

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
Final Decision and Order

CLOSED EXPEDITED HEARING

ODR File Number: 19969 17 18

Child's Name: A.H. Date of Birth: [redacted]

Date(s) of Hearing:
December 18, 2017

Parents:
Parent(s)

Counsel for Family
Pro Se

Local Education Agency:
Rose Tree Media School District
308 N. Olive Street
Media, PA 19063

Counsel for the LEA
Gabrielle Goham Esquire
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19 West Third Street
Media, PA 19063

Hearing Officer: Linda M. Valentini, Psy.D.
Certified Hearing Official

Date of Decision: December 26, 2017

Background

Student¹ is an early-teen-aged student residing in the District who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the classification of Other Health Impairment (ADHD, Inattentive presentation).²

Student's Father³ requested this hearing to challenge the District's conclusions pursuant to the manifestation determination meeting held when Student committed a violation of the District's Student Discipline Code.

Based upon the preponderance of the evidence before me I find in favor of the District.

Issue

Was the District's manifestation determination correct?

Findings of Fact

1. Student is an eligible District resident enrolled in 9th grade. Student's classification under the IDEA is other health impaired due to ADHD, Inattentive presentation. [S-1, S-4]
2. Student transferred to the District from parochial school at the beginning of the 2016-2017 school year. [S-1]
3. On January 27, 2017 the District issued a Prior Written Notice for an Initial Evaluation to determine eligibility for special education because Student's teachers expressed concern about Student's work completion, and the consistency of Student's attention and effort at school and at home. Further, Student did not take advantage of the interventions that were offered through the Response to Intervention process. [S-2]

¹ 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).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794.

³ Student's Father, who initiated the complaint, appeared pro se; Student's Mother, who lives at another address, was also present for the hearing and testified on Student's behalf. Thus, I acknowledge that Student's Mother joins in the Father's claims in this matter and, as her claims do not differ, will be bound by this decision equally with Father.

4. Father signed consent for the evaluation on February 25, 2017; the District received the signed form on March 7, 2017. [NT 19; S-2]
5. On the Parent/Guardian questionnaire issued for purposes of the initial evaluation, Father noted his belief that Student's greatest educational needs were: "The ability to sit in class and pay attention, focus on homework". Father endorsed that Student exhibited the following from a list of behaviors: lacks self-control, happy, impulsive, and angry. Father noted that Student had not received any previous psychological evaluations and was not taking prescription medication. [NT 20; S-3]
6. Eighth grade teachers' comments on Student's weaknesses were as follows "Does not listen, take [Student's] time, ask questions or take notes" (Language Arts); "Struggles with work completion, organization and paying attention in class" (Science); "Work completion (in and out of class), fooling around, work ethic, motivation" (Social Studies); "[Student's] apathy toward school and learning" (Math). [S-4]
7. Over the course of three testing sessions with the school psychologist Student was pleasant and cooperative, motivated and persistent. Attention and focus on tasks was generally appropriate for age, but at times Student appeared to temporarily lose concentration on less-preferred academic tasks. [S-4]
8. As assessed on the Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) Student's Full Scale IQ was in the Average range, and academic achievement as assessed with the Woodcock Johnson Tests of Achievement – Fourth Edition (WJ IV) was in the Average range in the areas of reading, math and writing. [S-4]
9. Memory and learning, as assessed through the Wide Range Assessment of Memory and Learning – Second Edition (WRAML2) were in the High Average to Superior ranges. [S-4]
10. On the Connors - Third Edition (Connors-3), an instrument designed to assess Attention Deficit/Hyperactivity Disorder and its most common co-existing problems in children and adolescents, Father's Connors ratings resulted in a Very Elevated score only for Learning Problems. Student's self-responses resulted in Very Elevated ratings on Inattention (ADHD, predominantly inattentive type), Hyperactivity/Impulsivity (ADHD, Hyperactive Impulsive type), Learning Problems, Defiance/Aggression, and Conduct Disorder. The two teachers who completed the Connors both rated Student as Very Elevated on Inattention (ADHD, Inattentive type), Hyperactivity/Impulsivity (ADHD, Hyperactive/Impulsive type), Executive Functioning, Defiance/Aggression, and Oppositional Defiant Disorder; one teacher endorsed Learning problems at the Very Elevated level and the other teacher endorsed Peer Relations at the Very Elevated level. [S-4]

11. On the Connors-3, Student's self-ratings included endorsement of six out of six symptoms required for a definitive DSM-5⁴ diagnosis of ADHD, Inattentive presentation, and five out of the necessary six symptoms for a diagnosis of ADHD, Hyperactive/Impulsive presentation. [S-4]
12. On the Behavior Assessment System for Children – Third Edition (BASC3), an instrument designed to obtain information about social, emotional, and behavioral functioning at home and school, Father's ratings on the Clinical Scales resulted in no Clinically Significant scores, and one At-Risk score for Attention Problems. The teachers' endorsements resulted in no Clinically Significant scores; both teachers rated Student At-Risk for Attention Problems.⁵ [S-4]
13. The certified school psychologist concluded that Student met the DSM-5 criteria for Attention Deficit/Hyperactivity Disorder, Inattentive presentation and thus met the IDEA's eligibility criteria under the disability category of Other Health Impairment, that is, a presentation of heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. [S-4]
14. The certified school psychologist noted that Student had deficits in executive functioning that should be addressed. [S-4]
15. The evaluation also revealed that Student had some weaknesses in math. [S-4]
16. The evaluation revealed that Student had some needs in the area of responding to adult direction. The certified school psychologist noted that although some symptoms of Oppositional Defiant Disorder were endorsed, none of the adult raters endorsed enough of the symptoms to make a definitive diagnosis according to DSM-5 criteria. [NT 23-27; S-4]
17. Both Parents participated in the meeting held to discuss the results of the initial evaluation as indicated by their signatures. [NT 27-28; S-4]
18. On April 28, 2017 the District issued a Notice of Recommended Educational Placement (NOREP) indicating that for 9th grade Student would participate in a regular education class with special education support for language arts, math, science and social studies, and that Student would attend a regular education achievement center in lieu of a study hall. Father signed approval of the NOREP on May 1, 2017. [S-7]
19. The IEP does not indicate that Student displays behaviors that interfere with Student's learning or that of others. Although at the time of the evaluation and the creation of the IEP Student was exhibiting behaviors such as arguing and being annoyed by others, the

⁴ Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition, published by the American Psychiatric Association

⁵ A BASC3 score in the At-Risk range identifies a problem area that, while not severe enough to require formal treatment, may have the potential for developing into a larger problem and therefore requires careful monitoring.

IEP team determined that Student was functioning overall at an age-appropriate level. [NT 55-57; S-8]

20. Student's IEP contains goals to address Student's ADHD, Inattentive presentation as follows: arriving to class on time with required materials including homework; prompt initiation of an assigned task, maintaining attention to ask, and task completion. [S-8]
21. Student's IEP provides for Specially Designed Instruction to address Student's ADHD, Inattentive presentation as follows: preferential seating near instruction and near appropriate peer models, garnering Student's attention with nonverbal cues before giving oral directions, making directions clear and concise and checking for understanding, attempting to keep Student as involved as possible in the lesson to reduce distractibility, frequent checks for work completion, providing verbal prompting to start assignments, setting clear expectations. [S-8]
22. Student's IEP provides for Specially Designed Instruction to address Student's executive functioning deficits as follows: supporting and training on organization and study skills, assistance with breaking down long-term assignments, assistance with organization of methods for recording homework. [S-8]
23. Student's IEP had supports to address math weaknesses as follows: review and practice with math concepts in math class and in the Achievement Center. [S-8]
24. In the 2017-2018 school year Student participates in co-taught classes (regular education and special education teachers) for Algebra I, English 9, Environmental Science and Global Studies. Student participates in Spanish I-A and Foundations of Technology with special education support. In the Achievement Center Student receives Academic and executive functioning support. [S-15]
25. Student's progress monitoring showed improvements on IEP goals and Student's grades "had improved markedly". [S-15]
26. In middle school Student incurred two suspensions. From the beginning of 9th grade to the conduct leading to the manifestation determination Student received disciplinary referrals for being late-to-school and late-to-class, horseplay in the cafeteria [details redacted]. [NT 72-75; S-5, S-9, S-10, S-15]
27. On two separate times, one in 8th grade, and the other at the beginning of October in 9th grade, Student obtained two peers' passwords (the peers did not voluntarily share the passwords with Student) and in an attempt to hide Student's own identity on two separate dates (10-16-17 and 10-27-17) during school hours sent threatening and obscene emails to two teachers using the peers' passwords. [NT 36-37, 75-82, 84, 101-102; S-10, S-15]
28. The October 16, 2017 email [sexual content redacted].
29. An October 27, 2017 email to the same teacher [threatening content redacted].

30. Another October 27, 2017 email [sexual content redacted].
31. Another October 27, 2017 email from a peer's account was sent to a guidance counselor. The email read: [self-harm content redacted].
32. Following reports of the October 27th emails, two staff members began investigating the situation over the weekend but could not determine who had sent the emails. On October 30, 2017 the assistant principal called the State Police and asked that a Trooper be sent over to take a report. [NT 75-82, 96; S-10]
33. The assistant principal engaged with other staff in the investigation, and on October 31, 2017 determined that it was highly likely that Student had sent the emails. He questioned Student, and after initially denying responsibility, Student eventually admitted sending the emails. Student said Student didn't see what the big deal was and it was just a joke. [NT 75-82; S-10, S-15]
34. On October 31, 2017 the assistant principal called the State Police and left a message. He received a call back from the Trooper who indicated that he would come to the school the next morning because he was in court all day on October 31st. [NT 75-82, 96; S-10, S-15]
35. On November 1, 2017 the Trooper arrived at the school, and when Student's Mother arrived the Trooper interviewed Student. The Trooper indicated that he had been in contact with the Juvenile District Attorney and that Student would be charged with Misdemeanor Terroristic Threats. [NT 75-82, 93; S-10, S-15]
36. These actions constituted misconduct at Level IV of the Student Discipline Code: Actions which pose a direct threat to the safety of others. Examples under Level IV include bullying and cyberbullying. [NT 93; P-1]
37. According to the Student Discipline Code, Level IV actions are "clearly criminal" such that "intervention of law enforcement agencies/authorities and/or action by the school board will ensue". [NT 95; P-1]
38. The special education teacher charged with seeing that Student's IEP was implemented, along with the other school-based IEP team members, was 'shocked' that Student had engaged in the conduct in question as there had been no previous pattern of behavior of this type. In constructing the IEP the IEP team did not include goals or SDIs to address sending terroristic or offensive emails to teachers. [NT 61-62, 85-86]
39. On November 2, 2017 the Superintendent sent letters to each Parent notifying them that there would be a Pre-Expulsion Hearing on November 9, 2017. [S-11]
40. The November 9th meeting was the Manifestation Determination Meeting. [S-15]

41. The team consisted of Student, both Parents, a high school psychologist, a special education teacher, a regular education teacher, the secondary supervisor of special education and the assistant principal who acted as the LEA representative. [NT 28; S-15]
42. The manifestation determination team reviewed all school-based documents that may be related to Student, including the evaluation report, the IEP, the disciplinary record, the attendance record, the health record, and any document that might exist in the District that would shed light on the nature of the behavior and whether it had a substantial relationship to Student's disability. [NT 29]
43. At the manifestation determination meeting and at the hearing Student's father expressed concerns about Student's impulsive decision making. [NT 32-33; S-15]
44. At the manifestation determination meeting and at the hearing Student's mother referenced behaviors the year previously and believes that Student should have been evaluated for the presence of oppositional defiant disorder. However, after the evaluation report was issued the record does not indicate that either Parent expressed disagreement or requested an independent educational evaluation at public expense. [NT 32-33, 110-111; S-15]
45. Student's teachers did not report a pattern of misbehavior from Student such as that referenced in the DSM-5 criteria for Oppositional Defiant Disorder. [NT 30; S-15, S-19]
46. According to the information provided to the District upon Student's enrollment, Student had not been, and was not at that time, suspended or expelled from any other school. [NT 70; S-1]
47. Although the family referenced trying two counselors for Student there is no formal diagnosis of Oppositional Defiant Disorder on the record, and no evidence that Student is currently being treated with either psychotherapy or medication. [Entire record; S-15]
48. Student's behavior was not impulsive; having previously obtained the peers' passwords, Student used the occasion of the classroom teacher's absence to hide Student's own identity and send the emails on two dates eleven calendar days apart. [NT 38-39, 41, 83-84, 103-105; S-10, S-15]
49. Student's Father believes that the IEP was not being implemented because at the times Student sent the emails there was a substitute teacher in the classroom who did not have a copy of Student's IEP. [S-15]
50. IEP implementation refers to carrying out the services put forth in the IEP. Student's IEP was being implemented; the school was providing Student with all the services indicated on the IEP. [NT 48-50, 55, 62]
51. A manifestation determination is rooted in the IEP existing at the time the behaviors in question occurred. On the day of the behavior in question Student was not exhibiting

inattentiveness, loss of focus, inability to initiate work, or any of the other characteristics related to Student's needs and the goals of the IEP. Student was sitting in the assigned preferential seating area, engaging in assigned computer work. The teacher's role in that setting was to monitor those behaviors. [NT 51, 85, 86-87, 90]

52. Student did not receive any behavior referrals from the periods when Student engaged in the conduct in question. [NT 42-43]
53. Student's IEP was in place in 9th grade, implementation was being monitored, and Student was making academic progress and responding positively to the supports offered. Student's grades had improved markedly since the IEP was in place. [NT 64, S-15]
54. The team reached the conclusion that Student's actions were not a manifestation of Student's disability, i.e. that sending the emails did not have a direct and substantial relationship to the child's disability and that the conduct was not the direct result of failure to implement Student's IEP. [NT 33, 63, 83; S-15]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). There were no credibility issues in testimony.

FAPE: Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). For a student with a disability, FAPE includes certain disciplinary protections not afforded to a non-disabled student.

Manifestation Determination: Under the IDEA and its implementing regulations, within 10 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, the local educational agency, the parent, and relevant members of the IEP Team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's failure to implement an IEP. 20 U.S.C. § 1415(k)(E)(i). *See also* 34 C.F.R. § 300.530(e). If it is determined that the conduct in question had either the 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).

Discussion

This was an expedited hearing in response to a complaint filed by Student's Father to challenge the outcome of a manifestation determination meeting.

The function of a manifestation determination is to determine "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or ... if the conduct in question was the direct result of the local educational agency's failure to implement the IEP." (*emphasis added*) 20 U.S.C. § 1415(k)(1)(E)(i)(I),(II).

Student receives special education under the classification of other health impairment, specifically attention deficit/hyperactivity disorder, inattentive type commonly called attention deficit disorder, or ADD. Student has an IEP that addresses attention, focus, and certain deficits in executive functioning such as difficulty organizing and difficulty getting started on tasks. At the time the IEP was created, and up to the time of the behavior in question, Student's in-school behavior was deemed to be age-appropriate. In 8th grade Student cut class, in 9th grade Student [engaged in horseplay in the cafeteria]. There was nothing in Student's behavior to indicate that Student required goals or SDI related to seriously inappropriate behavior or that Student required a behavior support plan to manage behaviors. After an investigation that resulted in Student's admitting to the behavior in question, members of the IEP team were surprised, indeed 'shocked' because Student had not previously exhibited a pattern of such behavior.

Student's behaviors described above violated the Student Discipline Code at Level 4, and the behaviors also warranted the Juvenile District Attorney to charge Student with Misdemeanor Terroristic Threats.

The District convened a manifestation determination meeting in accord with statutory requirements, and went through the procedures to protect Student's rights as the IDEA requires. Examining all the available documented data, the manifestation determination school-based team determined that Student's conduct was not related to Student's disability classification and that therefore Student was eligible to receive the same disciplinary consequences that a non-disabled student would receive for the same types of behaviors. I find that the manifestation determination was conducted in accord with federal and state law, and that the conclusion reached was correct.

The Parents maintain that Student's behavior was impulsive and therefore a manifestation of ADD, and that in addition Student should also be classified as having oppositional defiant disorder (ODD) which they believe would account for Student's behaviors. I cannot credit the Parents' position because the record clearly does not support a finding that the behavior was impulsive, and because at Student's evaluation/IEP creation the criteria for ODD was not met and no evidence was presented that Student had ever been formally diagnosed with, or treated for, ODD. For sake of argument, even if Student carried an ODD diagnosis, I would be hard-pressed to recognize the behavior in question as bearing a direct and substantial causal relationship to that diagnosis.

The Parents also argue that because there was a substitute teacher in the room on both occasions when Student committed the offenses, and because the substitute did not have access to the IEP, the IEP was not being implemented. I cannot endorse that argument. Student's IEP was being implemented throughout the time it was in force through provision of co-taught classes or having special education support for the two classes that were not co-taught, and through the provision of specially designed instruction to address/remediate Student's areas of weakness in attention and executive functioning. Part of the specially designed instruction included monitoring Student's focus on task and task completion. Based on the absence of behavioral referrals for the two classes on the two dates in question, there is no indication in the record that Student was not appearing to do exactly what the class required, that is, sitting in the assigned preferential area and working on an assignment. Implementation of the existing IEP did not require a teacher, substitute or not, to watch the computer screen to see whether or not Student was sending rapid emails. In fact, it would have been highly unlikely that a teacher in the course of conducting the class would even have "caught" Student in the act in time to issue a prompt. The only almost foolproof strategy that an IEP could have provided to prevent Student's from engaging in behavior of this kind would have been assignment of a one-to-one aide to be with Student constantly and to monitor every word Student was writing or typing, an intervention clearly not considered needed or appropriate for Student at the time the IEP was created and during the time its success was being monitored.

The Parents cannot be faulted for trying very hard to help their child avoid the serious disciplinary consequences that this type of behavior warrants. Student is very fortunate that the Parents pulled together to offer support at this difficult time. It is hoped that, having had their opportunity to offer their point of view, the Parents will now help Student to accept and profit from the disciplinary consequences of Student's behavior. It is also hoped that Student will recognize and appreciate the Parents' sincere desire to help, and accept their support.

Conclusion

The District's conclusion that Student's conduct was not a manifestation of Student's disability was correct. Student is eligible to receive the same disciplinary consequences as would be applied to general education non-disabled peers.

ORDER

It is hereby ORDERED that:

The District's conclusion that Student's conduct was not a manifestation of Student's disability was correct.

The District may impose on Student the same disciplinary consequences as would be applied a non-disabled peer who engaged in the same type of behavior.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D. CHO

December 26, 2017

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official