PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

EXPEDITED DUE PROCESS HEARING

Name of Child: CB
ODR #9028/07-08 AS

Date of Birth: xx/xx/xx

Date of Hearing: July 16, 2008

CLOSED HEARING

Parties to the Hearing:	Representative:
Ms.	Pro Se
Folk Arts Cultural Treasures Charter School 1023 Callowhill Street Philadelphia, Pennsylvania 19123	Maria Ramola, Esquire Latsha, Davis, Yohe & McKenna 350 Eagleview Boulevard Suite 100 Exton, Pennsylvania 19341
Date Transcript Received:	July 19, 2008
Date of Decision:	July 20, 2008
Hearing Officer:	Linda M. Valentini, Psy.D.

Background

Student is pre-teen aged eligible student enrolled in the Folk Arts Cultural Treasures Charter School (hereinafter FACT). Pursuant to an incident on the last day of school FACT conducted certain investigatory activities and determined that Student was involved. Student's mother (hereinafter Parent) asked for this expedited hearing alleging that FACT made a decision to recommend expulsion of her child without first conducting a manifestation determination.

As a manifestation determination meeting was in the process of being scheduled just before the hearing date, FACT moved for a dismissal and both parties asked for a continuance. This hearing officer denied the requests for a continuance as this matter had Expedited status, and also denied FACT's Motion to Dismiss as the Parent was unwilling to withdraw the hearing request. An evidentiary expedited hearing was held.

FACT received the hearing request on June 27, 2008 and ODR received its copy on the same day. Unless otherwise specified, in the IDEIA "day" means calendar days. Therefore this due process decision is due on July 27, 2008.

Issue

Did the Folk Arts Cultural Treasures Center withhold information from Ms. about her child's right to a Manifestation Determination in violation of Student's procedural rights under the IDEIA?

Findings of Fact[1]

1. Student is an eligible student who is classified as having a specific learning disability in reading and math and speech/language impairment. (NT 14)

2. On June 18, 2008, the last day of school, Student participated in an incident on the school bus. (NT 16, 25; S-7)

3. The Dean of Students was informed of the incident on June 23, 2008. The Dean of Students informed the Principal. (NT 16, 25)

[1] The reader must note that the testimony of the special education teacher was taken using a cell phone as a speaker phone and that certain portions were difficult to hear and had to be repeated. At times the hearing officer, the school's attorney, and/or another participant repeated what the witness had said; this at times makes it appear as though these individuals were testifying at that time, which was not the case. (NT 67-79) As the record will show the hearing officer asked that this witness be called to testify. NT 66-67)

4. On June 25, 2008 all involved students and their parent(s) met individually with FACT staff. This was the first contact school administration had with Student and the Parent about the incident. (NT 16-17, 26-27)

5. After hearing from the students involved and their parent(s) the Dean of Students and the Principal met together immediately and then met again with each child and his/her parent(s). The Dean of Students and the Principal "had decided that we were going to proceed with recommending expulsion for the whole process for Student". (NT 17)

6. The Dean of Students and the Principal met with the Parent and told her that they were recommending expulsion of Student to the Board. (NT 17, 45-46)

7. The Principal did not mention the term Manifestation Determination Meeting to the Parent. (NT 45, 48)

8. The Principal told the Parent that the FACT staff did not have the ultimate authority, that the Board had the ultimate authority, and that if the process went forward there would be an expulsion hearing before the Board of the school at which the school and the Parent would give their evidence and a decision would be made. (NT 30, 82)

9. The Principal told the Parent that if Student were expelled Student could no longer attend a public or a charter school in the city of Philadelphia again. (NT 82)

10. The Principal also told the Parent that if she decided to transfer Student out or withdraw Student from the school that would stop the process from going forward and it would just appear that she were withdrawing her child for personal reasons. (NT 30, 82)

11. The Dean of Students and the Principal did not talk with the Parent about a Manifestation Determination because "the next step" was [the Parent] meeting with the learning support team". (NT 18, 30, 37)

12. The Parent told the Principal that she wanted to withdraw her child from the school. (NT 30)

13. The Parent and the Principal had no further contact that day. (NT 31)

14. On the same day that the Parent and Student were in the school for their interview, the Parent was handed a letter signed by the Dean of Students. The Parent was not given a Noticed of Recommended Educational Placement (NOREP). (NT 19-20)

15. The letter, dated June 25, 2008, the day of the interviews, stated in part, "We have recommended to The FACTS Board for Student to be expelled from FACTS. Upon the Board's decision, the Dean and Principal will meet with the parent/guardian to discuss the expulsion and how the outcome will affect Student as a student in the public school system in the city of Philadelphia if expelled". (NT 20; S-7)

16. The June 25, 2008 letter also stated, "As a parent or guardian you have the right to stand before the Board to plead your case but the final decision lies with the Board officers". (S-7)

17. At some time prior (between June 23 and June 25 although the record is not clear) the Dean of Students and the Principal met with the special education team and explained the situation and directed the Special Education Teacher to pull Student's past records and/or draw up papers for the Manifestation Determination "in case what we were looking at was a case of expulsion" since June 25th was the last day of work for the teachers. (NT 17, 28-29, 42, 49-50)

18. Before the Parent and Student met with the Principal and the Dean of Students, the special education teacher encountered the Parent in the waiting room and asked to speak with the Parent separately in another room. Thinking that the Parent had already met with the Principal and the Dean of Students, the special education teacher told the Parent that she was "under the impression that Student was being asked to leave the school". (NT 77)

19. Then realizing that the Parent and Student had not yet met with the Principal and the Dean of Students, the special education teacher apologized for speaking prematurely and said that she didn't know what the final outcome was. (NT 78)

20. The Parent said that she and the Principal and the Dean of Students hadn't met yet and she didn't know what was going to happen. (NT 78)

21. The Parent received the impression from this conversation with the special education teacher that the disciplinary decision to expel Student had already been made. This put the Parent in an uncomfortable position going into the meeting with the Principal and the Dean of Students. (NT 81, 88)

22. After her meeting with the Parent, the Principal told the Parent that she was to meet with the learning support team "to go over a few things". The Parent was not told that the purpose of the meeting was to conduct a Manifestation Determination. (NT 17, 47)

23. The only member of the learning support team present to meet with the Parent was the Special Education Teacher. (NT 31, 67-68)

24. The special education teacher was prepared and planning to conduct a Manifestation Determination Meeting with just herself and the Parent on June 25th if the Parent agreed to the Meeting. (NT 43, 70-71)

25. When the Parent met with the Special Education Teacher the Parent said that the meeting would not be necessary because she was withdrawing her child.[2] The Parent, after speaking with the Principal, felt that her child's only two options were expulsion or withdrawal. (NT 31, 82; S-1)

26. The special education teacher briefly spoke about the Manifestation Determination paperwork and the possibility of a meeting but did not hold the Manifestation Determination Meeting because the Parent told her she was withdrawing her child, and the special education teacher's understanding was that "the Manifestation Determination is only done if the child was being expelled from school". (NT 72, 78, 89)

27. The special education teacher told the Parent that having a Manifestation Determination meeting "did not make sense to me if she was withdrawing her child".[3] (NT 73, 75-76)

28. The special education teacher took the paperwork and put it into Student's confidential file and "that was all". She spoke with some of her colleagues and "knew or thought [she] knew that it [Manifestation Determination] was only for children who were being expelled". (NT 73-75)

29. The Parent went home and reconsidered and called the school immediately, leaving a voicemail message for the Principal. (NT 83)

30. The next morning, June 26, 2008 the Principal returned the Parent's call, and the Parent said that she did want to proceed with having a Manifestation Determination Meeting for Student as she was not going to transfer the child. (NT 33, 43, 83)

31. By letter dated June 26, 2008 the Principal issued a written Invitation to the Parent to participate in a Manifestation Determination Meeting to be held on July 17, 2008, a date that was acceptable to the Parent and allowed time for the school to coordinate teachers' summer schedules. By telephone the school had offered the Parent June 27th and June 30th as well, but neither date was acceptable to the Parent. Another date was unacceptable to the Principal. (NT 31, 33-36, 83; S-1)

32. The individuals being invited to the Manifestation Determination Meeting as per the Invitation were the Parent, the Principal, a Regular Education Teacher, a

[2] The record is not clear regarding whether the Parent or the Special Education Teacher was the first to say that a Manifestation Determination Meeting was not necessary.
[3] See Footnote 1 above.

Special Education Teacher, the Special Education Coordinator, the Dean of Students and the School Psychologist. (S-1)

33. The June 26th letter noted "in the event that your [child]'s conduct is agreed not to be a manifestation of [the Student's] disability, the alleged conduct in question would be subject to commencement of expulsion proceedings in accordance with the school's Code of Conduct". (S-1)

34. The letter did not specify what would happen to Student if the Manifestation Determination Meeting resulted in a finding that the behavior in question was a manifestation of Student's disability and/or that the IEP was not being implemented. (S-1)

35. A Procedural Safeguards Notice was sent along with the June 26th Invitation to Participate letter. (S-1)

36. By letter to the Principal dated June 27, 2008 and faxed to the school at 1:14 pm on that same date, the Parent noted receipt of the school's June 26th letter and said that the date of July 17th for the Manifestation Determination Meeting was acceptable. (S-2)

37. The Principal received this letter on or around the date that it was faxed. (NT 36)

38. By letter to the Principal dated June 27, 2008 and faxed to the School at 2:13 pm on that same date, the Parent filed a complaint, asking for a Due Process Hearing on the issue of the school's failure to follow designated [due process] procedures. The Parent stated that she was requesting a hearing in addition to her request of June 26, 2008 to have a Manifestation Determination Meeting. (S-3)

39. The Principal received the June 27th letter on June 27th. She assumed that the Parent's reference to a Due Process Hearing meant the Manifestation Determination Meeting that was scheduled for July 17th, so she "just stuck it [the complaint letter] in the file, left the file with [a staff member – the Chief of Staff]" and went on vacation. (NT 38, 39, 54)

40. Although the school had received the Parent's Due Process Hearing request, and the Principal had skimmed the letter and filed it, the school did not become aware of the import of the request until ODR's Hearing Notice arrived and the Chief of Staff went back and actually read the contents of the file. (NT 54-60)

41. The Parent had also faxed a copy of her hearing request to the Office for Dispute Resolution on June 27, 2008 at 2:07 pm. The Office for Dispute Resolution received it on that date and date-stamped the cover sheet accordingly. (HO-1)

42. By letter to the Principal, dated and faxed on July 10, 2008, the Parent requested that the Manifestation Determination Meeting scheduled for July 17th be

rescheduled for any date after July 21st to permit the participation of Student's attorney. (S-5)

43. The Principal did not see this letter until the date of the Due Process Hearing as she had been on vacation. (NT 40)

44. As of the date of the Due Process Hearing the Board had taken no action with regard to disciplining Student. (NT 41-42)

45. As of the date of the Due Process Hearing Student has not been suspended since the date of the incident, as the incident occurred on the last day of school. (NT 42)

46. FACTS has never had to conduct a Manifestation Determination meeting before. (NT 21-22, 70)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.[4] Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. This hearing officer has made the following determinations of the witnesses' credibility related to the parties' cases in chief:

Dean of Students: This witness' description of the series of events was credible and given due weight, however her explanation that the June 25, 2008 letter (S-7) should have read "will make (a recommendation to the Board]" and that the letter should have said "going to recommend" rather than "recommended" was not credible.

Principal: This witness' description of the series of events was credible, and her admission that she didn't carefully read what turned out to be a Complaint Letter and that she and her staff were not experienced with Manifestation Determination procedures added to her credibility.

[4] Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Chief of Staff: This witnesses' testimony was credible, and her acting quickly in an area outside her direct expertise when she found out that the Parent had asked for a Due Process Hearing is commendable.

Special Education Teacher: This witness was credible and it obviously enhanced her credibility when she answered the Parent's cross examination questions in such a way that did not support FACT's case.

Parent: This witness' testimony was credible and she is to be commended for quickly researching her child's due process rights and acting quickly to invoke them.

Legal Basis

Motion to Dismiss

When a party files a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a Hearing Officer must accept as true "the factual allegations in a complaint and all reasonable inferences that can be drawn therefrom" in order to rule on the Motion. Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) (quoting Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990)). Thus, a Hearing Officer should not grant a motion to dismiss "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Graves v. Lowrey 117 F.3d 723 (3rd Cir. 1997).

Additionally, the Appeals Panels in the Commonwealth have made it clear that a hearing must be held once requested, even when considering a motion to dismiss. In In Re the Educational Assignment of G.M., Spec. Educ. Op. 1196 (2001) [footnotes provided as presented] the Panel wrote:

> A due process hearing must be provided when requested by a school district or parent.[5] Once convened, hearing officers have wide discretion in conducting hearings.[6] Nevertheless, even prior to a dismissal, the hearing officer must first conduct an evidentiary hearing, that establishes not only the opportunity for arguments, but also develops a record of sufficient facts upon which to base a decision.[7] Our previous opinions make clear that this

[5] 20 U.S.C. Sec. 1415(b)(5); 34 C.F.R. Sec. 300.507.

[6] *See, e.g.*, Special Educ. Opinion No. 1176 (Sept. 24, 2001); Special Educ. Opinion No. 1068A (Nov. 29, 2000); Special Educ. Opinion No. 1068 (Nov. 15, 2000).

[7] *See, e.g.*, Special Educ. Opinion No. 1176 (Sept. 24, 2001); Special Educ. Opinion No. 1127-A (June 8, 2001); Special Educ. Opinion No. 1125 (June 1, 2001).

> requirement applies to an order in response to a motion to dismiss, as well as to an order addressing the merits of a case.[8]

In In Re the Educational Assignment of K.M., Spec. Educ. Op. 1311-B (2002) the Panel stated that even though the hearing was short and even though the legal arguments of the parties were presented within written briefs, the hearing itself "was a necessary first step" when considering a motion to dismiss, and that it was "critical for the hearing officer to convene a hearing." The Panel has regularly reiterated its position, calling a hearing to consider dismissal not only proper, but "critical" (In Re the Educational Assignment of K.B., Spec. Educ. Op. 1712 (2006)) and concluding that failure to hold a hearing "would have been error." In Re the Educational Assignment of C.G., Spec. Educ. Op. 1816 (2007).

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case the evidence was not in equipoise.

Charter Schools

The IDEA requires states to provide a "free appropriate public education" to all students who qualify for special education services.[9] Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, Pennsylvania charter schools are designed to be "independent public schools." Act 22 of 1997 provides charter schools with autonomy from school districts and freedom from certain regulations. Specifically, charter schools are exempt from complying with Pennsylvania's special education regulations and standards.[10] The Charter School Law was passed June 12, 1997. As of June 12, 1997 charter schools have had special education duties, as Act 22 of 1997 requires charter schools to comply with federal laws and regulations governing children with disabilities.

However, on June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,[11] was adopted and became effective on June 9, 2001 to specify

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[8] *See, e.g.*, Special Educ. Opinion No. 1176 (Sept. 24, 2001); Special Educ. Opinion No. 1167 (Aug. 17, 2001).

[9] 20 U.S.C. §1412.

[10] 22 Pa. Code Chapters 14 and 342. (See, the Charter School Law, Act 22 of 1997, 24 P.S. §17-1732-A; see also, 22 Pa. Code §711.2(c)).

[11] 22 Pa. Code §711.1 et seq

how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with the IDEA and its implementing regulations.[12] Accordingly, although from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the Federal Laws, effective June 9, 2001, 22 Pa. Code §711.1 et seq., also governs special education in Pennsylvania Charter Schools.

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* This federal special education statute recognizes that a child's disability may lessen or remove her responsibility for a behavioral infraction, and thus mitigate the disciplinary consequence of the action. If an LEA wishes to discipline an eligible student in such 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.

In December 2005, Pennsylvania's State Board of Education, adopted new Chapter 12 regulations regarding discipline. These new Chapter 12 regulations specifically adopted federal IDEA-1997 regulations which were promulgated on March 12, 1999[13] and stated:

> "(a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. Exclusions affecting certain students with disabilities shall be governed by §§ 14.143 (relating to disciplinary placements) and 34 CFR §300.519-300.529 (relating to discipline procedures)." 22 Pa. Code §12.6.

The IDEIA and its implementing regulations set forth detailed provisions for disciplinary matters. Because this is the first experience involving a due process hearing of this type for both the charter school and the parent, the complete provisions are presented as follows:

Discipline Procedures

34 CFR §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

[12] 34 CFR Part 300, and Section 504 and its implementing regulations in 34 CFR Part 104

[13] The new federal regulations for IDEIA (IDEA) 2004 were not written at that time.

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))

Change in Placement

Under the IDEIA, a Notice of Recommended Educational Placement (NOREP) must be issued whenever an LEA proposes to initiate or change the identification, evaluation, or educational placement for the provision of a free, appropriate public education (FAPE) to a child. 34 C.F.R. §300.503

In Letter to Fisher, 21 IDELR 992 (OSEP 1994), the United States Department of Education Office of Special Education Programs (OSEP) specifically addressed the question of circumstances that constitute a change in educational placement. In that opinion, OSEP concluded that consideration should be given to whether a change in educational placement has occurred on a case-by-case basis, as it is a very fact specific inquiry. OSEP determined that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program". The following factors to be considered in determining whether a change in educational placement has occurred are:

(1) whether the educational program set out in the child's IEP has been revised;
(2) whether the child will be able to be educated with non-disabled children to the same extent;
(3) whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and,
(4) whether the new placement option is the same option on the continuum of alternative placements.

In Letter to Fisher, OSEP established that if this inquiry leads to the conclusion that a substantial or material change in the child's educational program had occurred, the public agency must provide written prior notice.

Expedited Hearings

Pennsylvania Special Education Regulations at PA Chapter 14 §14.162(q)(4) provide:

> If an expedited hearing is conducted under 34 CFR 300.532 (relating to appeals), the hearing officer decision shall be mailed within 30 school days of the public agency's receipt of the request for the hearing without exceptions or extensions.

Discussion and Conclusions of Law

It is undisputed by the parties that the Student is eligible for special education services under federal and state special education laws, and that the Student is a protected handicapped student under federal law[14].

The testimony of the Principal and the Special Education Teacher, as well that of the Parent, established to this hearing officer's certainty that FACT had determined that Student would be expelled pending Board approval or offered voluntary withdrawal, even before the child and the mother met with the Principal and the Dean of Students. (FF 5, 15, 18, 19, 20) Although the school intended to conduct a Manifestation Determination it intended to do so after the fact (decision to recommend expulsion) rather than before. (FF 17, 18, 22, 24) This was not initially a violation of the IDEIA, as the timeline-pertinent regulations read that the Manifestation Determination must take place, "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" (Emphasis added) and given the date of the events "school days" would not begin being counted until September. However, what was a violation, albeit quickly corrected, was FACT's decision to not hold a Manifestation Determination because it understood the Parent to say that she didn't want/need one. (FF 25, 26, 27, 28) The regulations clearly state that "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 [whether the conduct was a manifestation of the child's disability]". (Emphasis added). A Manifestation Determination must be held, and there are no stated exceptions to this requirement, including lack of parental participation. A timely and properly conducted Manifestation Determination Meeting of a properly composed team would function to halt or to commence the school's acting on its decision with respect to the intended disciplinary action.

FACT is found to have violated Student's procedural safeguards in several respects. First, FACT did not present the Parent with a NOREP when it informed her that

[14] See Section 504 of the Rehabilitation Act of 1973.

expulsion was being recommended to the Board. (FF 14) Second, the FACT administration did not mention the words "Manifestation Determination" nor did the administration explain that a meeting would be held that might mitigate or cancel the disciplinary recommendation. Third, the special education teacher did not adequately explain the process or the function of a Manifestation Determination Meeting to the Parent such that the Parent could make an informed decision about her options. (FF 7, 8, 22, 26) Fourth, the school intended to hold a Manifestation Determination meeting with only the Parent and the special education teacher present, not affording the Parent input as to the individuals participating. (FF 11, 17, 23, 24) Fifth, the special education teacher allowed the Manifestation Meeting to be canceled with no intention to follow-up to reschedule the meeting. (FF 25, 27, 28) Sixth, neither the FACT administration nor the special education teacher provided the Parent with a copy of the Procedural Safeguards Notice until after the Parent asked that the aborted Manifestation Meeting be held. (FF 14, S-1)

The school committed procedural errors that violated Student's rights under the IDEIA. Had it not been for the Parent's diligent second thoughts the child would have been withdrawn from the school and the Manifestation Meeting would likely never have been held. (FF 29, 30, 31, 32, 35) The school's admitted lack of familiarity with the requirements for conducting a Manifestation Determination (FF 46) is not a mitigating factor, although this hearing officer does not impute any ill-will or improper motives to the school's errors and found the school to be cooperative before and during the due process proceedings.

As of now, however, the school is on immediate notice that a NOREP must be issued whenever it proposes to change the educational placement of a child; that a child's rights must be explained clearly to parents so that they can make informed decisions; that formal Procedural Safeguards Notices must be issued, among other occasions, when a disciplinary situation involving a special education child arises; that the team conducting a Manifestation Determination must be composed of persons knowledgeable about the child's disability and his/her special education program; that a parent has the right to participate in deciding who will be on the team; and that a Manifestation Determination must be held regardless of whether a parent wants to participate or not.

In the 2004 revisions to the IDEA, Congress affirmed its position that *de minimis* procedural violations do not constitute a deprivation of FAPE. Section 1415 provides:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process…; or (3) caused a deprivation of educational benefits.

In Special Education Opinion No. 1652, the appeals panel held that while a failure to provide a procedural safeguards notice may be harmless error, "failure to provide the parent with notice of an opportunity to participate in the M[anifestation] – D[etermination]…is a more serious matter."

FACT's violations of the procedures for issuing a NOREP, issuing a Procedural Safeguards Notice, explaining the import of Student's rights to a Manifestation Determination to the Parent, and holding a Manifestation Determination Meeting together constitute more than a *de minimus* procedural violation. However, fortunately for FACT the Parent's astute and rapid response once she had collected herself resulted in almost immediate correction of FACT's violations – the Procedural Safeguards were issued, the Parent educated herself about the import of a Manifestation Determination, and a Manifestation Determination Meeting is now scheduled and will be held.[15] Since the events unfolded in a short period of time immediately after school had recessed for the summer, Student incurred no out-of school suspensions, has not had an expulsion hearing before the Board of the school, remains enrolled in the Charter School, and has not experienced a denial of FAPE for which compensatory education would be due. Because the Parent acted quickly, the school's impeding the Parent's opportunity to participate in the decision making process regarding her child was quickly rectified. Therefore, although FACT did violate Student's procedural rights under IDEIA, there was no denial of FAPE.

ORDER

It is hereby ORDERED that:

The Folk Arts Cultural Treasures Charter School did withhold information from Ms. about her child's right to a Manifestation Determination in violation of Student's procedural rights under the IDEIA.

This and other associated procedural violations were almost immediately corrected due to Ms. 's diligence, and Student experienced no denial of FAPE.

July 20, 2008
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer

[15] Following the Manifestation Determination Meeting a NOREP will be presented to the Parent if the outcome is a finding that the behavior in question was not a result of Student's disability and that the IEP was being implemented. If the Parent disagrees with the outcome of the Manifestation Determination Meeting she may file for an Expedited Due Process Hearing. These matters must be completed before any recommendation is made to the school's Board.