

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:**

25453-21-22

**Child's Name:**

A.N.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

*Counsel for Parent:*

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Montgomery Law  
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Philadelphia, PA 19102

**Local Education Agency:**

Upper Darby School District  
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*Counsel for the LEA:*

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**Hearing Officer:**

James Gerl, CHO

**Date of Decision:**

October 18, 2021

## **BACKGROUND**

The parent filed a due process complaint alleging that the student should be entitled to IDEA discipline protections, that the manifestation determination review conducted by the school district was not legally compliant and that the student is entitled to stay put protection. I find in favor of the parent with regard to whether the student is entitled to IDEA discipline protection, and I find in favor of the school district with regard to all other issues.

## **PROCEDURAL HISTORY**

The expedited hearing for this matter was conducted in one virtual session. The parties were only able to agree to a limited number of stipulations of fact, which unduly prolonged the hearing.

Five witnesses testified at the hearing, and the was parent additionally recalled for rebuttal testimony. The parent Exhibit No. 9 was withdrawn. Parent Exhibits 1 through 8 and 10 through 11 were admitted into evidence. School district Exhibits 1 through 41 were admitted into evidence.

At the conclusion of the expedited hearing, counsel for each party submitted oral closing arguments. In addition, counsel were permitted to and both sides did submit an additional written argument in the two days following the hearing. The parent also submitted a prehearing brief.

All arguments submitted by the parties have been considered. To the extent that the 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 and proposed findings have been omitted as

not relevant or not necessary to a proper determination of the material issues as presented. 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 PRESENTED**

Three issues were presented by the due process complaint and counsel submitted arguments on each of the three issues:

1. Whether the parent has proven that the student was entitled to IDEA disciplinary protections?
2. Whether the parent has proven that the manifestation determination review conducted by the school district was not legally compliant?
3. Whether the parent has proven that the student is entitled to stay put protection?

### **FINDINGS OF FACT**

Based upon the parties' stipulations of fact, as agreed to by counsel, I make the following findings of fact.

1. The student is a [high school aged] student residing within the boundaries of the school district.
2. The student's date of birth is [redacted].

3. The district programs for the student through a 504 plan for the student's ADHD.

4. On September 13, 2021, the student and the student's sibling were in a physical altercation with another student, hereafter Student No. 1.

5. The parent filed the due process complaint on September 17, 2021.

6. The district convened a manifestation determination review meeting on September 27, 2021.

7. The Section 504 team determined that the student's behavior for which the student was subject to discipline was not a manifestation of the student's disability.

8. The school district convened an informal expulsion hearing on September 27, 2021. As a result of the informal hearing, the district recommended expulsion of the student. The district has not yet convened a formal expulsion hearing for the student.

Based upon the evidence in the record compiled at the expedited due process hearing, I make the following findings of fact.<sup>1</sup>

9. The student is very involved in sports and tries hard at whatever the student does. (NT 88)

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<sup>1</sup> (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; and "J-1," etc. for joint exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT\_\_\_").

10. The student suffers from ADHD. The student previously suffered from a temporary adjustment disorder for which the student received services from approximately November, 2013 to 2015. (NT 41 – 42, 54-57; P-11; S-1)

11. The student has had a 504 service plan through the school district for ADHD, which was in effect at all relevant times herein. The student's 504 plan identifies the student's limitations concerning organization, concentration and learning. The 504 plan includes a number of accommodations to be implemented by the general education teacher, including: preferential seating, extended time for tests and assignments, a reminder to write down homework and assignments and prompts to remain on task. (S-1, S-9; NT 20 – 21, 43 – 44, 162 – 164)

12. On August 31, 2021, the student's mother e-mailed the student's counselor stating that the student was in desperate need of emotional support. The counselor e-mailed back asking whether the parent was looking for outside counseling services for the student or additional support in school. The student's mother responded that both outside services and support in school were needed. (P-3; NT 62)

13. On approximately September 9, 2021, the student's mother e-mailed the student's counselor stating that the student had been the victim of bullying by another student, who was Student No. 1. The school district investigated the allegation of bullying and determined that it was unfounded. Instead, the school district found that the student and the student's sibling and Student No. 1 were engaged in an ongoing mutual disagreement and conflict. The student was not a victim of bullying. (S-37; NT 133 – 135, 144 – 148)

14. On September 13, 2021, the student and the student's sibling went [redacted] to engage in a fight with Student No. 1. An argument had

occurred between the student and the student's sibling and Student No. 1 a few days earlier on a school bus and continued throughout this period of time. They had arranged to meet [redacted] to fight. None of the students involved had a class near [redacted] although the student needed to bring some papers to the center which is located on that floor. The fight occurred [redacted]. Student No. 1 began the fight by hitting the student's sibling. The student's sibling and the student then began hitting Student No. 1. Because it appeared that the student and the student's sibling were defending themselves from an attack by Student No. 1, they were initially suspended only for three days. Later, school district officials were informed of social media video of the fight that indicated that as the fight went on, there came a point when the student and the student's sibling were on top of Student No. 1, [redacted]. The fight continued on even after other students attempted to break it up. (S-26, S-39, S-40, S-41, S-19, S-14, S-15; NT 53 – 54, 99 – 107, 114 – 120)

15. The manifestation determination review team determined that the student's conduct in engaging in the fight and assaulting Student No. 1 was not a manifestation of the student's disability because the conduct in question was not caused by and did not have a direct or substantial relationship to the student's disability. The student and the student's mother disagreed with the conclusion of the manifestation determination review team. (S-33; NT 21 – 36, 38 – 51, 131 – 138, 143, 152 – 158, 166 - 170)

16. Physical fighting is not a manifestation of ADHD, in general. Physical fighting is also not one of the ways that the student's ADHD manifested itself. The student's ADHD caused problems with organization, concentration and learning. The student did not exhibit aggression or externalization. (S-1; NT 43 – 47)

17. The manifestation determination review team considered whether impulsivity could have been a factor in causing the conduct in question. The student did not exhibit impulsivity at school. The student's 504 plan did not address impulsivity. The team rejected the parent's suggestion that impulsivity caused the behavior in question. (NT 44, 157 – 158; S-1)

18. After an informal hearing, the principal recommended expulsion of the student for committing an assault. (S-31 S-32, P-6; NT 109)

### **CONCLUSIONS OF LAW**

Based upon the arguments of counsel, all of the evidence in the record, as well as my own independent legal research, I have made the following conclusions of law:

1. 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 direct to substantial relationship to the child's disability; or (ii) if the conduct in question was a direct result of a local education agency's failure to implement the IEP. IDEA § 615(k)(1)(E); 34 C.F.R. § 300.530.

2. 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 the 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) teacher or other staff expressed specific concerns about a pattern of behavior directly to a director of special education or other supervisory personnel. 34 C.F.R. § 300.534(a)(b).

3. 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).

4. 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 10 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 a 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 (D.C. Cir. 2010).

5. In the instant case, the parent has proven that the student is entitled to the IDEA disciplinary protections as a "not yet identified as being eligible" student.



6. The manifestation determination review team in the instant case properly concluded that the student's conduct in committing assault was not a manifestation of a disability of the student. Because the conduct was not a manifestation of the student's disability, the school district may discipline the student in the same manner and for the same duration as a student without a disability.

7. The stay put placement for a student whose parent has filed a due process hearing appealing a disciplinary decision is the interim alternative educational setting. 34 C.F.R. § § 300.533; See, Analysis of Comments to Proposed Regulations, 71 Fed. Reg. No. 156 at page 46726 (OSEP August 14, 2006).

8. In the instant case, the appropriate stay put placement until the hearing officer decision was the interim placement assigned by the district.

## **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 public school classrooms altogether. Honig v. Doe, 484 U.S. 305, 324, 559 IDELR 231 (1988).

The key protection provided by the law is the requirement that a student with a disability 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. Whether the parent has proven that the student is entitled disciplinary protections as a not yet eligible student?**

In the instant case, the parent has proven that the student is entitled to IDEA disciplinary protections as a “not yet eligible” student. The parties have stipulated that the student has an active 504 plan for ADHD. This fact, coupled with the fact that the parent informed the student’s counselor on August 31, 2021, that the student was in desperate need of emotional support and clarified in a subsequent e-mail that the student needed both outside counseling as well as additional emotional support in school. These facts taken together, are sufficient to impute knowledge of a disability for purposes of discipline protections for this particular student. Although the parent did not specifically ask for an evaluation or say that the student needed special education, the combination of both the current 504 plan and the request for additional emotional supports in school is sufficient to trigger the important IDEA discipline protections. It should be noted that this conclusion applies to the discipline protections of IDEA only and does not mean that the student is entitled to a special education evaluation.

The parent has proven that the student is entitled to the discipline protections of IDEA.

**2. Has the parent proven that the manifestation determination review conducted by the school district was not appropriate?**

Because the student was on an active 504 plan, the school district conducted a full manifestation determination review concerning the potential expulsion of the student despite the fact that the school district contended that the student was not covered by IDEA disciplinary protections.

The conduct in question for which the school district seeks to change the student's placement involves a violent fight that occurred on September 13, 2021. On September 13, 2021, the student and the student's sibling had arranged to meet Student No. 1 [redacted] in order to fight. Student No. 1 began the fight by hitting the student's sibling in the head. The sibling and Student No. 1 began to fight and the student in this case joined in. The fight continued and at some point, the student and the student's sibling had Student No. 1 on the ground [redacted] as both the student and the student's sibling repeatedly punched Student No. 1.

The school district convened a manifestation determination review meeting on September 27, 2021. Present at the meeting were the student, the student's parent, the student's grandparent, a general education teacher, an assistant principal, the student's counselor and the school psychologist. After reviewing the conduct and the student's disability and the documents in the student's file, the team concluded that the conduct in question was not a manifestation of the student's disability. This conclusion was clearly correct.

The student and the student's parent disagreed with the conclusion of the manifestation determination review team. At the hearing, the student's

parent testified that the student's ADHD caused impulsivity which may be attributable to the conduct in question. The school district's school psychologist testified credibly and persuasively that physical fighting is not a manifestation of ADHD in general and in particular is not a manifestation of ADHD as it is presented in this student. At the manifestation determination review meeting, the school psychologist specifically considered whether impulsivity might have been associated with ADHD that caused the behavior and rejected that possibility.

To the extent that the testimony of the student's mother is inconsistent with the testimony of the school district staff concerning this issue, the testimony of the school district staff is more persuasive and credible than the testimony of the student's mother based upon the demeanor of the witnesses, as well as the following: the mother's testimony that the student and [the Student's] sibling had good reason to be near [redacted] on the day of the incident is inherently noncredible. In addition, the testimony of the student's mother that the student and the student's sibling were merely defending themselves against Student No. 1 is contradicted by the cell phone videos of the later portions of the fight which clearly show that both the student and the student's sibling are on top of Student No. 1, [redacted], as the student and the student's sibling punch Student No. 1 repeatedly. The contradictory video evidence significantly impairs the credibility of the mother's testimony.

In view of the conclusion that the manifestation determination review was compliant with the provisions of IDEA, the school district is free to discipline the student in the same manner and for the same duration as it would any other student.

The parent's argument is rejected. The parent has not proven that the school district's manifestation determination review team's conclusion violated IDEA. Because the manifestation determination review team's conclusion was compliant with the law, the parent has not shown that the student is entitled to any relief.

### **3. Whether the parent has proven that the student is entitled to stay put protection?**

The parent contends that the student should continue in the student's general education placement because of the filing of the due process complaint. In cases involving discipline of students with a disability, the stay put placement is the interim alternative educational setting. 34 C.F.R. § 300.533.

In any event, the parent has not proven that the manifestation determination review in this case was inappropriate or wrong. Because the manifestation determination review team correctly concluded that the violent assault by the student was not a manifestation of the student's ADHD, the school district is now free to discipline the student in the same manner and for the same duration as it would any other student. Because an appropriate manifestation determination review has been conducted and properly concluded that the behavior is not a manifestation of the student's disability, the student is not entitled to stay put protection after this decision.

The parent's argument concerning the stay put placement is rejected. The parent has not proven that the student is entitled to a stay put placement subsequent to this decision.

## **ORDER**

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

**IT IS SO ORDERED.**

ENTERED: October 18, 2021

*James Gerl*

James Gerl, CHO  
Hearing Officer