

*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 HEARING**  
**ODR File Number: 21446-18-19AS**

**Child's Name:** N.S.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

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**Hearing Officer:** James Gerl, CHO    **Date of Decision:** December 20, 2018

## **DECISION**

### **DUE PROCESS HEARING**

21446/18-19AS

### **BACKGROUND**

The parent requested an expedited hearing challenging the determination of a manifestation review meeting. In view of the foregoing, I find in favor of the Parent with regard to whether or not the student was entitled to a manifestation determination review meeting, and I find in favor of the District with regard to the appropriateness and timing of the manifestation determination review meeting and its conclusion.

### **PROCEDURAL HISTORY**

No extensions were granted in this expedited hearing. The expedited due process hearing was conducted at the school district offices on December 7, 2018. The hearing was closed to the public.

At the outset of the hearing, the attorney for the parent made a motion to dismiss without prejudice any issues contained in the due process complaint that were not related to the discipline issues which required an expedited hearing. Counsel for the

school district did not oppose the motion. The motion was granted, and any issues raised by the due process complaint that do not pertain directly to the discipline of the student, the manifestation determination review, or directly related issues were dismissed without prejudice at that time.

After the hearing, counsel for each party presented an oral closing argument. All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

## **ISSUES**

1. Was the student entitled to a manifestation determination review as a student “not yet determined eligible” for special education?

2. Did the manifestation determination review team meeting conducted for the student reach the appropriate conclusion and did it do so within the required timeframe?

### **FINDINGS OF FACT**

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:<sup>1</sup>

1. The Student is [a redacted] grade student in the district. The student enrolled in the school district in the 2016 – 2017 school year. (T of mother; P-10).

2. The student has a history of being abused [redacted]. In 2013, the student left a note containing references to potential self-injurious behaviors. (T of mother)

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1. <sup>1</sup> (Exhibits shall hereafter be referred to as “P-1,” etc. for the parent’s exhibits; “S-1,” etc. for the school district’s exhibits; references to testimony at the hearing is hereafter designated as “T” of \_\_\_\_\_).

3. The student had a history of disciplinary incidents in the previous out-of-state school district. The student was suspended there for five days for having a cork screw. (T of mother; P-10)

4. The student did not have a 504 plan or IEP in the previous out of state school district prior to coming to this school district. (P-10; T of principal)

5. The student's mother orally requested that the student be evaluated for special education on about February 9, 2018. The parent never returned the form sent home by the district or followed up with a written request for evaluation or an e-mail requesting that the student be evaluated. (S-1; T of counselor; T of principal)

6. The student received a number of disciplinary actions while in the school district. On January 27, 2017, the student was removed from class for disruptive behavior. On February 1, 2017, the student distracted classmates and a teacher during a test, and the student's mother was called to discuss the student's behaviors. On February 7, 2017, the student was sent to the lunch detention area because the student refused to take a seat in the cafeteria. On February 23, 2017, the student refused to change a seat at the direction of a teacher. As a result, the teacher sent the student to the office. On March 8, 2017, the student and another student [redacted]. The student received in-school suspension for a day. On March 9, 2017, the student received in-school suspension for [redacted]. On September 21, 2017, the student was given lunch in-school suspension for changing a seat without permission. On November 15, 2017,

the student was given in-school suspension for two days for refusing to take out the student's notebook and participate constructively in class and for insubordination when Student refused to comply when redirected by teachers. (P1 to P8)

7. On approximately June 1, 2018, the student's parent met with the principal to discuss a behavior contract for the student. On September 28, 2018, the student received a two day in-school suspension for insubordination and inappropriate expression. On October 10, 2018, the student received a two day in-school suspension for disobedience and inappropriate expression. (S-5; T of principal)

8. On October 18, 2018, while on the school bus, the student [exhibited inappropriate behavior toward a peer]. The [peer] reported the [redacted behavior] to a vice principal the next day. (P-4; T of principal)

9. The principal met with the [peer], as well as the student, on the next day, October 19, 2018. The [peer] stated [redacted]. The student [admitted the behavior but stated that the interaction was mutual]. [redacted] (S-4; T of principal)

10. The bus surveillance video [confirmed the peer's account of the incident]. (T of principal)

11. On October 23, 2018, the student's mother requested in an e-mail that the student be evaluated for IDEA. The request makes reference to a previous request that the school psychologist review or meet with the student that the parent had allegedly made the prior year. (P-9)

12. The principal continued his investigation on October 24, 2018 when he met with the student, the parent, the student's great-aunt, the police chief and the assistant superintendent. The student again admitted at the October 24 meeting that [student engaged in the behavior but that it was mutual]. (S-4; T of principal)

13. On October 29, 2018, an independent psychologist issued a letter report concerning an evaluation of the student that had been conducted on that day. After reviewing responses by the student's mother, the evaluator stated that it "appears" that the student meets the criteria for the diagnosis of attention deficient hyperactivity disorder, combined type mild. The evaluator also concluded that the student "likely suffers" from disruptive mood dysregulation disorder. The evaluator concluded that the student has adequate self-concept, and does not present a danger to self or others, student is likely not depressed and that although student has angry moods and outbursts, student does not appear to be an adolescent who carries a "chip on (...the) shoulder" or is always surly or belligerent. (S-2)

14. On November 2, 2018, the school district issued a prior written notice and consent form for the initial evaluation of the student for special education. (S-3)

15. On November 7, 2018, the school district convened a manifestation determination review meeting concerning the incident in question. Present at the manifestation determination review were the student's mother, the student's grandmother, the student's aunt, the school psychologist assigned to the school district,

one of the district's school counselors, and the building principal. Also participating by telephone were the lawyer for the parent and the lawyer for the school district. (S-5; T of school psychologist)

16. The manifestation determination review meeting lasted approximately three hours. During the meeting, the team discussed the student's strengths and needs, as well as the student's potential disabilities. The team reviewed the report of the evaluation of the student by the independent psychologist. The student's mother had provided the team with the evaluation report, and the team considered the information provided. The team also considered the events on October 18, 2018 on the bus which led to the disciplinary action against the student. The team reviewed the principal's investigation into the incident, including the statements made by the [peer], as well as the statement made by the student. (S-5; T of school psychologist; T of principal; T of counselor)

17. The student's mother requested at the manifestation determination review meeting that the team put off its decision until after an IDEA evaluation for the student could be conducted. The team denied the parent's request that the conclusion of the manifestation determination review be delayed. (T of mother; T of school psychologist)

18. The manifestation determination review team concluded that there was not a good fit between the disabilities identified in the letter report of the independent psychologist and the conduct in question. Nothing in either diagnosis provided by the



independent psychologist would lead one to expect an incident involving [redacted]. The school psychologist assigned to the district wanted to speak with the independent psychologist in order to ask some questions about the report. The parent, on advice of counsel, refused to allow the district school psychologist to speak with the independent psychologist who had evaluated the student. (S-5; T of school psychologist)

19. At the manifestation determination review meeting, the student's parent brought up the possibility that the student may be suffering from a concussion. The parent stated that the student suffered an injury during a [sports event] during which student had lost consciousness. The school's athletic director and the [team] coach had told the principal that the student did not report any injury during the student's time [engaging in the sport]. (S-5; T of principal)

20. The manifestation determination review team determined that the [redacted] misconduct on the school bus did not have a direct or substantial relationship to any disability and was not caused by a disability. Because the student had not yet been identified as eligible for special education, the manifestation determination review team concluded that the incident was not a direct result of the district's failure to implement an IEP. Accordingly, the team concluded that the conduct was not a manifestation of the student's alleged disabilities. The school district representatives on the manifestation determination review team agreed with the conclusion and signed their names to the final page. The parent did not sign the document on advice of

counsel. The parent was provided with a copy of the procedural safeguards notice at the end of the meeting. (S-5; T of school psychologist; T of principal; T of counselor)

21. The student's grades for the marking periods for the first three quarters of the 2017 – 2018 school year are mostly A's and B's with the exception of three F's and four C's. (S-6)

22. The student's conduct [redacted] was not caused by or a direct result of any disability the student may have had. (Record evidence as a whole.)

### **CONCLUSIONS OF LAW**

Based upon the arguments of counsel, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. The special education laws provide that a student with a disability may not be punished by means of a change of educational placement for conduct that is a manifestation of his/her disability. Individuals with Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. § 1400 et seq., § 615(k); 34 C.F.R. § 300.530(f); 22 Pa. Code § 14.143.

2. When a local education agency decides to change the educational placement of a child with a disability because of a violation of a code of student conduct, it must within 10 school days convene a manifestation determination review meeting

with the local education agency, the parent and relevant members of the student's IEP team. The manifestation determination review team is to 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:

(i) if the conduct in question was caused by or had a direct or substantial relationship to the child's disability; or

(ii) if the conduct in question was a direct result of the local education agency's failure to implement the IEP.

IDEA § 615(k)(1)(E); 34 C.F.R. Section 300.530.

3. Certain students who have not yet been identified as being eligible for special education may be entitled to the disciplinary protections of IDEA if the district has knowledge that the student has a disability prior to the behavior that precipitated the disciplinary action. A public agency is deemed to have knowledge that a child had a disability if (1) the parent expressed concern in writing that the student is in need of special education; (2) the parent requested an evaluation of the child for special education or (3) if a teacher or other personnel expressed specific concerns about a pattern of behavior directly to a director of special education. 34 C.F.R. § 300.534(a) and (b).

4. A state may add but not subtract from the protections provided by IDEA and any such state added protections can be enforced through IDEA procedural safeguards. See, IZM v. Rosemount – Apple Valley – Eagan Public Schools, Independent School District No. 1, 863 F. 3d 966, 70 IDELR 86 (8th Cir. 2017).

5. If a manifestation determination review team determines that either of the two prongs of the test are answered in the affirmative, the school district may not change the student’s educational placement. If the answer to both questions is no, the student may be disciplined in the same manner and for the same duration as children without disabilities. 34 C.F.R. § 300.530(c).

6. When a parent challenges a manifestation determination review with a due process complaint, there must be an expedited hearing within 20 school days after the filing of the complaint and a decision within ten school days after the hearing. 34 C.F.R. § 300.532(c); Letter to Gerl 51 IDELR 166 (OSEP 2008). When a local education agency violates the IDEA discipline rules, a hearing officer has broad authority to order appropriate equitable remedies including changes to the placement of the student and the elimination or reduction of the disciplinary penalty. 34 C.F.R. § 300.532(b); See, District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 2010).

7. A manifestation determination review team may not delay its conclusion past the 10 school days required by law. 34 C.F.R. § 300.530(e).

8. The manifestation determination review team in the instant case was properly constituted. 34 C.F.R. § 300.530(e)(1).

9. The student's conduct, [redacted], in the instant case was not caused by, and did not have a direct or substantial relationship to, any disability the student may have had.

10. The student's conduct, [redacted], was not the direct result of the failure by the school district to implement an IEP.

11. The manifestation determination review team properly concluded that the student's conduct [reacted] was not a manifestation of any disability of the student.

12. The school district has complied with the special education laws and regulations in disciplining the student for the violation of the student code of conduct in this case.

## **DISCUSSION**

IDEA provides special protections regarding student discipline because prior to the passage of the predecessor of IDEA, school districts often misused disciplinary measures in order to exclude children with disabilities from the public school

classrooms altogether. Honnig v. Doe, 484 U.S. 305, 324, 108 S. Ct. 592, 559 IDELR 231 (1988).

The key protection provided by the law is the requirement that students with disabilities cannot be punished by means of a change of educational placement for conduct that is a manifestation of his/her disability. IDEA § 615(k); 34 CFR § 300.530(f); 22 Pa. Code § 14.143. Thus, when a change of placement of a student with a disability is contemplated because the student violated a student code of conduct, a school district must convene a manifestation determination meeting. IDEA § 615(k)(4); 34 CFR § 300.530(e).

1. Was the Student entitled to a manifestation determination review meeting as a student “not determined eligible for special education.”

The parent has proven that the student should have received a manifestation determination review meeting because the parent had previously requested a special education evaluation.

In addition to students who have already been identified as eligible for special education, students who have not yet been determined to be eligible may receive the disciplinary protections of the act where the parent expresses concern in writing

concerning the child or request an evaluation of the child for special education. 34 C.F.R. § 300.534(b)(1) and (2).

The school district contends that a parent must submit any request for special education services in writing citing the Pennsylvania regulations. The district's argument fails. The law is clear that a state may add but not subtract from IDEA's protections and that if any protections are authorized by a state, they can be enforced through IDEA procedural safeguards. See, IZM v. Rosemount - Apple Valley – Eagan Public Schools, Independent School District No. 1, 863 F. 3d 966, 70 IDELR 86 (8th Cir. 2017). Thus, the state cannot subtract from IDEA's protections by requiring that a request for special education evaluation be in writing in order for a student to be eligible for a manifestation determination as “not yet eligible”. The district's argument is rejected.

In the instant case, the parent submitted an exhibit that shows that on or about February 9, 2018 the parent requested special education evaluation for the student, and the district documentation shows that it began the process of generating a permission to evaluate form for the student's parent to provide consent for the evaluation. Although there is no evidence in the record that the parent ever followed up on the initial request, the parent did make an oral request in February 2018 that the student be evaluated for purposes of special education. This oral request by the parent is sufficient

to put the district on notice the student was entitled to a manifestation determination review in the event that the district later proposed a change in the student's placement for disciplinary reasons.

The district's argument that it was not required to convene a manifestation determination review meeting is rejected. The district was required to conduct a manifestation determination review meeting prior to changing the student's placement for the incident [redacted] that is the subject of this case.

2. Did the manifestation determination review team meeting conducted for the student reach the appropriate conclusion and did it do so within the required timeframe?

The school district convened a manifestation determination review meeting for the student on November 7, 2018. The meeting took approximately three hours and was attended by the parent, the parent's attorney, the student's grandmother, the student's aunt, the school psychologist assigned to the district, one of the district's school counselors, the district's building principal, and the attorney for the school district. The team reviewed the student's current regular education placement.

The team also reviewed input from the parent concerning the student. One item submitted by the parent was a report prepared by the independent psychologist that



concluded that the student likely met the criteria for attention deficient hyperactivity disorder and that the student likely suffers from disruptive mood dysregulation disorder. The team went on to analyze the student's strengths, as well as the student's needs, and then reviewed the incident on October 18, 2018.

The team noted that student admitted when interviewed by the principal previous to the MDR meeting that [student had engaged in the behavior]. The team also reviewed the student's claim that the [interaction was mutual]. The principal related that the bus surveillance video showed that the [peer's account of the incident was true].

At the hearing, the school psychologist assigned to the district testified persuasively and credibly that nothing in either diagnosis provided by the independent psychologist would lead one to believe that the incident [redacted] would be a typical presentation. No evidence offered by the parent contradicts this testimony by the school psychologist. The team properly concluded that the student's conduct [redacted] was not caused by and did not have a direct and substantial relationship to the student's alleged disabilities. Because the student had not yet been found eligible for special education, the team also found that the conduct was not a direct result of the district's failure to implement an IEP.

The three school district staff members who attended the meeting signed report of the manifestation determination review team and indicated their agreement with the

conclusion. The student's parent did not sign the manifestation determination review document after having been advised not to do so by the parent's lawyer. The parent was given a copy of the written procedural safeguards after the meeting. It is clear that the conclusion of the manifestation determination review team that the student's misconduct [redacted] was not caused by or directly related to the student's disability.

The student's mother testified at the hearing that the student was on a 504 plan in the previous out of state school district. The principal testified that the student was not on a 504 plan in the previous district and that the parent never informed the school officials that the student had been on a 504 plan in the previous district. The parent's testimony is less credible and persuasive than the testimony of the principal in this regard. The parent's testimony is also contradicted by the documentary evidence. When the student's parent registered the student in the school district on October 14, 2016, the parent signed a notarized statement to the registration staff of the school district stating among other things that the student was not on a 504 plan or an IEP in the previous school district.

In the instant case, the parent's primary argument is not that the conclusion of the manifestation determination review team was incorrect but rather that they should have delayed their conclusion in order to permit a full special education evaluation of the student. The parent's attorney admits in closing argument that he could find no

legal authority to support this argument. In fact, there likely are no cases to support the argument advanced by the parent because the argument is in contradiction of the specific requirements of the law.

The manifestation determination review requirement provides that the manifestation team must meet and make its required conclusions 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. 34 C.F.R. § 300.530(e)(1); (emphasis added). Nothing in the law gives a local education agency the ability to extend the timelines specified by the law. Accordingly, the argument by the parent that the manifestation determination review team's conclusion should have been delayed until the student had a complete IDEA evaluation is rejected.

The parent also made an argument that the manifestation determination review team was not properly constituted. In specific, the parent argues that the manifestation determination review team should have included one of the student's teachers. The parent's argument, however, misconstrues the law. The regulations require that the manifestation determination review team include "the LEA, the parent, and relevant members of the child's IEP team (**as determined by the parent and the LEA**)." 34 C.F.R. § 300.530(e)(1) (emphasis added).

The people who will attend a manifestation determination review team meeting are determined by the parent and the LEA. Indeed, the parent invited the student's aunt and grandmother to attend the meeting. Although the student technically did not have an IEP team in this case because the student had not yet been determined to be eligible for special education, it is clear from the regulation that the parent could have invited one of the student's teachers to the MDR meeting as a full and participating member. The parent elected not to do so. Accordingly, it is concluded that the manifestation determination review team was properly constituted and had the correct members.

### **CONCLUSION**

It is concluded, therefore, that the student was entitled to a manifestation determination review as a student "not yet determined eligible" for special education because the parent had made an oral request for a special education evaluation. The determination by the manifestation determination review team, however, was correct and consistent with all of the evidence in the record. The student's conduct was not a manifestation of student's disability. The manifestation determination review team decision was not required to be delayed for the completion of an IDEA evaluation. The manifestation determination review team was properly constituted and had the appropriate members. Accordingly the school district was free to discipline the student

in the same manner and for the same duration as it might discipline a regular education student and the record evidence does not establish any violation of IDEA, the federal regulations or the Pennsylvania statutes or regulations concerning special education.

**ORDER**

Based upon the foregoing, it is HEREBY ORDERED that all of the relief requested in the due process complaint is hereby denied. The complaint is dismissed.

ENTERED: December 20, 2018

*James Gerl*

James Gerl, CHO  
Hearing Officer

