge to the manifestation determination. While I agree that the 45-day "special circumstance" IAES placement can be made regardless of the results of the manifestation determination, assuming *arguendo* the manifestation determination can be challenged, I find the manifestation determination here is appropriate.

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[5] The Charter School principal testified convincingly, that the staff did an online search on how to measure the length of the blade. On the record, in a live demonstration, the principal testified that he placed the tip of the blade at the edge of the ruler and then measured the distance from the tip of the blade to the nearest point the blade connects to the handle (Joint Exhibit #2).

First, I find no procedural irregularity in the manifestation determination. The law does not require a full IEP team to meet to decide the manifestation. The law requires only a group composed of the LEA, the Parent and "relevant members of the child's IEP team … ." participate in the decision making. 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e)(1). The manifestation determination here included the Parents, the principal, the assistant principal, the teacher, and the special education supervisor. Clearly, the team was made up of a group of knowledgeable persons. The meeting lasted many hours allowing both sides to discuss all of their concerns.

Second, the Director of Pupil Services testified convincingly, that the decision to make the IAES placement occurred after and not before the manifestation meeting. Both the Parents and the school staff testified that the team considered the Parents request for a 10-day suspension. However, when the team concluded that the Student's conduct was not related to the Student's disability, the Charter School staff then began to look for IAES. When the manifestation determination meeting resumed, in an effort to work with the Parents, the Charter School sought the Parents' input about the three IAES options. When the Parties could not agree on a single IAES placement, the Charter School made a unilateral decision, provided the Parents with procedural safeguards and even went so far as to provide the Parents with a NOREP.

Parents here did not challenge the adequacy or thoroughness of the review of documentation that served as the factual predicate of the manifestation determination. Instead, they argue that the statements in the summary of the manifestation determination meeting somehow exaggerated the Student's level of misconduct and therefore fed into the selection of the IAES location. Curiously, however, the Parents did not call the classroom teacher, the students who made the statements, enter the manifestation summary into the record, or for that matter, call the Student to offer any evidence to attack the alleged misstatements. Therefore, absent preponderant evidence I conclude the Parents did not meet their burden of proof about the alleged inaccuracies in the report that affected the manifestation determination. Assuming, *arguendo* the statements are exaggerations, the prejudice from the alleged misstatements, under these circumstances is harmless. The Parents do not contest the fact that the misconduct was not related to the Student's disability; therefore, the alleged statements did not affect the decision-making. Accordingly, I also find that the Charter School's analysis of the Student's behavior for manifestation purposes was not flawed, inaccurate, or inappropriate.

Appropriateness of the IAES

I conclude that the IAES placement is appropriate in this matter. While the IAES is not using the same math or reading curriculum, the Parent did not offer any evidence that the Student was falling behind academically, experiencing behavioral difficulties, adjustment problems or that the Student was not participating in the regular education curriculum, or that the IEP was not being implemented. The Charter School offered to convene an IEP meeting prior to the Student's return; therefore, I encourage the Charter School and the Parents to meet 10 days before the Student's scheduled return to put a plan in place to ensure the Student continues to benefit.

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. I also credit the Parents' testimony; each Parent answered directly, was modest in characterizing their perspective, knowledge, and expressed a deep concern for the Student and disappointment in the Student's uncharacteristic behavior. I find no evidence of embellishment or pretending in this testimony. Similarly, I credit the Director the Pupil Services who described the IAES placement; I find that this witness's testimony was reliable and truthful.

Summary

Thus, I reach several conclusions. First, the Student's removal from the Charter School was legally appropriate and authorized by law. Second, the manifestation determination was procedurally and substantively appropriate. Third, the IAES placement recommended by the team is appropriate.

ORDER

1. The Charter School'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 Charter School's manifestation determination was appropriate.
3. The Student's placement in the interim alternative educational setting is appropriate.

4. Ten days before the Student is scheduled to leave the IAES, the Charter School should have an IEP team meeting to review.

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer
November 4, 2016