

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 D.S.
Date of Birth: xx/xx/xx
File Number: 6209/05-06KE

Dates of Hearings:
February 6, 2006, February 15, 2006, February 24, 2006

CLOSED HEARING

Parties:
Parent(s)

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Date Transcript Received:
Date of Decision:
Hearing Officer:

March 1, 2006
March 6, 2006
David F. Bateman, PhD

I. BACKGROUND

Student is [a late teenaged] student eligible for special education and related services identified as needing learning support. Student is a resident of the Penn Delco School District. On December 13, 2005, a [weapon] was found in his vehicle at school. The District held a manifestation determination hearing and found that the behavior was not a manifestation of his disability. After the completion of the manifestation determination the District placed Student on homebound instruction.

The Parents filed a due process hearing challenging the adequacy of the manifestation determination, and the appropriateness of the recommendation of the District for a 45-day interim alternative placement.

The Parent disagreed with the manifestation determination report as completed by the District, and requested a due process hearing. They contend the behavior was a manifestation of his disability and that the 45-day interim alternative placement was inappropriate.

This due process hearing was held shortly after the U.S. Supreme Court issued their decision in the *Schaffer v. Weast* matter shifting the burden to the party filing for the hearing. Additionally, this hearing was briefly delayed, as there was a switch in hearing officers and to allow the Parents expert witness to return from vacation.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently [late teenaged]. (NT 11).
2. Student is a resident of the School District eligible for special education and related services as a student with a learning disability (NT 11).
3. Student is currently in his 12th grade year, and is a senior (NT 11).
4. The District completed an evaluation on Student on May 1995, recommending he repeat a grade or move into learning support (P-4). The Parents elected to have him repeat second grade.
5. The District completed an evaluation report in April 1999 finding Student eligible for special education and related services (S-7).
6. The District completed an evaluation report in May 2001 finding Student's continued eligibility for special education (S-10).
7. During the 2001-2002 school year there were two discipline infraction reports. This was for his eighth grade (P-19, p. 1).
8. The District issued an IEP on May 22, 2002 (S-12). The focus of the goals and objectives of his IEP are math.
9. During the 2002-2003 school year there was no infractions or student discipline reports (P-19, p. 4).
10. The District issued an IEP on May 6, 2003 (S-15). The focus of the goals and objectives of his IEP are math.

¹ 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.

11. During the 2003-2004 school year there was no infractions or student discipline reports (P-19, p. 6).
12. The District issued an IEP on April 15, 2004 (S-20). The focus of the goals and objectives of this IEP are monitoring his progress in his classes. He was also to be provided frequent positive monitoring (S-20, p. 5).
13. The District completed an evaluation report in April 2004 finding Student's continued eligibility for special education (S-18). Specifically, Student has a non-verbal learning disability affecting visual perceptual motor processing, sequencing, and recall.
14. During the 2004-2005 school year there was no infractions or student discipline reports (P-19, p. 8).
15. The District issued an IEP on April 6, 2005 (S-23). The focus of the goals and objectives of this IEP are monitoring his progress in his classes.
16. Student's SAT scores are as follows: critical reading 330, math 310, writing 280 (P-8).
17. On September 8, 2005, both Student and his Parents signed they received and reviewed the regulations in the student handbook for the High School (S-34, p. 62). The student code of conduct states: Students are not permitted to carry cell phones, radios, pagers, personal CD and cassette players or tape recorders during the school day. It goes on to state: Pepper spray will be confiscated. Students who are in possession and/or use pepper spray may lead to an expulsion.

18. On October 10, 2005 the district issued a report indicating the student was failing personal finance (P-5, p. 4). The report also indicated he neglects his homework.
19. There were no records of infractions or student discipline reports for the current school year prior to the December 13, 2005 incident (P-13, p. 3).
20. On December 13, 2005, the District completed a school incident report detailing items found in the car (S-25). Items found in the car include a [redacted and other items]. Pictures of the items found in the car are included in S-25.
21. Student was placed on a ten-day suspension (NT 63).
22. Shortly after the announcement of the suspension, the special education case manager wrote a letter in support of Student to the superintendent. His letter states Student is one of the best students he has ever taught (P-15).
23. The District completed a manifestation determination on Student on December 15, 2005 (S-27). The team concluded that the Student's academic difficulties did not impair his ability to control his behavior. There was discussion at the meeting relating [and] the team checked that the specially designed instruction, related services and supplementary aids and services were not delivered consistent with the IEP (S-27, p. 2). The team reviewed the IDEA 2004 content relating to discipline looking to determine if there was a direct and substantial relationship between the student's conduct and his disability.

24. The math teacher/case manager disagreed with the manifestation determination made by the District (S-27, p. 4).
25. The District issued a NOREP instituting a homebound placement for Student on December 15, 2005 (P-20). There is no signature from the Parents.
26. On December 19, 2005 the math teacher/case manager authored a letter of recommendation for Student to attend a trade school (P-23). The letter describes Student as an asset to any program that chooses to accept him.
27. The District scheduled an expulsion hearing on January 3, 2006 (P-24).
28. The District initiated a 45-day alternative placement for Student on January 5, 2006 (S-30).
29. The District issued a NOREP on January 5, 2006 for homebound instruction (P-30). The Parents did not approve the recommendation and requested a due process hearing.
30. Student is diagnosed with a math disability requiring itinerant learning support (NT 73).
31. The midpoint marking period report card indicted failing grades in several subjects (P-21). This report was issued December 16, 2005. The report indicated he fails to complete in-class work.
32. On December 26, 2005 the wrestling coach wrote a letter of support for Student's post-secondary application (P-25).
33. The District sent a letter to the Parents on January 5, 2006 indicating Student would continue to receive educational services in a 45-day alternative placement with services in the home (S-30).

34. Student has a prescription for Focalin, a medication for attention deficit disorder (P-32).
35. The Parents obtained an independent psychological evaluation of Student on January 16, 2006 (P-1). This psychological evaluation found problems with executive functioning, difficulty with auditory processing, particularly immediate memory for information presented once and recognition after a delay (P-1, p. 14). He also requires repetition for learning. He was also described as a slow processor (NT 567). Scores on the Woodcock Johnson Tests of Achievement-III indicate standard scores of 75 in math fluency, 80 in calculation, 80 in writing fluency, and 84 in reading fluency.
36. Student's first semester grades indicate a 75 in art, 76 in personal finance, 61 in British Literature, 76 in weight training, 65 in video journalism, 60 in comp app, and a 58 in geometry (P-31). These number grades equate to four F's (NT 321).
37. The District offered a monthly report on homebound instruction for January 2006 (S-33). The report indicates a 92 average in economics, 92 in computer applications, a 76 in mathematics, and a 92 in English.
38. The Parents had authorized an evaluation on Student by the District, but on January 23, 2006, the Parents withdrew their permission due to a recently completed independent educational evaluation (S-31).
39. Student has been receiving homebound services since January 2005 (P-34, S-33).

40. The District completed an evaluation on Student on February 13, 2006 (S-35). The evaluation found he is a student with average cognitive ability, and no longer exhibits a significant difference between his nonverbal and his verbal abilities (S-35, p. 14). The report found his continuing eligibility for special education as a student with a learning disability in math.

III. ISSUES PRESENTED

Was the manifestation determination held by the District appropriate?

Was the District's recommendation for a 45-day interim alternative placement appropriate?

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because Student's Parents disagrees with the manifestation determination meeting made by the District. The District 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 Parents in this proceeding.

Student's Educational Placement

Before there is a discussion regarding the manifestation determination process, a review of the necessary components of the law is appropriate. It will start with a discussion of the rationale for a manifestation determination, and the steps that are a part of the process.

Appropriateness of the IEP

The educational standard to which the District 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 (3rd Cir., 1998), and *Carlisle Area School District v. Scoot*, 62 F.3d 520 (3rd 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.

Manifestation Determination

Discipline Procedures

§300.530 Authority of school personnel.

(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.

(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))

There was not much discussion of the appropriateness of the IEP for Student; however, the Parents did raise the issue (NT 461). It should be noted that during the semester of the incident Student was receiving four F's on his report card (FF:36). There was also little discussion regarding the fact that the manifestation

determination indicated he understood his behavior (P-9, S-2). The team, at the manifestation determination meeting, indicated that it was recommending Student be disciplined as a student without a disability. The issue in front of this Hearing Officer was the appropriateness of the manifestation determination report as generated by the District, 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 District conducting a manifestation determination report involves an incident where there was a search of the parking lot at the high school and found several items, most notably a [redacted], in the student's [vehicle]. Additional items were found in the [vehicle] [redacted]; however, the focus of the manifestation determination that is the focus of this hearing was the presence of the [redacted].

[Redacted].

The student code of conduct classified the presence of a [redacted] as a level IV misconduct (S-34, p. 35). Level IV acts are those which result in violence to another's person or property or which poses a threat to the safety of others in school. These acts may clearly be criminal in nature and the administrative staff will immediately contact the proper law enforcement authorities.

The manifestation determination meeting was held and the District found his behavior was not a manifestation of his disability. The Parents disagreed to the determination made by the District (S-27, p. 4).

The first part of the manifestation determination hearing the districts 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.

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.

On question two, the team checked the answer false. It went on to explain on the next page (S-27, p. 3) that there was a difference between what the IEP said about

contacting parents and the contacts that were made by the District. Specifically, the contacts relating to the IEP were made by the Parents and not the teachers. The Parents also stated that the team was at a standstill on Question Four, but due to the length of the meeting, and the fact that Question Two had already been checked as false the team agreed to checking Question 4 as true (NT 466).

During the meeting the director of special education and the assistant superintendent were called into the meeting and they highlighted the changes to discipline that were made under IDEA 2004. Specifically, the team went on to review changes made by IDEA 2004 stating that there must be a direct and substantial relationship between the student's conduct and his disability. The manifestation determination document as prepared by the District states:

The current IEP for this student indicated that the parent would be notified if Student were to fall behind in assignment competition. There is no direct and substantial relationship between the conduct in question and the failure to implement that provision (S-27, p. 4).

The team concluded that Student's behavior was not a manifestation of his disability. Student's case manager/math teacher and the Parents disagreed with the determination, and checked they disagreed with the team. The Parents then filed the present due process hearing.

After the manifestation determination meeting, Student was placed on homebound instruction for 45 days. The Parents are disputing the appropriateness of the placement during the 45 day period and the services he is being provided.

After the incident Student received an independent psychoeducational evaluation. The independent psychologist who evaluated Student stated the lack of awareness of the [redacted] in the [vehicle] is a direct manifestation of his disability (NT 586). She went on to say that she does not think he knew the [redacted] was in the [vehicle].

The case manager who has worked closely with Student stated he felt it was a manifestation of his disability (NT 335-336). He stated he did not think Student knew that he brought the [redacted] on to the school property, and that he thinks Student forgot about having it in his [vehicle] (NT 336). He also described other instance of forgetting by Student (NT 337-340).

This Hearing Officer agrees with the independent evaluator that his behavior was a manifestation of his disability (NT 586). This hearing officer was convinced by the independent evaluator's knowledge, expertise, and many years of experience. This is consistent with the remarks made by the individuals who know Student the best, that he has a memory problem (NT 335-336). Given the fact that this student has a memory problem that is clearly documented over time, that the individuals who know him the best, the math teacher/case manager, the Parent, and the independent evaluator all indicate his behavior was a manifestation of his disability, this hearing officer finds it was a manifestation of his disability. Additionally, the student has had no disciplinary infractions in the past three years. There is also clearly not a pattern of endangerment/aggression manifested by Student. The District is correct that IDEA 2004 changed the determination about whether there is a nexus between a disability and the disciplinary infraction. However, this Hearing

Officer believes there is a nexus between the behavior exhibited by the student and his disability. Not only would the District find that there was a manifestation between his disability and the action under IDEA 1997, it should have with the new regulations.

Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996).

The Parents argue that the placement made by the District was not determined by his IEP team, and that the placement is unduly restrictive. It is clear that before he was placed on homebound instruction he was receiving low grades, mostly F's. After starting homebound instruction, his grades improved, and all of the homebound instructors who testified indicated a 92 average in economics, 92 in computer applications, a 76 in mathematics, and a 92 in English (FF:37). Clearly, he is making progress.

Additionally, the District has the right to place a student in an interim alternative placement as highlighted in §300.530:

(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;

Given that it is clear the dispute in this case involves the possession of a [redacted], the District has the authority to remove a student to an interim alternative educational placement for 45-days. Therefore, given that the District has the right to remove a student to this placement and the student is making progress no award of compensatory education is due.

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 inappropriate, and that the possession of the [redacted] in the [vehicle] was a manifestation of his disability. The Parents demand for compensatory education is not supported.

Date

Hearing Officer