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: J. H.
Date of Birth: [redacted]
Dates of Hearing: 5/30/2017 and 7/18/2017
Closed HEARING
ODR File No. 19233-16-17

Parties to the Hearing:	Representative:
Parent(s)	Parent Attorney Michael Raffaele Esq. Frankel & Kershenbaum, LLC 1230 County Line Road Bryn Mawr, PA 19010 610-922-4206
Local Education Agency Rose Tree Media School District 308 North Olive Street Media, PA 19063-2403	LEA Attorney Gabrielle Sereni Esq. 19 W. Third Street Media, PA 19063 610-357-2016
Date of Decision:	July 28, 2017
Hearing Officer:	Charles W. Jelley Esq. LL.M.

PROCEDURAL HISTORY AND TIMELINE OF EVENTS

This special education due process hearing was requested by the Parent[1] on behalf of the child (the Student) against the School District (District).[2] This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., more specifically at 20 U.S.C. § 1415(k).e. Parent here is appealing the District's determination that the Student's violation of the code of conduct was not a manifestation of the Student's disability. Consequently, the matter is expedited.

THE DISTRICT'S MOTION TO DISMISS

The Complaint was filed on May 19, 2017, and was initially scheduled for hearing on July 18, 2017. Shortly after the filing of the Complaint, the District filed a motion to dismiss the Complaint alleging either a waiver or in the alternative, that the Complaint was untimely. On May 30, 2017, the parties participated in oral argument on the District's Motion. The hearing officer, on the record, denied the requested relief, but preserved the District's right to refile the Motion after the factual record was developed. The District renewed the Motion on July 11, 2017, the hearing officer issued a written Ruling on July 14, 2017, again denying the Motion without prejudice to the right to refile.

THE ONE DAY HEARING

On July 18, 2017, the Parties participated in a single session ten-hour hearing. Before taking any testimony, the District sought to exclude the Parent's expert report, evaluation and testimony. The District argued that the report was provided outside the applicable timelines, but instead was sent on July 17, 2017, by email, at 11:20 pm. District's counsel opened the email on July 18, 2017, the morning of the hearing, at approximately 6:20 am. After hearing argument on the record, the hearing officer granted the District's request to exclude the report and the witness'

[1] Parent or Family references the individual who carried out communication with the District and presented the family's point of view at all relevant meetings SD#1.

[2] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

testimony. The hearing officer found that the District would be prejudiced by the lack of timely disclosure as the District's attorney would not have adequate time to review the report with the District's staff, administration and psychologists. The hearing officer also excluded the expert's oral testimony. The hearing officer concluded if the expert were permitted to testify, she would have repeated the content of the otherwise excluded report, thereby re-creating the apparent prejudice. The Parent's objection to the ruling was preserved on the record.

STATEMENT OF THE ISSUE

Did the District comply with the IDEA requirements to conduct a legally sufficient manifestation determination meeting, and if not, what relief should be ordered?

THE INCIDENT

1. [redacted] (J#19; S#3).[3]

2. [redacted] (J#19; S#3).[4]

3. [redacted] (J#19; S#3).

4. [redacted] (J#13 118-155).

5. [redacted] (N.T. 174-175).

6. [redacted] The entire [incident] was caught on [redacted] camera number three. The entire encounter lasted about 35 seconds, six of those seconds deal with the [incident] (J#13 pp.118-155).

PRIOR PLANNING OF THE INCIDENT

7. [redacted] the Student had sought the assistance of an accomplice. The accomplice's role in the incident was to act as the videographer. Once the action

[3] Citations to the record will be as follows: Notes of Testimony (N.T.), consistent with the references at the hearing all Parent exhibits are referenced as "J#" followed by the exhibit number; School District Exhibits (S#) followed by the exhibit number; and Hearing Officer Exhibits (HO#) followed by the exhibit number.

was completed, the videographer would upload it to the internet. [redacted] (J#19, S#13, S#4, S#5, S#6).

8. Once the word got out about the incident, the Student was sent to the office, at which time the Student freely admitted [the incident]. Later when the accomplice was identified, the accomplice readily gave up the Student and the plan to video and quickly upload the incident to the internet (N.T. 307-310).

9. The police were called and criminal charges were filed. Sometime in April 2017, pursuant to 42 Pa.R.J.C.P. §407(A)(1) the Student knowingly, intelligently, and voluntarily entered a plea of guilty to felony Aggravated Assault charges (J#5; N.T. 215).

STUDENT'S EXPULSION

10. On or about March 7, 2017, the superintendent sent the Parent a letter notifying her that the District was convening a prehearing expulsion meeting. The purpose of the prehearing meeting is to review the violation of the code of conduct from the perspective of traditional discipline (J#4, S#5, S#7, S#8, S#9, N.T. 373, N.T. 191, N.T. 373, N.T. 418-420).

11. The Parent and the grandfather appeared at the conference at which time the superintendent gave the Parent a choice to request a special education due process hearing or proceed to a regular education expulsion proceeding before the school board. On April 7, 2017, Parent's counsel told the superintendent they would go to the expulsion hearing (J#4, SD#7, N.T. 191, N.T. 418-420).

12. On May 25, 2017, the District held an expulsion hearing. The Parent, the grandfather, the Student and the family's lawyer attended the hearing. After hearing testimony from the staff and the target's family, the School Board voted to permanently expel the Student (J#13).

MANIFESTATION DETERMINATION

13. Also on March 7, 2017, the psychologist, the special education teacher, the assistant principal, the Parent, the Student and the Student's grandfather met face-to-face to review the Student's school records, discuss the incident and work to reach consensus if the Student's actions were a manifestation of Student's disability (SD# 3, S#13, N.T. 227-263, N.T. 289-232, N.T. 327-330, N.T. 393-397).

14. After reviewing the relevant records, collecting input from the teaching staff, the psychologist, the mental health counselor and weighing the Parent input the team concluded that the actions were not a manifestation of the Student's disability (SD#2, SD# 3, S#7, S#8, S#9, S#11, S#13, N.T. 227-263, N.T. 289-232, N.T. 327-330, N.T. 393-397).

15. At the conclusion of the meeting, the District provided the Parent with a copy of the IDEA procedural safeguards and a Notice of Recommended Educational Placement (NOREP) stating that it was the District's intention to place the Student in a unilateral 45-day interim alternative educational setting (S#4, S#6, N.T. 188-189, N.T. 262-263, N.T. 352-353).

16. The District gave the Parent several interim alternative educational setting options. In a few days, after the Parent visited all the interim alternative educational settings, the District issued a second NOREP and placed the student in the interim alternative educational setting that Student attended (S#3, S#4, S#6, N.T. 202-204, N.T. 462-463, N.T. 482-483).

GENERAL LEGAL PRINCIPLES AND LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA AND CHAPTER 12

BURDEN OF PERSUASION AND PRODUCTION

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3rd 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, rests with the Parent as the party requesting this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

CREDIBILITY

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley*

School District, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014*); A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, and the testimony overall was rather consistent. It should be noted that the disagreements that did occur were not disputes about the facts surrounding the manifestation review determination, but rather on how the undisputed facts should be construed.

All of the witnesses were candid, clear and concise in their recollection of the facts at issue. To the extent the testimony was divergent, the differences did not go to the ultimate facts at issue surrounding the manifestation determination review.

THE PROMISE OF A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA provides procedural safeguards for children with disabilities and their parents concerning the provision of a free, appropriate public education. 20 U.S.C. § 1415(a). One such procedural safeguard is the opportunity for any party to present a complaint "concerning any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" or set forth any alleged violation. 20 U.S.C. § 1415(b)(6)(A)-(B).

Another subset of the procedural safeguards applies when school personnel decide to order a change in placement for a child with a disability who violates a school district's code of student conduct. See 20 U.S.C. §1415(k). In such circumstances, school personnel may remove a child with a disability from his/her current placement to an appropriate interim alternative educational setting, another school setting, or suspend the student for not more than ten school days, to the extent such alternatives are applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B).

If the school personnel seek to order a change in placement that would exceed ten school days, and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child with the disability in the same manner, and for the same duration, as they would be applied to the child without disabilities -- with some statutory exceptions. 20 U.S.C. § 1415(k)(1)(C); 22 Pa Code Chapter 12 *et seq*. Importantly, the IDEA "manifestation determination" decision must be made within ten school 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).

THE MANIFESTATION DETERMINATION REVIEW AND APPEAL

When a local educational agency decides to change a special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, the local educational agency, the parent and relevant members of the IEP team shall review all relevant information to determine whether the child's violation was a manifestation of the child's disability. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46720 (Aug. 14, 2006) (Comments to IDEA 2004 Regulations published in 2006); 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1). [5]

The manifestation determination is typically done in a meeting referred to as a manifestation determination review. The relevant information that must be reviewed at the manifestation determination includes the student's IEP, any teacher observations, and information provided by the parents. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e).) A manifestation determination team must consider the student's behavior as demonstrated across settings and across times. (Comments to 2006 Regulations, supra, 71 Fed. Reg. 46720.) A student's conduct is a manifestation

[5] IDEA 2004 revised the manifestation determination review decision making process. First, the 2004 Amendments dropped "the behavior subject to disciplinary action" verbiage in IDEA 1997 and instead focused on "the conduct in question" in light of the student's alleged "violation of code of student conduct". Second, the 2004 Amendments redefined the minimum membership of the manifestation determination team by mandating only the district representative, the parent, and other "relevant members," rather than the full IEP team. Third, the 2004 Amendments directed the manifestation determination review team to discuss student specific data. The team should consider "all relevant information" in the student's file. IDEA 2004 dropped several previous requirements including the specification of "diagnostic and evaluation results," the IEP-accompanying reference to "and placement," and noticeably revised "observations of the child" requirement to "any teacher observations." The fourth change concerns the required criteria for the manifestation determination decision making. The emphasis now "is no longer on the appropriateness of the IEP and placement as formulated and implemented, but rather on the causal link between a lack of implementation and the causal link between the disability and behavior in question. IDEA 2004 placed a narrow standard on the analysis of the student's behavior focusing on causation, which — "unlike the previous 1997 correlation standard narrows the manifestation analysis. The addition of a direct and substantial relationship' language emphases definitional repetition of causation, akin to the "substantial factor" test for causation in the common law of negligence, and the alternative, which concerns the implementation rather than the appropriateness of the IEP, is similarly keyed to causation." See, *The New Legal Requirements for Manifestation Determinations Under the IDEA*, Perry Zirkel, NASP *Communiqué*, Vol. 35, #1 (September 2006) http://www.emporia.edu/~persingj/manifestationdeterminations.htm

of the student's disability: (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 education agency's failure to implement the IEP. 34 C.F.R. § 300.530(e)(i) & (ii).

If the manifestation determination team determines the conduct is not a manifestation of the student's disability or is not due to the failure to implement the student's IEP, then the local educational agency may use normal school disciplinary procedures to address the incident in the same way as the procedures would be applied to non-disabled students. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); see *Honig v. Doe,* 484 U.S. 305 (1988).

UNILATERAL PLACEMENT DECISION CAN ALTER STAY PUT

IDEA 2004 and the implementing regulations at 34 C.F.R. §§ 300.530-535 permit districts to change the placement of a student eligible for special education for not more than 45-school-days when a student eligible for special education inflicts serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the district. "Serious bodily injury" within the meaning of the IDEA means bodily injury, that involves "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365(h)(3); 20 U.S.C. § 1415(k)(1)(E)(i).

If the parents of a child with a disability disagree with any decision regarding unilateral placement or with the manifestation determination, they may request a hearing, as may the local educational agency when it believes that maintaining a child's current placement is likely to result in injury to the child or others. 20 U.S.C. § 1415(k)(3)(A). Such hearings are expedited and must (1) occur within twenty school days of the date the hearing is requested, and (2) result in a determination within ten school days after the hearing. 20 U.S.C. § 1415(k)(4)(B).

INTERIM ALTERNATIVE EDUCATIONAL PLACEMENT FOR 45-DAYS

The IDEA permits the district to change the student's placement to a 45-school-day interim alternative educational setting in certain instances. The interim change must be determined by the IEP team and must meet the requirements of IDEA 2004. These requirements include the selection of an educational setting that will enable the student eligible for special education to continue to participate in the general curriculum, to receive services and modifications in the current IEP, and which

includes the services and modifications designed to address the student's unique needs. When a student is placed in an interim alternative educational setting, and the parents request a due process hearing to challenge the interim alternative educational setting, then the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the 45-school-day time period, whichever occurs first, unless the parents and the LEA agree otherwise.

APPEALS FROM THE MANIFESTATION DETERMINATION DECISION

A parent of a special education student may appeal a determination that the violation of the code of conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability, or the direct result of a district's failure to implement student's IEP, by requesting an expedited due process hearing. 20 U.S.C. § 1415(k)(3)(A); 34 § C.F.R. 300.532(a). Such an appeal addresses the correctness of the manifestation determination made. 20 U.S.C. § 1415(k)(3)(A), (k)(5); see *Molina v. Board of Educ. of Los Lunas Schools*, (D. New Mexico, June 15, 2015, No. 14-CV-00979 WJ/KBM) 2015 WL 9681416, pp. 6-7.

Additional procedural due process safeguard rules govern the actual hearing itself. See 20 U.S.C. § 1415(i); 34 CFR §§.300.530-535. For example, before the hearing, the parties are required to participate in a resolution session. If the parties cannot reach an agreement at the resolution session, at a minimum two days before the hearing the parties are required to exchange a list of witnesses, exhibits, and evaluations. *Id*.

DISCUSSION

THE STUDENT IS ESTOPPED FROM ARGUING THE [INCIDENT] WAS A MANIFESTATION OF A DISABILITY

As a threshold consideration, the Student's inconsistent arguments in the criminal matter and here are troubling. In one long breath the Student by pleading guilty "accepted full responsibility" and then in the second half of the same breath, the Student does an about face, contending that the [incident] was either a disability related impulsive act or an act of self-defense. These statements on their face are inconsistent and implausible not to mention troubling to irreconcilable with the "accept full responsibility" guilty plea to a criminal charge of [redacted] and the manifestation defense here.

[redacted]

[redacted] the actor, once he/she enters a guilty plea and "accepts full responsibility" by operation of law, is precluded from making a good faith claim that the same behavior was a manifestation of a disability. See, 18 Pa. Con. Stat. § § 302, 2301, 2702; 20 USC § 1415(k); 34 CFR §300.530-535.

It is axiomatic that by pleading guilty, the Student knowingly and voluntarily waived the manifestation defense here. In the alternative, the Student is estopped from taking one position in criminal court "accepting responsibility" based on either a knowing or reckless violation of a standard of conduct and then here, in direct contradiction of the guilty plea "accept responsibility" colloquy, assert a manifestation defense. In taking the guilty plea, the Student started down a path that acknowledged and accepted a conscious awareness of a voluntary choice to engage in behavior that violated both the District's code of conduct and Pennsylvania law. Simply stated the Student cannot now claim to be aware and in control in the criminal proceeding and then argue here that the conduct was beyond control [i.e. a manifestation of the disability] on the same set of facts. Accordingly, the Student's guilty plea conflicts with and negates the manifestation defense. Therefore, as a matter of law, in light of the guilty plea, the Student's Complaint is dismissed.

THE PARENT'S IDEA-CENTERED ARGUMENTS ARE UNAVAILING

Putting the waiver and estoppel legal niceties aside, viewing the instant dispute solely under an IDEA lens leads to the same conclusion, that the manifestation determination was correct.

THE QUESTION OF DISABILITY-RELATED IMPULSIVITY

Although, in addition to her legal arguments, the Parent suggests that the [incident] was a "prank" gone wrong (N.T. 98, 272, 281-282, 408-409) the Parent also suggests the Student's [action] was an impulsive act associated with the Student's disability (N.T. 307-308, 316-318). These contentions are flawed.[6]

[6] *In Sequoia Union High School District*, California State Educational Agency 17 LRP 11723 (March 30, 2017) the hearing officer concluded that "Whether a student's misconduct is caused by a disability often depends on whether the conduct was impulsive. Evidence of planning, or that the student was thinking about the conduct well before it occurred may demonstrate that the

There is no support for the proposition that the Student's [action] was causally related to the Student's other health impairment/specific learning disability in written expression. The underlying planning and the attendant circumstances of the [redacted] incident make it very highly unlikely that the Student's other health impairment played a role in the misconduct. While the fine grained details of when the scheme to [redacted] was hatched are not in evidence, what is known about the plan is illuminating.

First, the Student selected an easy prey, a less popular and more challenged student with communication and social skills deficits. Second, the Student sought out and convinced the accomplice to video tape the [incident]. Third, the Student put in place a plan to upload the [incident] to social media. The uploading of the [incident] would accomplish several ends. The Student would be noticed and the [other student] would be humiliated. Assuming *arguendo,* the grandfather is accurate, the Student may well have been accepted in the preferred peer group by virtue of engaging in this behavior. Assuming *arguendo* the Parent is correct, the Student would be feared and therefore the cyber-bullying would stop. Fourth, the uncontested fact that other unidentified students [redacted] beyond the accomplice filmed the incident speaks volumes. The likelihood that other students [redacted] would somehow, randomly follow the Student and film the six (6) second incident is beyond random chance. The special education teacher testified that the video she saw on the day of the incident was different than the two videos in evidence (S#13, J#19). The grandfather testified that the Student showed him a video that depicted the incident at a "different" angle. The building principal testified that other videos were quickly uploaded to social media websites soon after the incident. The psychologist testified about yet another video, after interviewing the accomplice. The psychologist opined that the social media posting would "humiliate" and further isolate the more disabled targeted peer.

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misconduct was planned, rather than impulsive." In *Sequoia,* like here, after reviewing the video tape versions of the [incident], the evidence is preponderant that the Student was considering the [action before it took place]. According to video of the instant incident, the Student [redacted]. Like *Sequoia,* the [incident] was not at all impulsive; instead it was considered for hours, planned, and then executed. "The absence of evidence that the student ever engaged in any remotely similar incident at school in the past, and for most parts has been generally well-behaved is a telltale fact that the [redacted], [incident] was not impulsive (N.T. 185-186, N.T. 270-271, 336-337, 409-410). See also, *J.M. v. Liberty Union High Sch. Dist.*, 117 LRP 20084(N.D. Cal. 05/16/17)(in following the IDEA manifestation determination regulations the court held that a district did not violate Section 504 when it expelled a high schooler with ADHD who had an altercation with a classmate) (S#13, J#19).

The [incident] was not at all an impulsive act; the [incident] was planned for what appears to be hours, if not days, and then executed with precision. There was no substantive evidence that the other health impairment caused or substantially contributed to the violation of the code of conduct. Quite the contrary, although the record is somewhat sparse, the planning and the [incident] overlap with behaviors commonly associated with the IDEA representation of "socially maladjusted" (N.T. 363-368). 34 CFR §300.8.[7] While not subject to determination on this record, the alternative understanding of the Student's behavior undercuts the Student's theory of the "prank" gone wrong.

The Parent's attempt to characterize the [incident] as a series of impulsive acts, brought on by the "stressors" that contributed to emotional and or behavioral dysregulation cannot be squared with the facts not in dispute. [redacted] topples the Student's impulsivity argument. Accordingly, the Parent did not provide the manifestation determination team or the hearing officer any convincing evidence that the violation of the code of conduct was causally connected to the Student's disability

THE MANIFESTATION DETERMINATION

The Parent contends that the manifestation determination team violated the IDEA requirement that the team consider all relevant information (20 U.S.C. § 1415(k) (1) (E) (i); 34 C.F.R. § 300.530(e) (1). The Parent contends the District's manifestation determination is fundamentally flawed in several ways. First, that the District failed to factor in Student's "stressors" when conceptualizing Student's disability, including failing to consult with the mental health counselor; second, that the District failed to implement the IEP; and third, that the District failed to consider Student's past discipline record. The District counters all the Parent's contentions.

STRESSORS AS PART OF STUDENT'S DISABILITY

The Parent contends the manifestation determination team failed to give proper weight to the Parent's and the grandfather's input about "stressors," "impulsivity,"

[7] 34 CFR §300.8 (4)(ii**)** The IDEA classification of Emotional Disturbance does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section. See also, *Emotional Disturbance vs. Social Maladjustment: An Examination of the Distinction from a Lawyer's Perspective* By: Rebecca Heaton Hall, Esq. (collecting and distinguishing case law on the topic of children who are identified as emotionally disturbed and socially maladjusted) https://tristate.pitt.edu/wordpress/wp-content/uploads/2015/08/Handout-for-2.23.17-Tri-State-ED-v-SM.pdf

“family dynamics” and the Student’s “living arrangements.” The Parent contends it is appropriate to consider the effects of Student's family “stressors” (a general upheaval in the Student’s living conditions) and cyberbullying by peers in and out of school as well as the Student’s “low frustration tolerance”, “impulsivity” and “inattentiveness” as separate or comorbid features or factors as part of the Student’s disability for the purpose of a manifestation determination.

The Parent insists that when all of the Parent input is properly credited, the Student’s misconduct is a manifestation of the Student’s disability. Therefore, Parent argues, the hearing officer should conflate the Student's disability and the family and community “stressors” by redefining the Student’s disability as a hybrid disability that resulted in a six-second misadventure.

The District disagrees, relying on the applicable regulations, the relevant school records, and teacher and Parent input in making the manifestation determination decision. In the alternative, the District argues, even if the stressors are factored in they do not change the manifestation determination decision.

While there appears to be no IDEA decision on point about the consideration of the “stressors” as part of the manifestation determination review the Department of Education has stated in a comment to the relevant regulation that "the criteria in [34 C.F.R.] § 300.530(e) (1) . . ." are "broad and flexible, and would include such factors as the inter-related and individual challenges associated with many disabilities." (Comments to 2006 Regulations, supra, 71 Fed. Reg. 46720.) Therefore, I read the comment as suggesting the effects of the “stressors” should be considered as part of the review for disciplinary purposes. Even accepting the “stressors” are “inter-related and individual challenges associated” with the Student’s disability, the Parent’s argument is misguided.

To the extent the “stressors” may overlap, the Student, here, is eligible for special education under the category of other health impaired due to Student’s “limited strength, vitality or alertness" caused by "chronic or acute health problems" that adversely affect the Student’s educational performance. (34 CFR §300.8) The agreed upon health problem here is Attention Hyperactivity Disorder Inattentive Type; in the alternative, the Student is identified as a person with a Specific Learning Disability in Written Expression. (34 CFR §300.8)

The evidence is preponderant, and the parties otherwise agree, that the other health impairment, present here, impacts the Student’s attentiveness, executive functioning, planning, time management, organization, levels of attention and ability to finish

projects. The Student's IEP includes measurable goals and the related service of school based psychological supports targeting participation in groups, emotional management, including coping skills, social skills and supports to address the other health impairment. The IEP also includes mental health counseling targeting low frustration and applying coping skills. (S#12 p.23).

The IEP goals target the Student's unique written expression needs, executive functioning and time management needs. To the extent, the "stressors" are inter-connected with the Student's IDEA disabilities the specially designed instruction and program modifications include Student-specific individual strategies to support the Student's unique circumstance arising from the Student's inattentiveness, social skills, attention/focus, executive functioning, and written expression unique needs.

The Parent acknowledges the Student's grandfather shared the "stressors" with the manifestation determination team, both at the meeting and in writing. The grandfather's input focused on the "stressors" and how in the grandfather's opinion the Student was coping with the "stressors." The grandfather testified extensively about his viewpoint that the Student wanted to "fit in," have "friends" and have improved "living conditions." On the other hand, the Parent testified extensively about how the Student was cyberbullied by peers in the community and school. The Parent also testified that for the most part before the move to another state and the return to Pennsylvania, the family "stressors," the family living conditions and Student's lack of friends/peer relationships was a nagging concern.

While the mental health counselor did not participate in the manifestation review, the psychologist talked to the counselor about the [redacted] incident. To ensure the manifestation determination team had up to date data the psychologist spent three to four hours reading and reviewing records. The psychologist also consulted with all of the IEP team members. The evidence is preponderant that the manifestation determination team was aware of and considered the "stressors." The evidence is also preponderant that the District manifestation team members, like the Parent and the grandparent, were not able to causally connect the "stressors" or for that matter the disability to the Student's misconduct.

Even assuming arguendo that "stressors" are "inter-related and individual challenges associated with [the Student's] disabilities" the Parent did not meet her burden of proof that the violation of the code of conduct in question was caused by the "inter-related" stressors. Equally true is the conclusion that the "stressors" and disabilities did not have a direct and substantial relationship to the Student's misconduct.

IEP IMPLEMENTATION

The Parent contends the District failed to either implement the Student's Individual Education Program (IEP) (SD#12, N.T.134) or in the alternative, that the District failed to provide the quarterly progress monitoring reports. Contrary to the Parent and the grandfather's testimony the evidence is preponderant that the special education teacher and the regular education staff implemented the specially designed instruction with fidelity (N.T. 126: 23; 155:25, 159:11, 163:25, 165:15, 232:6). Likewise, the psychologist and the special education teacher both testified that the Student received the related mental health support on a weekly basis. *Id.*

The grandfather and the Parent both testified that before the incident and after the incident, the Student was "doing better" and is "more organized" in school this year than in previous school years prior to and after a move from another state (N.T. 218. N.T. 398, N.T. 443-444). The contention that non-implementation of the IEP is not persuasive when juxtaposed against the testimony about the implementation of the Student's IEP and noted changes in the Student's grades, attention, executive functioning, time management, planning and organization skills reported in the quarterly progress monitoring. The Student was provided with specially-designed instruction that addressed both IDEA disabilities. Further, nothing in the record merited specially-designed instruction targeted to behavior relevant to a predilection for a foreseeable [incident].

The Parent also faults the manifestation determination team for not considering certain unspecified errors such as the lack of progress monitoring. The record is preponderant that the Parent did not identify one important piece of information that the manifestation determination team as a whole should have but did not consider. Assuming arguendo, the manifestation team did fail to consider some relevant information, the error, under these facts is subject to the IDEA's harmless error analysis. See, *Fitzgerald v. Fairfax County Sch. Bd*. (E.D. VA. 2008) 556 F.Supp.2d 543, 559; *Farrin v. Maine School Admin. Dist*. 165 F.Supp.2d 37, 33-34, 51-55 (D. Maine 2001). For example, the alleged error in not preparing or providing mental health progress reports or requiring the mental health counselor to attend the full manifestation determination team was harmless error. The progress report contention ignores the fact that the IEP does not require the mental health counselor to prepare progress reports.

As for the attendance of the counselor at the team meeting, the psychologist reached out and talked to the counselor about the Student, the [incident], and the manifestation meeting. As for the attenuated claim that the counselor failed to

implement the IEP the record is preponderant that the psychologist and the teacher both testified that all of the staff implemented the specially-designed instruction with fidelity. The psychologist also testified credibly that the counselor and the teacher worked together to implement the specially-designed instruction. Therefore, I find that any alleged error did not affect the outcome of the manifestation determination.

The evidence is preponderant that the manifestation team, the Parent and the grandparent, were not able to causally connect the Student's actions to a failure to implement the IEP. The Parent did not meet her burden of proof that the behavior/conduct in question was the direct result of the District's failure to implement the IEP.

PAST HISTORY OF MISCONDUCT

The Parent argues the manifestation determination team failed to give proper weight to the Student's previous two incidents [redacted]. During the hearing, the Parent argued the manifestation team erred by not factoring in the Student's past incidents [redacted] into the manifestation determination mix. The discipline incidents of [redacted] were correctly recalled and described to the manifestation determination team. The two [redacted] incidents in the past are distinguishable. The middle school discipline incident was nothing more than that [redacted]. The past incidents [redacted] arose after the Student was provoked. Nothing in the record indicates the [other student involved in the incident in question] bullied or provoked the Student. For that matter, nothing in Student's discipline record remotely resembles the [incident] (N.T. 185-186, N.T. 270-271, N.T. 336-337, N.T. 409-410).

The evidence, here, is preponderant the [other student] did nothing to instigate the Student. In fact, just before the [redacted]. Therefore, the Student's argument that the team ignored or failed to credit previous acts of [redacted] are not persuasive.

FAILURE TO HONOR "THE DEAL"

A small segment of the testimony discussed a disagreement over an alleged offer from the District that if the Parent agreed to the 45-day placement, the District would not move to expel the Student. The District denies any such deal. The determination if a deal existed is beyond the scope of this hearing. The Parent's Complaint targeted the manifestation determination team decision as the chief flaw. To the extent the disagreement goes to the District's waiver due process hearing

argument, the preliminary ruling that the Parent and Student were entitled to a hearing as a matter of law disposed of that issue. To the extent the deal argument goes to the manifestation determination, again the argument does not address the two statutory manifestation determination prongs set forth at 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46720 (Aug. 14, 2006) (Comments to IDEA 2004 Regulations published in 2006); 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1). Accordingly, all relief sought by Parent on Student's behalf from the expedited hearing is denied.

DICTA

It was quite obvious that the events [redacted] and following to this date and forward have changed the lives of all parties, the target, the participants and the observers. That said, to the extent they can, if they can, the parties, the target and the participants are encouraged to reach for and find a path towards a restorative justice approach.

CONCLUSION

The Parent failed to provide preponderant convincing evidence that the Student's violation of the code of conduct was causally connected to the Student's disability classifications of Other Health Impairment, more specifically, Attention Deficit Hyperactivity Disorder Inattentive Type and a Specific Learning Disability in Written Expression, or caused by the District's failure to implement the IEP.

To the extent the manifestation determination was not picture perfect, I find any errors were harmless. I make these carefully considered and thorough findings in light of the District's compelling and convincing in-depth knowledge of the Student's relevant educational record and the open and timely manner in which the team reviewed the Student's IEP.

In coming to my conclusions, I also considered the videotaped evidence, the existing evaluation, the IEP, the past discipline record, the reports of the family stressors, and the Student's unique needs and circumstances.

For all of the reasons set forth herein, I find the District met its obligations under federal and state law in determining whether the Student's actions were a manifestation of the Student's disability. The team's manifestation determination was correct. The Student's conduct [redacted] was not caused by and did not have a

direct and/or substantial relationship to, either of the Student's disabilities. The stressors alone or in combination with the disabilities neither caused nor significantly contributed to that conduct. The Student's [redacted] conduct was premeditated, not impulsive. The Student's conduct was the product of a conscious choice [redacted]. Arguably, it was a one-time failure of judgment; however under these unique circumstances, by an otherwise well-behaved Student who was dealing with a variety of troubles, neither the Student's disability nor a failure to implement the IEP was the direct cause of the [incident].

ORDER

It is hereby ordered that:

The District's manifestation determination was appropriate. The District is not required to take any further action regarding the manifestation determination.

July 28, 2017

Charles W. Jelley, Esq. LL.M.

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HEARING OFFICER
ODR FILE #1-1617 KE

RIGHT TO APPEAL

This Decision is the final administrative determination. Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving this Decision. The complete Notice of Appeal Rights was provided along with this Decision to both Parties.