

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: T.P.

Date of Birth: [redacted]

ODR No. 3041-11-12-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Mimi Rose, Esquire
1601 Walnut Street, Suite 1017
Philadelphia, PA 19102

School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19130

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Date of Hearing:

May 8, 2012

Record Closed:

May 8, 2012

Date of Decision:

May 22, 2012

Hearing Officer:

William F. Culleton, Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is an eligible student enrolled in the District named in the title page of this decision (District). Student is placed in Student's neighborhood elementary school (School). Parent appeals the District's manifestation determination concerning Student's violation of the District's Student Code of Conduct, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The District asserts that the Student's behavior was not a manifestation of Student's identified disability, and that it should be allowed to transfer¹ Student to an interim alternative educational setting. The Parent contends that the District's manifestation determination was predetermined and that the Student's behavior was in fact a manifestation of Student's identified disabilities.

The hearing was concluded in one session on an expedited basis, and the record closed at that session. I conclude that the District's manifestation determination was inappropriate, and I order that the Student not be removed from Student's neighborhood school on account of the behavior that resulted in violation of the Student Code of Conduct.

ISSUES

1. Was the District's manifestation determination appropriate?
2. Should the hearing officer order that the Student not be removed from Student's neighborhood school on account of the behavior that resulted in violation of the Student Code of Conduct?

¹ By ruling conveyed in an email message, I ruled that the Student must remain in the neighborhood school pending the resolution of this proceeding.

FINDINGS OF FACT

1. Student is classified under the IDEA as a child with Other Health Impairment due to diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and depression. (P-8.)
2. On March 5, 2012, Student was involved in a fight with another student in violation of the District's Student Code of Conduct. (P-3, 13.)
3. On March 5, 2012, the School's special assignment principal signed a "pink slip" disciplinary referral. The "pink slip" charged Student with, among other things, [redacted]. (P-13; NT 58-59, 63.)
4. The "pink slip" indicated that a possible motivation for Student's conduct was to obtain peer attention. (NT 63; P-13.)
5. District officials believed that the charge of [redacted] was required under the Student Code of Conduct because Student [redacted]. (NT 59-62.)
6. On March 8, 2012, the District invited Parents to a manifestation determination meeting. (P-3.)
7. On March 9, the School's principal sent a Discipline Case Report to the District's Office of Hearings and Expulsions. The report indicated that the Student's behavior was not a manifestation of Student's behavior, and that a manifestation determination hearing had been held on March 8, 2012, with a follow-up meeting scheduled for March 12, 2012. There had been no manifestation determination meeting on March 8, 2012. (P-14; NT 64-69.)
8. Prior to the manifestation meeting scheduled for March 12, 2012, a school psychologist was assigned to conduct the manifestation meeting. The psychologist had evaluated Student several years previously. (NT 95.)
9. The psychologist reviewed statements taken in the investigation of the disciplinary charges and previous evaluations. (P-7, 8; NT 95, 97-98, 107, 113, 115, 116-117.)
10. Prior to the manifestation meeting on March 12, 2012, the School principal met with the special education director and a liaison for the District's Office for Specialized Instructional Services. The principal sought these individuals' advice because the principal had not done a manifestation determination previous to this one. (NT 42-45.)
11. Prior to the manifestation meeting, the psychologist met with the principal of the school and the principal specially assigned to the School, both of whom had knowledge of the incident. These principals told the psychologist their understanding of what had occurred on March 5, 2012. These principals told the psychologist that the fight had been planned, and the psychologist accepted their assertion as true. The psychologist further accepted as true that the Student had participated in planning the fight. (NT 48-95, 113-119.)

12. On March 12, 2012, District personnel conducted a manifestation meeting and made a manifestation determination. (P-1; NT 41-42.)
13. The group that conducted the manifestation meeting consisted of the neighborhood school's principal, a school psychologist, a special education teacher, a regular education teacher and the Parents. (P-1 p. 6.)
14. Also present at the meeting on March 12 were the special education director, a liaison for the District's Office for Specialized Instructional Services, and one other person. These participants did not sign in as present on the Manifestation Determination form. (NT 42-43.)
15. The persons at the meeting reviewed reports that on March 5, 2012, Student was in class in the morning, when another student told Student that [redacted]. Student proceeded to the scene [redacted]. (P-1.)
16. The persons at the meeting reviewed reports that Student disengaged from the altercation, but returned to the scene. [Redacted]. (P-1.)
17. The evidence included hearsay oral statements that other students had alleged that the fight was planned for several days before it happened. None of these reports indicated that Student had planned or known about a planned fight before being made aware of it on March 5, 2012. (P-1 p. 5; P16, 17.)
18. The evidence included a hearsay statement that [redacted]. (P-1 p. 5.)
19. Student has no prior disciplinary record in the present school year. (P-1.)
20. The school psychologist conducted the manifestation meeting by reviewing the diagnostic criteria for ADHD, but not for depression. The persons at the meeting discussed whether or not Student's behavior, as reported by the principals, "fit" the diagnostic criteria that the psychologist listed. The psychologist did not utilize the Diagnostic and Statistical Manual of psychiatry during the manifestation meeting; rather, the psychologist utilized diagnostic criteria downloaded from an unidentified internet web site as the criteria to be considered at the meeting. (NT 98-102, 105-106.)
21. District personnel and Parent at the meeting did not make a determination of the Student's motivation for [redacted]. (NT 61, 64, 100.)
22. At the manifestation meeting, there was no effort to reach agreement or make a determination as to exactly what behavior was being judged for manifestation purposes. There was no attempt to determine whether or not the Student had planned the fight, had joined in the planning of the fight, or had known about the fight in advance. (NT 60-66, 107, 113-119.)
23. Although a security camera had recorded much of Student's behavior during the incident, the recording was not made available or reviewed in conjunction with the manifestation determination. (NT 113.)

24. The evaluation reports were not reviewed with Parents at the manifestation meeting, although the NOREP signed at the meeting indicates that they were reviewed. (P-2; NT 48, 53.)
25. Although there was some evidence in the evaluations of record that the Student's ADHD might lead Student to experience deficits in executive functions, there was no discussion of executive functions, either before or during the manifestation meeting. (P-7, 8; NT 50-99-100, 105-106, 108-112.)
26. The principal, school psychologist and two teachers concluded that the behavior was not a manifestation of the Student's disability and the manifestation determination was so reported. (P-1 p. 6.)
27. Parents disagreed with the manifestation determination. (P-1 p. 6.)
28. The District provided a Notice of Recommended Educational Placement (NOREP) to Parents on or about March 12, 2012, which recommended changing Student's placement from the neighborhood school for disciplinary reasons. The NOREP contained an explanation that was not related to the action taken. (P-2 p. 2.)
29. Parents disagreed with the change in placement and reiterated their assertion that the Student's behavior had been a manifestation of Student's disability. The Parents requested a due process hearing. (P-2 p. 2-3.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claim, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

MANIFESTATION DETERMINATION

The IDEA requires a local education agency such as the District to conduct a manifestation determination procedure if it seeks to change the placement of an eligible child for disciplinary reasons. 34 C.F.R. §300.530(c). The manifestation determination is made by the agency, 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). These individuals are required to review all available information, including parental input. 34 C.F.R. §300.530(e)(1). The individuals must determine whether or not the “conduct in question was caused by, or had a direct and substantial

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

relationship to, the child's disability" 34 C.F.R. §300.530(e)(i). I conclude that the District failed to meet these procedural requirements.

As noted above, the parent must participate in the manifestation review. In particular, the parent must be given the opportunity to review all relevant documentation and to provide information to the group making the manifestation determination. I conclude that the Parents in this matter were excluded from the decision making for three reasons. First, the evidence shows by a preponderance that the conclusion was pre-determined; School officials and the school psychologist pre-determined that the "conduct in question" included planning, and planning was sufficient to rule out ADHD or impulsivity as a cause of the conduct. Second, there was no discussion of whether or not Student's conduct had been the product of depression or deficient executive functions, and whether or not the conduct had been influenced by [redacted]. Indeed, District personnel at the meeting did not even review the evaluation report that raised the issue of Student's depression and weak executive functions. Third, the group at the manifestation meeting did not advert to the statutory standard for finding a manifestation; rather than considering whether or not the conduct in question was "caused by, or had a direct and substantial relationship to, the child's disability", 34 C.F.R. §300.530(e)(i), the group considered whether or not the "conduct" as stipulated by the principal, "fit" any of the diagnostic criteria for ADHD that the school psychologist recited at the meeting.

Pre-Determination

The evidence is preponderant that the District's personnel pre-determined that the Student's conduct on March 5 had not been a manifestation of Student's disability. The School principal reported that the conduct was not a manifestation three days before the manifestation meeting, incorrectly reporting that there had been a manifestation meeting already. (FF 7.) Moreover, the principal had two meetings prior to the manifestation meeting. The first meeting was with the responsible regional director of special education and another administrator from the District; the principal requested this meeting because this was the principal's first manifestation determination, and these persons were present at the meeting without signing the form as present. (FF 10, 14.) The second meeting was with the school psychologist assigned to conduct the manifestation determination meeting.

At the meeting with the psychologist, the principal and another principal assigned to the School discussed the "conduct in question" that would be reviewed for manifestation purposes. (FF 11.) In that meeting, the two principals told the psychologist that the conduct included planning of the fight prior to the date of the fight. The psychologist left the meeting believing that the Student had participated in planning the fight. Moreover, the evidence is preponderant that the psychologist had concluded prior to the meeting that the conduct as described in the pre-meeting with the principals, was not a manifestation of Student's disability, because it did not "fit" with the diagnostic criteria for ADHD. (FF 1-9.) The psychologist testified that, if the psychologist had not believed that the conduct had been planned, then the manifestation determination might have been different. (NT 116.)

In reaching this conclusion, I have weighed conflicting evidence. While all of the evidence recited above is substantial evidence of predetermination, the psychologist did deny

discussing whether or not the conduct was a manifestation of disability in the advance meeting with the principals. I give this denial less weight than the evidence raising an inference of pre-determination. It is not a direct denial of pre-determination; indeed, none of the District witnesses explicitly denied pre-determining the issue of manifestation. The psychologist clearly indicated that the psychologist had been told that the Student had pre-planned the fight, and this without more excluded ADHD as a cause of the conduct in question. Thus, the manifestation determination was a foregone conclusion as soon as the principals told the psychologist what the conduct had been.⁴

I conclude that the IDEA requires at least that the nature of the “conduct in question” be considered with participation of the parents. The regulations make clear that the group making the determination must review all relevant information, and must consider whether or not the conduct in question was a manifestation of disability. 34 C.F.R. §300.530(e)(i). It follows that this group must consider the nature of the conduct. In the matter at hand, the nature of the conduct was pre-determined, thus precluding Parents from participation in that decision, contrary to the IDEA.

Failure to Review All Relevant Information

The manifestation meeting was deficient also in that the group making the determination, including the parents, did not review all relevant information in the Student’s file. 34 C.F.R. §300.530(e). The evidence is preponderant that the District officials conducting the meeting did not review Student’s evaluation reports with the Parents. (FF 24.) If they had done so, they

⁴ I note that the evidence shows overwhelmingly that there was no basis at all to believe that Student had participated in planning of the fight. (FF 17.) Thus, I conclude that the advance meeting with the principals essentially biased the psychologist’s view of the issue before the manifestation determination group, and it biased the understanding of the issue in a way that guaranteed an outcome of no manifestation.

would have needed to address three issues in those evaluations that were not discussed in the meeting. The Student had been diagnosed with depression, yet there was no consideration of whether or not depression was related to the conduct. In addition, the Student's evaluation had revealed possible deficiencies in executive functions that include the ability to plan behavior. This was never discussed, either. Finally, [redacted]. Thus, the Parents were deprived of the opportunity to discuss and convey their knowledge of three salient aspects of the Student's disability that could have been substantially or causally related to Student's fighting on March 5. (FF 12-29.)

Failure to Utilize IDEA Test for Manifestation

The psychologist testified at length to the process by which the District conducted its manifestation review at the meeting on March 12, 2012. Nowhere did the psychologist advert to the IDEA test for manifestation as set forth in the regulations. 34 C.F.R. §300.530(e)(i). On the contrary, the psychologist testified to having reviewed diagnostic criteria for ADHD, taken from the internet, and asking the question whether or not the Student's conduct, including planning the fight, "fit" with the diagnostic criteria. (FF 20.) These criteria are not the sum and substance of the symptoms of ADHD; they are used for a specific purpose and are defined narrowly for that purpose. Thus, this exercise at the meeting did not suffice to consider whether or not there was a "substantial relationship" between the conduct and the disability. Those words were not used as the standard for decision at the meeting; thus, the group making the manifestation determination failed to carry out the mandate of the IDEA – it did not consider what the IDEA requires to be considered.

Issues Relating to the Substantive Decision

The District argues that the issue here is not whether the discipline meted out to Student was fair or appropriate, and I accept that caution. There was much evidence also on whether or not the Student's conduct was impulsive or disorganized and therefore the product of or substantially related to Student's ADHD; I do not reach those questions. Rather, I consider whether or not the manifestation determination met the IDEA's procedural requirements, and I conclude that it did not meet those requirements.

The manifestation determination must be more than a pre-determined formality, as it was in this matter. It must meaningfully consider the "conduct in question", and the salient features of the child's disability, based upon a thorough review of the record by a group that includes the Parents. The District failed to comply with these procedural mandates. I therefore conclude that the manifestation determination was inappropriate, and that the procedural deficiencies in this case could have resulted in an incorrect manifestation determination. Because there has not been an appropriate manifestation determination within ten school days of the decision to change the Student's placement as required by the IDEA, 34 C.F.R. §300.530(e), I order the District not to change Student's placement on account of the violation of the Student Code of Conduct on March 5, 2012.

CONCLUSION

I conclude that the District's manifestation determination was inappropriate, and I order that the Student not be removed from Student's neighborhood school on account of the behavior that resulted in violation of the Student Code of Conduct. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's manifestation determination was inappropriate.
2. I hereby order that the Student not be removed from Student's neighborhood school on account of the behavior that resulted in violation of the Student Code of Conduct.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 22, 2012