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# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: DG

Date of Birth: xx/xx/xx

Dates of Hearing:  
September 11, 2006, September 28, 2006  
CLOSED HEARING  
ODR #6816/ 06-07 LS

Parties to the Hearing:

Mr. and Mrs.

Bethlehem Area School District  
1516 Sycamore Street  
Bethlehem PA 18017-6099

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Angela Uliana- Murphy, Esquire  
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September 28, 2006

October 13, 2006

William F. Culleton, Jr., Esquire

## INTRODUCTION

Student is a xx year old student of the Bethlehem Area School District who is considered eligible for a plan of services under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1973). (NT 17-11 to 18-20.) He is in tenth grade. (NT 19-21 to 25.) His Parents, Mr. and Mrs. seek reversal of the District's manifestation determination of June 21, 2006. (NT 26-11.) They assert that the Student's admitted act of bringing prescription medicine to school and handing it to another student was impulsive and a manifestation of his diagnosed ADHD, and that the District did not give proper consideration to the evidence at the manifestation determination session. The District contends that the Student's ADHD does not typically manifest itself in impulsiveness, and that the Student's behavior was not impulsive because it was planned over a period of several days.

## PROCEDURAL HISTORY

The Parents requested due process by letter of counsel dated August 3, 2006, received by the Office for Dispute Resolution on August 7, 2006. The Parents requested identification, an appropriate IEP and services, tuition reimbursement, reimbursement for the cost of an independent IEE, compensatory education, and a decision as to the appropriateness of the District's recent manifestation determination. The parties waived the resolution session and, upon admission of the Student to school at the beginning of the year pending resolution of this due process proceeding, the Parents waived expedited treatment of the matter by email message dated August 15, 2006. There was no objection by the District.

Hearing sessions were held on September 11 and 24, 2006. At the outset, the parties stipulated that the only issue remaining between them was the Parents' challenge to the manifestation determination of June 21, 2006. Claims for identification, IEP and appropriate services, reimbursement for tuition and independent evaluation, and compensatory education were withdrawn without prejudice. (NT 33-7 to 34-4; 36-4 to 37-15.) The hearing officer determined that the claims for an appropriate 504 plan, services and accommodations were not ripe for determination because the District had offered to convene a 504 meeting potentially to alter the 504 plan; the hearing officer declined to include that as an issue in the pending due process proceeding. (NT 34-5 to 20.) The claims regarding the Student's suspension were determined to be moot and not listed as an issue. (NT 35-3 to 15.) A claim regarding the length of time of the Student's suspension was withdrawn without prejudice. (NT 35-15 to 22.) During the course of the hearing, Parents' counsel affirmed that the only issue being raised as a basis for challenging the manifestation determination was that the Student's behavior was not caused by or directly and substantially related to the Student's disability of ADHD. (NT 280-11 to 281-3.)

## ISSUES

1. Did the manifestation team err in determining that the Student's behavior was not a manifestation of his disability?
2. Did the manifestation review team review all relevant information, including relevant information provided by the Parents in determining whether or not the Student's behavior was a manifestation of his disability?

## FINDINGS

1. The Student is a xx year old resident of the District and is eligible for the protection of section 504 of the Rehabilitation Act of 1973. (NT 18-13 to 19-5.)
2. The Student is in tenth grade in the District. (NT 19-21 to 20-3.)
3. The Student began in the District in kindergarten and attended first and part of second grade with the District at the [redacted] Elementary School. (NT 42-12 to 14; S-2 p. 1, P-8 p. 1.)
4. The Parents placed the Student in the Private School for grades three through six. (P-9 p. 2, P-8 p. 1, P-7 p. 1, P-3 p. 1.)
5. The Student returned to the District and attended the District's [redacted] Middle School for grades seven through nine. (S-22 p. 1.)
6. The Student began exhibiting behavioral difficulties in first grade, including calling out in class, getting out of his seat, cutting up paper and not finishing assignments. (NT 42-12 to 25; S-2 p. 3.)
7. During the summer of 1998, after the Student's first grade year, the District issued a CER that found the Student to be gifted and recommended behavioral interventions in the regular classroom. The IEP dated September 16, 1998 recommended gifted support classes with itinerant supplemental intervention in the regular education classroom. (S-2 p. 3, S-3 p. 2.)
8. In January 1999, in the middle of his first grade year, the Student was seen by a private school psychologist. (NT 42-12 to 14.)
9. The private psychologist through standardized testing found attentional deficits, processing delays, difficulties in auditory processing, memory and visual motor integration and discrepancies between ability and performance, meeting diagnostic criteria for Attention Deficit Disorder. There is no documentation

that she or anyone else diagnosed ADHD combined type with prominent features of impulsivity during the Student's early years in school. (NT 103-10 to 104-21, 119-1 to 16; P-11 p. 1,3.)

10. While the private psychologist listed impulsivity as a behavior of concern, teacher reports were not found to be statistically significant for impulsivity, nor was there a positive score on testing for hyperactivity. Classroom observation noted only "motoric restlessness", which was attributed in part to "academic frustration." In its summary, the report focused upon attentional difficulties rather than impulsivity. (P-11 p. 3, 4.) A behavior plan was recommended, and the Student subsequently began receiving medication for Attention Deficit Disorder. (NT 121-5 to 25, 169-17 to 170-23; P-11, S-28 p. 5.)
11. The private psychologist reported results of the McCarney ADD rating scale filled out by one of the Student's teachers at the time. The Student scored within the normal range in hyperactive behavior, and clinically significant for inattentiveness. The most prominent manifestation of impulsivity was rushing through schoolwork. (NT 53-8 to 15, 107-10 to 110-15.)
12. In April 1999, the Student was given a screening evaluation for admission to a private school for children with learning disorders. The screening recommended educational intervention, based upon evidence of problems with short term memory, auditory processing and fluid reasoning, as well as delays in academic achievement. Although the report mentioned self esteem issues and avoidance behavior, there was no mention of impulsivity. (P-10.)
13. In June 2000, after the Student completed third grade in the private school, the private school psychologist issued a report for the Social Security administration noting the Student's learning disability but not mentioning impulsivity. (P-9.)
14. The Carbon Lehigh Intermediate Unit evaluated the Student in May 2002 when the Student was in sixth grade at the private school. The report noted some difficulties consistent with ADD and some "restlessness and impulsivity." It recommended behavioral strategies in the regular classroom. (NT 125-8 to 126-3; P-8 p. 2, 3.)
15. In June 2003, after the Student completed sixth grade in the private school, the District provided an ER declining to identify him under IDEA, but recommending a 504 service agreement. The report noted impulsive rushing through tasks during testing, as well as calling out and playing with things on his desk and talking to others in class. (P-7.)
16. The Section 504 Accommodation Plans dated August 29, 2003 and September 2, 2004 did not address impulsivity or rushing through tasks. (S-11, 13.)

17. Upon his return to the District's [redacted] Middle School for seventh grade, the Student received good grades and was reported to have adjusted well. (P-3 p. 1.)
18. In eighth grade, the Student suffered from symptoms of depression and his ADHD medication was adjusted, alleviating the symptoms. However, during both his seventh and eighth grade years, the Student did not exhibit poor judgment or impulsive decision making while at school that was in any way similar to the behavior later made subject to a manifestation determination. (NT 178-1 to 14, 316-21 to 318-22; P-3 p. 1.)
19. In ninth grade the Student's grades declined and he failed two courses. (P-3 p. 1.)
20. Before May 2006, the Student never had a disciplinary infraction in the District; however, he had brought a pocket knife into school in first grade, and he was suspended for this infraction. (NT 122-19 to 25, 16503 to 16, 291-2 to 292-7; P-4 p. 2.)
21. On a Friday in May 2006, another student was talking about his own drug use to a group including the Student. The speaker encouraged the others to bring drugs to him in school. (NT 127-17 to 129-3, 189-21 to 25, 228-3 to 14, 301-6 to 22; P-3 p.2.)
22. That night, the Student found prescription anti-inflammatory medicine that had been given to him for an injury. The Student put the medicine in a plastic bag, discarded the bottle, and put the bag into his back pack. (NT 127-17 to 129-3, 228-14 to 23.)
23. On the following Monday, the Student carried the medicine with him to school in the bag, and kept it in the bag until the fourth period. At that time the other student saw him and asked him if he had any drugs, and the Student gave the medicine to that student. (NT 127-17 to 129-3, 190-1 to 5, 229-17 to 231-3, 301-16 to 22; P-3 p. 2, S-18 p.4.)
24. About one week later, the older student and others were found in possession of the medicine and identified the Student as the source. (P-3 p.2.)
25. On May 18, 2006, the Student was suspended for bringing prescription medications into school and giving them to another student. The suspension extended for thirteen school days. (P-3 p. 2, P-4 p. 2.)
26. This behavior was highly unusual for the Student and the Parents were shocked to hear of it. (NT 189-10 to 12.)

27. The Student gave the medicine to the other student in order to gain social advantage with that student and others. It was done in a planned and clandestine way, not impulsively. (NT 231-8 to 23, 347-22 to 348-2, 348-2 to 350-5.)
28. Until this incident, the documentary record of the Student's disability reflected ADHD with predominantly inattentive features. (NT 346-9 to 25.)
29. After this incident, another private evaluation in July 2006 found that the Student exhibited poor decision making that warranted tutoring in avoiding self destructive behavior and social decision making. This included impulsive responses to questions presented in testing. The Parents reported concerns in the areas of self monitoring of social behavior and self inhibition. The evaluator indicated only that any self-regulation problems would affect behavior over a short time period. (NT 144-25 to 146-13; S-28 p. 8, 9, 19, 25; S-31 p. 9, 15, 16, 17, 18, 19.)
30. On June 21, 2006, the District convened a manifestation determination meeting with the participation of the Parents, at which it determined that the behavior was not a manifestation of the Student's disability. (NT 297-6 to 10; S-21.)
31. In preparation for the meeting, District staff reviewed all available documentation in the Student's educational and clinical record. (NT 287-9 to 297-5, 325-6 to 20.)
32. The staff at the meeting reviewed the report of the Parents' private psychologist. (NT 314-13 to 19, 317-25 to 318-22.)
33. The staff did not prejudge the manifestation determination before hearing from the Parents. (NT 313-5 to 314-24, 316-21 to 317-22, 334-17 to 25, 384-11 to 385-1.)

## DISCUSSION AND CONCLUSIONS OF LAW

If a District wishes to discipline an eligible student in a way that changes the student's current educational placement, it must first determine whether or not the action in question was a manifestation of the student's disability. The Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1415(k)(1)(E)(i) provides:

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 local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency) shall 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 local educational agency's failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

If a student's parent disagrees with any decision regarding placement or the manifestation determination the parent may request an expedited hearing at which a hearing officer will hear, and make a determination, regarding the appeal. 20 U.S.C. § 1415(k)(3)(A) and (B) and (4)(B). In this matter, the Parents are exercising their rights under the statute. They have specified that their challenge to the manifestation determination is based solely upon subclause I.

In applying this subclause to the behavior in question, the hearing officer is mindful that its plain language permits manifestation to be shown even when the disability does not cause the behavior in question. This hearing officer views the "direct and substantial relationship" test to be applicable when non-disabling factors such as intention and choice are undeniably part of the causal mechanism of the behavior. Nevertheless, the hearing officer is also guided by the words "direct" and "substantial." Literally, the presence of disability as one of several causal factors is insufficient to establish manifestation. The hearing officer believes that the statute's language calls upon him to weigh the extent to which the disability influenced the behavior, as well as its degree of remoteness in the causal chain of events.

#### CREDIBILITY

The Parents introduced the testimony and reports of their private evaluator, a licensed psychologist and certified school psychologist. (S-22 p. 1.) The witness has a Masters Degree in Learning and Behavior Disorders and has practiced in the areas of education and school psychology for over twenty years. (NT 10 to 42-6.) She has seen the Student intermittently for about eight years, sometimes for periods of frequent counseling. (NT 42-12 to 14, 54-17 to 18, 57-7 to 14, 93-23 to 102-7.)

The witness argued that the behavior in question was caused by the Student's diagnosed Attention Deficit Hyperactivity Disorder. However, in her testimony it became clear that the witness takes a global view of the disabling influence of ADHD in the Student. When asked on direct examination to identify those symptoms of ADHD that contributed to the behavior, the witness cited a variety of symptoms. She listed impulsivity, emotional thinking, lack of a social group to help the Student work through social decisions and consequent poor social judgment, his lack of abstract reasoning

ability, his history of taking objects which he liked, poor planning and organization, and what she called a tendency to “shut down.” (NT 66-25, 67-1 to 18, 69-11, 70-23 to 25, 74-1 to 8, 75-1 to 18, 86-11 to 18.) As examples of the latter, she cited the Student’s frequent terse answers to questions asking for explanation, and his tendency to become obsessed with his interests. (NT 74-14 to 17, 75-1 to 18.) Thus, in the witness’ view, ADHD is disabling to the Student in almost every area of his life. (NT 68-8 to 24.)

It is significant that the witness characterized the Student’s ADHD symptoms from his earliest years as being characterized prominently by “impulsivity.” (NT 42-17 to 25, 56-1 to 18.) She stated that this was the chief concern of the teacher at the time. (NT 48-13 to 49-2.) Reported behavior included calling out and leaving his chair. (NT 42-17 to 25.) This continued at a later age by not following rules, going into places where he was not allowed to be when visiting friends, and stealing toys from stores, and acting as the “class clown.” (NT57-15 to 58-7, 61-25, 65-25 to 66-3.)

However, the written record does not corroborate this emphasis on impulsivity in the Student’s behavioral profile in his early years. The witness’ original report was written for the Student’s pediatrician, when the Student was in second grade, to help him determine whether or not to place the Student on Ritalin. (P-11 p.1.) While the report did mention impulsivity more than once, it focused upon several other behaviors of concern, including restlessness, poor listening, and short attention span. (FF 9.) Moreover, the rating scales reported did not rate the Student’s impulsivity as clinically significant. (FF 9, 10, 11.) Thus, the scores themselves contradict the witness’ assertion that the Student’s impulsivity was the prominent feature of his attention deficit disorder at the time the witness evaluated him most intensively. Moreover, her report’s summary of the salient features of his attention deficit disorder did not focus on impulsivity; on the contrary, it focused upon attentional issues. (FF 10.)

The report concludes that the Student’s learning difficulties in academic areas are impacted by deficits in auditory processing and visual/motor integration. (P-11 p. 3.) One goal for treatment was improvement of “self-control”, but this was listed as only one of four issues to be addressed by an accommodation plan. (P-11 p. 4.) The diagnosis of ADD was considered, but not ADHD, nor was it characterized as “combined type”, which is a term of art sometimes used for ADHD with associated features including impulsivity. (NT 103-10 to 18, 104-24 to 105-1, 119-1 to 16; P-11 p. 3.)

Even more telling, in a report dated June 27, 2000, the witness wrote to the Social Security Administration in support of the Student. (P-9.) At this time the Student was attending a private school where he is reported to have done well both behaviorally and academically. (NT 63-5 to 11; P-9.) In relating the history in the first paragraph of her letter, the witness stated that the Student was referred initially for “performance problems in school – following directions, attention, completing work, following routines.” The resulting diagnosis was “ADD.” The report continues: “Poor listening skills, inattention, distractibility and motor restlessness were the most concerning behaviors.” (P-9.)



The hearing officer contrasts this summary of the history with the witness' testimony in which she emphasized repeatedly that impulsivity was the prominent characteristic of the Student's presentation during the earliest period in which she was receiving reports and observing the Student. If this presentation were so prominent, it is incongruous that it would not be mentioned at all in the letter to the Social Security Administration.

It is also significant that the witness had been seeing the Student immediately before the incident, in the Spring of 2006. (NT 83-10 to 17.) Her counseling goals had included motivation, doing homework, honesty and social involvement. (NT 83-6 to 84-4.) If impulsivity were such a prominent symptom of his illness, one would expect that the witness would have been dealing with it in counseling sessions, yet it was not a goal, virtually on the eve of the incident in question. In fact, the behavior was highly unusual for this Student and the Parents were shocked to hear it. (FF 26.)

The witness' view on this case derives, not from behavior observed or detected through testing, but from the witness' personal opinion that the paradigm that describes this disability is shifting, from a view that the disability is essentially a disorder of attention (as manifested in the DSM-IV, (NT 129-11 to 18)) to a view that ADHD is essentially a disorder of emotional inhibition. (NT 58-3 to 61-1, 141-8 to 143-18, 146-22 to 147-11.) While the hearing officer is in no position to take sides in that scientific debate, (NT 367-6 to 368-20), he can conclude that the witness' reliance upon her personal theoretical view without reference to probative facts, (NT 148-3 to 149-21), rendered her conclusions, (NT 152-10 to 154-21), purely speculative and entitled to little weight.

Underlying this credibility determination is the fact that the witness testified primarily about an evaluation that she had reported many years ago, while the Student was a small child. She had not observed the Student in the classroom since then. (NT 102-8 to 15.) She qualified her testimony by pointing out that she was merely providing test scores for the pediatrician, who would make the diagnosis, and that her evaluation was essentially a "screening" evaluation. (NT 47-9 to 23, 89-22 to 25.) In later years, her assessments were not full evaluations, but "clinical assessments" for purposes of counseling. (NT 89-13 to 22.)

## CAUSALITY

There is no question that the Student suffers from ADHD, and that one manifestation of the Student's ADHD is poor executive functioning that leads to poor decision making. The question is whether or not the specific behavior in question was the product of this disability. The hearing officer gives little weight to the testimony of the private psychologist that the disability was a causal factor in this case, for reasons stated above. In fact, even the witness did not assert that the disability was the predominant or immediate cause of the behavior. When pressed to clarify this, the witness indicated that she viewed the disability as one of several causal factors. (NT 64-9, 150-20 to 151-2, 155-8 to 16.) The Student's Mother was of the same view, indicating

that part of the behavior was based on the desire to gain social standing through the approval of the other student. (NT 193-16 to 25.)

In addition, the preponderance of the documentary evidence weighs against a finding of causation. Most evaluations in evidence reported no behavioral symptoms resembling the behavior in question. Some did note impulsivity, but this was described as a habit of answering questions without thinking and listening carefully to the directions. (FF 9-16, 28.) Never was it suggested that the Student was likely to engage in serious disciplinary breaches as a result of his ADHD. As a result, throughout the Student's history in school, his evaluations addressed attention and organization, rather than behavior, and where behavior was addressed, evaluators and educators gave relatively less consideration to behavioral manifestations of the Student's disability. (FF 28.). Plainly, the prominent characteristics of his ADHD did not include serious disciplinary violations. (FF 20.) Thus, the record as a whole militates against a conclusion that the behavior in question was caused by the Student's ADHD.

#### DIRECTNESS AND SUBSTANTIALITY

As noted above, the hearing officer considers the "direct and substantial" part of the statutory test for manifestation to be applicable where, as here, true causality is not established. However, here, even this less demanding test is not met. Here, the disability was not directly related to the behavior in question because of the time sequence. All witnesses agreed that the Student was asked to bring drugs to school on a Friday, and did so on a Monday, in the fourth "block" or period. Thus, a substantial period of time intervened between the initiation of the impulse and the act. The hearing officer finds nothing of weight in the evidence to show that, as the Parents contend, the act of handing the medicines to the other student was the continuation of an impulse that continued uninhibited by the Student's executive decision making faculties for an entire weekend and the better part of another day.

Nothing in the record indicates that the Student was in a constant state of disinhibition. He had only one other disciplinary infraction in the District, and none in the two years prior to the behavior in question. (FF 20.) Most reports of testing, and indeed most teacher reports described him as well behaved and able to focus on demand to the task at hand, despite the influence of his attentional deficits. (FF 9-16, 28.) Thus, he demonstrated throughout his school career that he was able to exert executive functioning over his impulses at least most of the time.

Nor was there any evidence in the record that the Student manifested a tendency to have uninhibited impulses over lengthy periods of time. The only references to impulsivity were observations of talking out of turn and rushing through work. (FF 9-16, 28.) The hearing officer simply cannot make the leap that somehow equates the Student's breach of discipline with these reported symptoms of his disability.

The hearing officer is left with the private psychologist's explanation that the Student "shuts down." (NT 152-13.) The Parents' expert witness' theory is that the student compartmentalizes his thoughts so thoroughly that he can follow an impulse without thinking of consequences by putting the medicine in his backpack on Friday, then forget all about it, thus blocking any thought about it for an entire weekend and the better part of a Monday. (NT 152-10 to 154-21.) Then the impulse is reactivated on Monday when the Student is asked for the "drugs." (NT 154-7 to 21.) This theory as presented was purely speculative; no factual basis was given for it deriving from the events themselves or any specific statement of the Student. *Ibid.* Moreover, the theory is contradicted by the witness' admission that the Student probably became anxious on the Sunday night before, or the Monday of the event, thus suggesting that he indeed thought about it before he did it. (NT 154-11, 157-5 to 12.) The hearing officer gives no weight to this theory as a depiction of what actually happened in this case.

One other factor gives pause: the Student testified that he did not understand that the "drugs" prohibited by the District's policy included "medicines"; rather, he thought that the policy applied only to illegal or street drugs. (NT 241-22 to 243-6, 247-12 to 13, 248-2 to 10, 253-12 to 254-18.) While the Parents argued that this was caused by the Student's ADHD, (NT 262-5 to 21), this was not mentioned by the Parents' expert witness in support of her theory. Nor was it supported in the many evaluation reports on the student over the years, many of which were based in substantial part on reports of the Parents. (FF 9-16, 28.) Because of this, the hearing officer finds that there is less than a preponderance of evidence to support the notion that this misunderstanding was the substantial and direct product of the disability.

#### PROCEDURAL VIOLATIONS

The hearing officer rejects the Parents' argument that the manifestation determination violated the procedural requirements of the IDEA. (NT 197-1 to 15.) There simply was no evidence of any procedural violation. The Parents argued that the private psychologist's report was not considered, but the District's witnesses credibly testified that they had considered the report. (FF 32.) The Parents argued that the manifestation team's District representatives had made up their mind before the hearing, but the Parents offered no evidence to that effect beyond a sense or feeling that they had upon entering the meeting room. (FF 33; NT 197-1 to 12, 263-2 to 18.) This is insufficient evidence to support a finding of failure to follow procedural rules.

#### ETHNIC HARRASSMENT

The Parents argue that the Student's behavior was due to the oppression of ethnic harassment he was suffering at the hands of other students because he is [ethnicity redacted]. (NT 195-8 to 196-11, 232-22 to 234-2.) Because this is such a serious charge, the hearing officer feels constrained to address it, albeit in a limited way. The Parents' expert attempted to tie this charge into her theory that the behavior was impulsive in nature; however, the hearing officer has determined that the evidence in support of this underlying theory is insufficient. It follows that the charge of ethnic harassment is not relevant legally to this due process proceeding. If the charge is true - and the hearing

officer makes no finding that it is true - such ethnic harassment would not be due to disability; thus, it would not prove manifestation. There is insufficient evidence to show that such harassment, added to the Student's asserted impulsiveness, added to the emotionality of his decision to violate District rules. Thus, it would be inappropriate for this administrative hearing officer to address this charge any further.

ORDER

1. The District did not err in finding that the Student's behavior was not a manifestation of his disability.
2. The District employed proper procedures in conducting its manifestation determination.

DATED: October 13, 2006

*WILLIAM F. CULLETON, JR. ESQ.*  
William F. Culleton, Jr. Esq.  
HEARING OFFICER