

*This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**Decision**

Due Process Hearing for S.F.

Date of Birth: xx/xx/xx

File Number: 6196/05-06LS

Date of Hearing:

May 16, 2006

**CLOSED HEARING**

Parties:

Parent(s)

Representative:

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Date of Decision:

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Hearing Officer:

David F. Bateman, PhD

## **I. BACKGROUND**

Student is a [teenaged] former student of the Franklin Towne Charter High School (hereinafter Charter School). She has a history of academic and behavior problems during the 2004-2005 school year. She is eligible for special education and related services as a student needing learning support. During the 2004-2005 school year she also receive counseling services of 60 minutes/week. In August 2005 an IEP meeting was held and the amount of counseling services was changed to 30 minutes/month.

During the fall of 2005 she started to exhibit behavior problems. The Charter School completed a functional behavioral analysis and worked with Student on contingency contracting. In December 2005, Student went into a different classroom and [was aggressive to another student who went] to the hospital. Student was removed from school and in January 2006 a manifestation determination meeting was held. The manifestation determination review indicated the behavior in question was not a manifestation of her disability. The guardian disagreed with the manifestation review and requested the present due process hearing.

The due process hearing was delayed to allow the guardian to obtain an advocate, scheduling difficulties with counsel, and because the guardian did not seek to have Student return to the Charter School, instead wanting Student to attend a different school.

The guardian requested the hearing seeking a ruling that the manifestation determination was inappropriate and the school had a pattern of seeking to remove Student instead of keeping her in school.

## **II. FINDINGS OF FACT<sup>1</sup>**

### **A. Background**

1. Student was born on xx/xx/xx. She is currently [late-teenaged.] (S-1, p. 1).
2. Student attended the Charter School for the 2004-2005 school year and in the 2005-2006 school year until the incident that was the reason for this hearing (NT 21).
3. Student is eligible for special education and related services as a student with a learning disability (S-1, p. 1)
4. The Charter School held an IEP meeting on September 30, 2003 (S-1, p. 15). The IEP lists a learning disability in reading and math. Student was to be provided counseling services on an as-needed basis.
5. An evaluation report was completed on September 12, 2003 (S-2, p. 14). The report indicates a learning disability in mathematics and language arts.
6. The Charter School held an IEP meeting on November 5, 2004 (S-1, p. 1). The IEP provides services for learning disability in math and reading. The IEP also provided for Student to receive counseling services up to 60 minutes a week (S-1, p. 9).
7. Student was referred for an assessment from CORA Services on October 11, 2004 (S-7).

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<sup>1</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number.

8. A meeting was held with Student on October 12, 2004 to explain problems she was having in school (S-4). Because of this meeting she was provided an “open-pass” to see the school psychologist at any time (NT 32).
9. On October 19, 2005, Student [engaged in problematic behaviors]. (S-6). The Charter School recommended counseling and daily report of her progress (NT 30).
10. The Charter School developed a behavior accommodation plan for Student on October 20, 2004 (S-8). The accommodations include daily progress report card and the special education office will work with her to make sure all discipline procedures are followed.
11. The Charter School completed a reevaluation of Student on October 29, 2004 (S-1, p. 1). The report indicates a learning disability in reading and math, but that she also experiences symptoms associated with anxiety (S-2, p. 7). It went on to say academic difficulties as well as anxiety symptoms are negatively impacting her classroom performance and should continue to be monitored and addressed.
12. A reminder was sent to Student regarding changes to her behavior plan and lack of compliance on January 19, 2005 (S-9). Student signed that she understood the reminder.
13. A meeting was held on February 4, 2005 between the Guardian and the Charter School regarding Student’s fighting in class (S-10). It was discussed that Student was no longer following the behavior plan.
14. Student attended summer school in 2005 (NT 36).

15. On August 18, 2005, the Charter School forwarded a document to the parent stating no evaluation was necessary at this time (S-3, p. 40). The Guardian agreed with the Charter School's recommendations.
16. The Charter School invited the Guardian to an IEP meeting on August 18, 2005 (S-3, p. 42).
17. The Charter School completed a reevaluation of Student's academic needs on August 22, 2005 (S-3, p. 36). The Charter School found that no additional data was needed to due to the more recent assessments being completed in 2004.
18. An IEP was developed on August 24, 2005 for Student's reading and math needs (S-3, p. 1). Counseling was to be provided by CORA Services outside of school once a week. Additionally, Student was to be provided counseling services for once a month for 30 minutes to review how she was doing (S-3, p. 10; NT 44).
19. A Notice of Recommended Educational Placement (NOREP) was issued on August 24, 2005 (S-3, p. 32). The NOREP provided for placement in full-time learning support classroom. The Guardian agreed to the placement.
20. A meeting was held on November 3, 2005 to address Student's behavior issues. Because of that meeting, Student was to be placed on daily report. There is a note on the summary that Student had not complied with the terms of the daily report as of November 30, 2005 (S-15). There are descriptions of two additional problems Student had in school regarding [redacted] other students (S-15, p. 3).

21. The School completed a functional behavioral assessment on Student on November 14, 2005 (S-3, p. 14). This was independently completed by the school (NT 46). The descriptions of the behaviors of concern include: cutting school and displaying an “I don’t care attitude,” and trying to get kicked out of class but not being violent. The recommendations include: May benefit from an administration of the Connors/BASC to get additional data (S-3, p. 29). Additionally, Student is to be provided classroom chores, positive verbal feedback, and ongoing staff contact with the guardian (S-3, p. 31).
22. On December 12, 2005, Student [engaged in aggressive behavior toward another student]. (S-22).
23. The school sent a letter to the guardian on December 16, 2005 indicating they were seeking an alternative placement (S-16). Additionally, in-home instruction would be provided.
24. Other schools were contacted regarding admission to different school (S-17).
25. Letters were sent to other schools seeking Student’s admission in December 2005 (S-17).
26. An expulsion hearing was scheduled for December 20, 2005 (S-25).
27. A manifestation hearing was held on January 4, 2006. The manifestation hearing determined the behavior was not a manifestation of her behavior (S-18, p. 4-5). The guardian objected that to the manifestation determination report because Student did not receive 30 minutes of counseling once a month.

28. A NOREP was issued on January 9, 2006 providing in-home instruction until permanent academic placement is established (S-21).
29. A due process hearing was requested on January 6, 2006 (S-19). Continuances were granted to allow the guardian to obtain an advocate and statements made that there was no desire to have Student return to the Charter School.
30. The school psychologist met with Student three times over the 2005-2006 school year (S-27). The meetings were brief (NT 97-100). She also stated she did not recommend additional counseling in school because she was receiving services through CORA (S-27).
31. The Guardian requested a reevaluation of Student on February 24, 2006 (S-23).



### **III. ISSUES PRESENTED**

Was the manifestation determination held by the District appropriate?

Did the Charter School have a pattern of trying to remove Student?

### **IV. DISCUSSION AND CONCLUSION OF THE LAW**

A Due Process Hearing was requested because Student's Guardian disagrees with the manifestation determination meeting made by the Charter School. The Charter School maintains that it has at all times satisfied the substantive and procedural requirements of the IDEA and Pennsylvania special education law with regard to the provision of special education and related services to Student. Therefore, it continues, there are no legal grounds to justify the relief sought by the Guardian in this proceeding.

#### **Appropriateness of the IEP**

The educational standard to which the Charter School is held is clearly established by statutes and the courts. The IDEA does not require states to develop IEPs that "maximize the potential of handicapped children," but requires the provision of "some" educational benefit to satisfy the Free Appropriate Public Education (FAPE) entitlement in IDEA. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The IDEA according to the United States Supreme Court in that case, further requires that the public school program, in order to be appropriate for the

eligible student, provide access to specialized instruction and related services which are “reasonably calculated” to provide the student with some educational benefit. *Id.* at 207-208. In the Third Circuit, this has been adopted through holdings that the student must receive more than “trivial” or “de minimus” benefit, through an IEP that provides a “basic floor of opportunity. See *Polk v. Central Susquehanna School District*, 853 F.2d 171 (3<sup>rd</sup> Cir., 1998), and *Carlisle Area School District v. Scoot*, 62 F.3d 520 (3<sup>rd</sup> Cir., 1995).

At issue in the instant matter is discipline; with respect to which federal law enables administration of school-wide discipline plans including immediate options or crisis situations involving drugs, weapons, or danger of physical harm. The law is constructed to assure proper administration and maintenance of a safe school environment.

The discussion in this case of the appropriateness of the IEP centered almost solely on the delivery of counseling services. Student’s IEP during the 2004-2005 school year called for 60 minutes of counseling once a week. An IEP meeting was held in August 2005 just prior to the start of the 2005-2006 school year and the amount of counseling was changed to up to 30 minutes once a month to be provided by the Charter School. The Charter School pointed out that Student was also receiving counseling from an outside agency during this time.

The testimony and focus of the due process hearing related to whether the counseling was provided as specified in the August 2005 IEP. The school psychologist who was primarily responsible for providing the counseling testified that she met with Student very briefly, three times in the fall of 2005 (NT 97-100).

The Guardian sought to claim that by not meeting with Student that the Charter School was not meeting the goals and objectives of her IEP, and that therefore the results of the manifestation determination were not valid. The Charter School at the manifestation determination meeting, indicated that it was recommending Student be disciplined as a student without a disability (NT 13-14). The issue in front of this Hearing Officer was the appropriateness of the manifestation determination report as generated by the Charter School, with respect to whether or not the behavior in question was a manifestation of the student's disability.

The specific incident that resulted in the Charter School conducting a manifestation determination report involves an incident where Student [was aggressive toward another student]. (FF:22).

The manifestation determination meeting was held and the Charter School found her behavior was not a manifestation of his disability. The Guardian disagreed to the determination made by the Charter School (FF:27).

The Charter School's manifestation determination hearing followed the regulations from IDEA 97:

The Individuals with Disabilities Education Act (IDEA) and the regulations specify several questions that must be answered in conducting a manifestation review, including: Was the review conducted by the District's IEP team and other qualified personnel? Did the IEP team consider all relevant information including evaluation results, information supplied by the parents and observations of the student, the student's IEP, and placement? Did the IEP team determine that the IEP and placement were appropriate and that special

education services were provided in a consistent manner with the IEP? Did the student's disability impair the student's ability to understand the consequences of his behavior? Did the student's disability impair the student's ability to control the behavior that was subject to the disciplinary action? (20 U.S.C. § 1415(K)(4).; 34 C.F.R. § 300.523.)

As a part of the manifestation determination meeting the District asked four specific questions, centered around the following areas:

Question One: The current IEP and placement are appropriate for the student.

Question Two: The specially designed instruction, related services and supplementary aids and services were delivered consistent with the IEP.

Question Three: The student's disability did not impair his/her ability to understand the impact and consequences of his/her behavior.

Question Four: The student's disability did not impair his/her ability to control his/her behavior.

The Charter School determined Student's behavior was not a manifestation of her disability. The Guardian disagreed arguing the counseling services delineated in the IEP were not delivered.

This Hearing Officer has reviewed the information presented in the hearing, and determined that the counseling services, while basic, were delivered. However, the regulations regarding manifestation determination changed in July 2005. Specifically, the changes made by IDEA 2004 which require a direct and substantial relationship between the student's conduct and his/her disability.

### **Manifestation Determination**

The regulations setting forth the disciplinary procedures relevant here currently only exist as to the predecessor of IDEA 2004, since regulations pursuant to the current statute are yet to be promulgated. In pertinent part, those existing regulations provide as follows.

#### **Discipline Procedures**

##### §300.530 Authority of school personnel.

A child with a disability may generally be removed from a setting for up to 10 consecutive days, to one that does not constitute a change of placement, providing services thereafter. Then, it states:

- (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.
- (b) General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services. (1) Except as provided in paragraphs (d)(3) and (d)(4) of this section, a child with a disability who is removed from the child's current placement pursuant to paragraphs (b), (c), or (g) of this section must--

(i) Continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1) of this section may be provided in an interim alternative educational setting.

(3) A public agency need not provide services during periods of removal under paragraph (b) of this section to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under §300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed under paragraph (d)(1) of this section, if any, and the location in which services, if any, will be provided.

(5) If the removal is for more than 10 consecutive school days or is a change of placement under §300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section and the location in which services will be provided.

Those regulations also set forth parameters for determining whether the conduct was a manifestation of the disability, at what must occur after that determination. They provide:

(e) Manifestation determination. (1) Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under §300.536, 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent

and the LEA) must 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 and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must--

(1) Either--

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.



(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child--

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) Notification. Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in §300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

§300.531 Determination of setting.

The interim alternative educational setting referred to in §300.530(c) and (g) is determined by the IEP Team.

(Authority: 20 U.S.C. 1415(k)(2))

§300.532 Appeal.

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request a hearing.

(b) Authority of hearing officer. (1) A hearing officer under §300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may--

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes the child would be dangerous if returned to the original placement.

(c) Expedited hearing. (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.510 through 300.514, except as provided in paragraph (c)(2) through (5) of this section.

(2) The SEA or LEA must arrange for an expedited hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.

(3) Except as provided in §300.510(a)(3)—

(i) A resolution session meeting must occur within seven days of the date the hearing is requested, and

(ii) The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the hearing request.

(4) For an expedited hearing, a State may provide that the time periods identified in §300.512(a)(3) and (b) are not less than two business days.

(5) A State may establish different procedural rules for expedited hearings under this section than it has established for due process hearings under §§300.511 through 300.513.

(6) The decisions on expedited due process hearings are appealable consistent with §300.514.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

§300.533 Placement during appeals.

When an appeal under §300.532 has been requested by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in §300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

The specific questions that needed to be addressed at this hearing were:

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

There was no evidence or testimony presented that the behavior demonstrated by Student was caused by, or had a direct and substantial relationship to her disability, nor was their evidence or testimony presented that the conduct in question was the direct result of the schools failure to implement the IEP. Granted the

monitoring of the counseling that occurred in the fall of 2005 was not overwhelming, but during that time the charter School met with Student numerous times, developed a daily report card (FF:20), and developed an FBA (FF:21). The school was aware of the problems she was demonstrating and was working to prevent problems from escalating. There were opportunities provided through “open door” policies to meet with staff when she wanted (NT 32), and even the Guardian had nothing but positive comments to say about the supervisor of special education for the Charter School (NT 157).

The Guardian sought to argue the Charter School had a pattern of working to exclude Student, and they wanted her out of the school. There was no evidence presented supporting this claim. As noted above, the Charter School staff met many times to address the problems Student presented. Granted they reduced the amount of counseling in August 2005 but her behaviors were not impeding her learning at that time. The Charter School developed an FBA, developed a behavior plan, and increased monitoring of her behaviors as a part of a daily report card. These are not the behaviors of a school seeking to remove a student from their midst.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the manifestation determination report developed by the District for Student was appropriate, and the Charter School did not have a pattern of behaviors to exclude her.

\_\_\_\_\_

Date

\_\_\_\_\_

Hearing Officer