

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

Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: P. J.

Date of Birth: 00/00/0000

Dates of Hearing: 07/22/08

CLOSED HEARING

ODR No. **9032/07-08 LS**

Parties to the Hearing:

Representative:

Parent

Darren Kennedy  
Special Education Coordinator

Parent Attorney: None

Penn Hills  
School District

Craig Alexander, Esq.  
School District Attorney

Date Record Closed:

July 25, 2008

Date of Decision:

August 9, 2008

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student, whose IDEA eligibility is attributed to specific learning disabilities, attends XX School. In the spring of 2008, Student [engaged in behavior that was dangerous and potentially destructive]. Subsequently, the School District members of Student's IEP team determined that such behavior was not a manifestation of Student's disability and issued a NOREP for a 45 day alternative disciplinary placement to occur at the beginning of the 2008/2009 school year.

Student's Mother opposed the alternative placement recommendation, contending, initially, that the District did not have sufficient evidence to conclude that Student was involved in the incident which triggered the action. She also protested the procedure of combining the Manifestation Determination Review with the IEP meeting to review and consider an IEP for the 2008/2009 school year, and the District's failure to inform her that a Manifestation Determination Review would occur at all, much less at the same time as the IEP meeting.

Her request for a due process hearing to address the alleged procedural and substantive violations arising from the manifestation determination and alternative placement recommendation was held in a half day session on July 22, 2008.

### **ISSUES**

Should the Penn Hills School District be permitted to assign Student to a 45 day alternative educational placement based upon an appropriate determination that Student's serious infraction of the school code of conduct on May 30, 2008 was not a manifestation of disability and that such determination was made in a procedurally proper manner?

### **FINDINGS OF FACT**

1. Student is a XX year old child. Student is a resident of the Penn Hills School District and is eligible for special education services. (Stipulation, N.T. pp. 17, 18).
2. Student has a current diagnosis of specific learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 18).
3. Student is enrolled at XX School, the same school Student would attend if not disabled, where Student receives academic instruction in the regular education setting with resource room learning support. (Stipulation, N.T. p. 18).
4. The District determined that on XX, 2008 Student [behavior redacted]. That conclusion was based primarily on a surveillance videotape which showed Student entering and exiting the [area] five times within a short period prior to the time the [incident] was discovered. Just before [evidence of the incident appeared], Student entered the [area] with a bag. (N.T. pp. 24—27, 29—34, 44; S-5, S-7)

5. On XX, 2008, the District convened Student's IEP team to conduct a Manifestation Determination Review and completed a Manifestation Determination Worksheet. At that meeting, the District representative and the IEP team members who were present did not complete a full review of Student's IEP, most recent reevaluation report, behavior plan in effect at the time of the incident, records of prior disciplinary action and teacher reports. (N.T. pp. 37, 38, 43—46, 52, 70; S-1, S-2, S-3, S-6)
6. Prior to the meeting in which Student's Mother participated, the District members of the IEP team met, reviewed the incident and Student's school records, and decided upon an alternative school recommendation. (N.T. pp. 53-- 58)
7. The District members of the IEP team all signed the Manifestation Determination Worksheet, and checked "Y" on the line below "Agreement," signifying their assent to the conclusion that the incident was not a manifestation of Student's disability. (N.T. pp. 37—39, 46, 66; S-1, S-2)
8. Based upon the Manifestation Determination Review, the IEP team issued a NOREP recommending that for the first 45 days of the 2008/2009 school year, Student be assigned to the [alternative program], an independently operated educational program located within the District. The District uses the Alternative Program as an alternative placement for students whose violation of school behavior standards would result in expulsion in the absence of IDEA eligibility. (N.T. pp. 39, 40, 46, 47, 82; S-1)
9. The Alternative Program is designed for students who have problems with maintaining proper behavior in the regular education environment. Student has a long history of engaging in oppositional, defiant, disruptive and attention-seeking behaviors in school, including fighting. (N.T. pp. 68, 98; S-2, S-3, S-6)
10. In explaining "Why the action is proposed or refused," the disciplinary NOREP stated that, "Student demonstrates a high degree of need for specially designed instruction with academic and behavioral supports." Other placement options considered were "Other approved private settings." Those options were rejected

- because, “At this time, Student’s needs exceed supports available in the above settings.” The disciplinary NOREP also provides for full-time learning support at Alternative Program. (S-1)
11. On the same date, immediately following the Manifestation Determination Review, Student’s IEP team considered the IEP proposed for the remainder of the 2007/2008 school year, with implementation for the following school year to begin, as a practical matter, after the Alternative Program placement concluded. (N.T. pp. 54, 60, 66, 70; S-2)
  12. The NOREP accompanying the proposed IEP provides that, “Student will continue to receive special education services in a pull out setting.” The NOREP concluded that “This action Alternative Program meets Student’s individual educational needs” and rejected the “other options that were considered: Regular education classes without support.” The NOREP provides for a continuation of “Resource Learning Support.” (S-2)
  13. Student’s Mother attended both the Manifestation Determination Review and the IEP meeting. She was not informed that the Manifestation Determination Review was to occur until she arrived for what she believed to be an IEP meeting alone. She did not agree with either the manifestation determination process under those circumstances, or with the conclusion and recommendation of the District members of the IEP team that Student should be assigned to the Alternative Program. (N.T. pp. 41, 42, 48, 49, 50, 63, 64, 67, 92, 111, 112, 114, 115, 117; S-1)
  14. Student’s case manager, the District representative who spoke to Student’s Mother about scheduling the IEP meeting, knew for a few days that a Manifestation Determination Review was to occur at the same time as the IEP meeting, but did not tell her that the meeting would include a Manifestation Determination Review when [speaking] to her about scheduling the IEP meeting. (N.T. pp. 63, 64, 67; S-1)
  15. At the time of the incident, a multi-page functional behavioral analysis and behavior plan was in effect for Student, which encompasses 10 annual goals and extensive specially designed

instruction/strategies for preventing unwanted behaviors, developing effective replacement behaviors and providing necessary structure, including supervision during class transitions. There is, however, no assurance that the behavior plan was implemented consistently or at all during the 2007/2008 school year. Student has a one to one aide to assist Student in maintaining proper behavior and arrive in class on time. (N.T. pp. 72, 83, 86, 88, 112--114; S-6)

16. The IEP reviewed at the June 5 meeting also included the report of an additional behavior plan directed toward improving Student's class cutting and tardiness. In the discussion of the implementation of the program and strategies, there is a notation that the program was interrupted due to Student's suspension for threatening a teacher. (S-2)
17. Student's most recent reevaluation was conducted in 2006, but consisted of a review of records only. Standardized academic achievement testing was last conducted in 2001 (S-3)
18. The reevaluation report notes Student's long history of oppositional, defiant, avoidant, escape, power, control and attention-seeking behaviors. There is no mention of standardized assessments of behavior or of any clinical examination of/ by a psychologist or psychiatrist, but Student's Mother reported that Student received mental health services since 1997, and at the time of the records review, was receiving therapy for behavior issues. (S-3)

### **DISCUSSION AND CONCLUSIONS OF LAW**

Pursuant to the applicable federal regulations, if a school district seeks to discipline an IDEA eligible student by a change in placement that will last more than 10 consecutive school days, the school district must conduct a review to determine whether the behavior which led to the proposed discipline "was caused by or had a direct or substantial relationship to the

child's disability or was the direct result of the LEA's [school district's] failure to implement the IEP." 34 C.F.R. §300.530(e)(1)(i), (ii). Such determination must be made within 10 school days of any decision to change an eligible child's placement, and must be made by **“the LEA the parent and relevant members of the child's IEP team (as determined by the parent and the LEA.”** §530(e)(1) (Emphasis in original). The participants “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.” §300.530(e).

The reviewing group must determine that the behavior in question is a manifestation of the student's disability if the school district, parent and IEP team members conclude that the behavior was either caused by or directly and substantially related to the student's disability, or was a direct result of the school district's failure to implement the IEP. §530(e)(2).

If, after conducting an appropriate review in compliance with the applicable regulatory standards, the IEP team concludes that the behavior at issue was not a manifestation of the child's disability, the school district may take the same type of disciplinary action that it would take with respect to a child with no disabilities, provided that if the student is removed from the current placement, the school district must ensure that the child is provided

with a free, appropriate public education (FAPE), continues to participate in the general curriculum in the alternative setting, and continues to make progress toward achieving his/her IEP goals. §300.530(c), (d)(1).

If the manifestation determination review results in upholding the school district's recommendation for an alternative placement, the IEP team determines the alternative setting. §531. A parent who disagrees with the results of the manifestation determination or with the alternative placement decision is entitled to appeal by means of a due process hearing. §532(a). If the hearing officer determines that the district violated the procedures required by §530 or that the behavior was a manifestation of the child's disability, the hearing officer may return the child to the original placement or order a change of placement to a 45 day alternative placement upon determining that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others." §532(b)(1), (2)

The manifestation determination review which resulted in the conclusion that the incident in this case was not substantially related to or caused by Student's disability was so cursory and procedurally flawed as to be meaningless. The documents that the District was required to review in that process describe behavioral issues that are serious, pervasive and create



a far more substantial barrier to Student's educational progress than the identified learning disability, yet the District focused only on the learning disability. (*See* F.F. 5, 9, 15, 16, 18) That jarring disconnect continued with the huge discrepancy between the NOREP proposed by the District as a result of the regular IEP team meeting and as a result of the Manifestation Determination Review, held on the same day, just prior to the IEP team meeting. The disciplinary NOREP was focused entirely on Student's behavioral issues and was written as if it were a true recommendation for a more restrictive placement based upon identified special education needs rather than a response to a serious infraction for which Student was subject to discipline as if Student were a regular education student. (*See* F.F. 10). A manifestation determination review which results in a conclusion that the behavior is not a manifestation of a disability permits a school district to impose the same discipline upon an eligible student that would be imposed upon any other student, provided if an interim alternative placement is recommended for an eligible student, the placement must be capable of implementing the IEP. 34 C.F.R. §530(d). In Student's case, the NOREP accompanying the June 5, 2008 IEP indicates that Student can be appropriately educated in a far less restrictive setting (*See* F.F. 12).

The discrepancy in the NOREPS issued on the same day calls into question the credibility of the District's witness who testified that the District's goal was to return Student to the regular high school after the 45 day placement. (N.T. pp. 46, 47). It is difficult to accept the implication that the Alternative Program would so improve Student's behavior in 45 days that the need for the restrictive placement described in S-1 would be replaced by the ability to return to the resource room level of support recommended in S-2. The more plausible inference is that the District's goal of returning Student to High School would remain out of reach for the 2008/2009 school year. Although it may appear harsh to suspect the District of attempting to effect a "back door" change of educational placement through the discipline process, that suspicion is warranted by the manner in which the manifestation determination review was handled in this case.

If the District's failure to fully consider all of the documents in Student's school records (F.F. 5), as required by the regulations, led to its failure to fully understand Student's serious behavioral issues when considering whether Student's conduct with respect to the incident was a manifestation of disability, that lapse appears to have been corrected and the long-standing behavior issues thoroughly considered in drafting the NOREP included in S-1. The discrepancy in the District's use of the records

detailing Student's behavior issues leads to the inescapable conclusion that the District's Manifestation Determination review was a charade. Student's behavior plans included in S-2 and S-6, and even the woefully inadequate reevaluation report of 2006 (S-3), describe serious and pervasive behavioral problems that must be addressed by far more diligent efforts than an alternative education placement, which will do nothing more than remove a challenging student from the regular high school setting, but will not address the underlying issue of the District's failure, to this point, to effectively address the full extent of Student's behavior problems.

The manner in which the Manifestation Determination Review process was conducted is as suspect as its disingenuous outcome. Although Student's Mother was invited to participate, as required by the IDEA regulations, she was not notified ahead of time that it was to occur at the same time as the meeting to develop Student's new IEP. In formulating the recommendation for an alternative placement, the District members of the IEP team met and reached their conclusion before Student's Mother arrived for the meeting of which she was given no prior notice, thereby doubly limiting the effectiveness of her participation. She certainly had no opportunity to participate in the process of selecting the members of the group who would make the manifestation determination as contemplated by

§530(e)(1) of the IDEA regulations. In effect, the IEP team had a determinative meeting before Student's Mother could participate, since she had no prior notice of the purportedly "official" Manifestation Determination Review meeting, much less the pre-meeting where the real decision was made. (F.F. 6, 12)

In addition, Student's Mother testified that had she known about the Manifestation Determination Review, she would have had someone accompany her to the meeting. (N.T. p. 42) The District provided no real reason for not informing Student's Mother of the dual purpose of the IEP meeting at the time it was arranged, leading to the inference that the District intended to foreclose any effective opposition to its pre-conceived conclusion that Student would be subject to discipline and sent to Alternative Program. In the strictest sense, the District may have complied with the requirement of parent participation, but it clearly did not intend to be dissuaded from the conclusion that the District members of the IEP had already reached.

Although the District did not entirely violate the prescribed IDEA procedures, since a meeting was held with Student's Mother, the District was obviously just "going through the motions" with respect to parent participation. As a result, Student's Mother was denied the procedural

safeguards to which she was entitled, since she had no real, meaningful opportunity to engage the District in a substantive discussion of the basis for its conclusion that the disciplinary incident was not caused by, or substantially related to, Student's disability. Without such opportunity, Student's Mother could not obtain the assistance of an advocate or attorney who might have raised a credible basis for disputing the District's conclusion that the incident was not disability-related, including the possibility, even likelihood, that the incident was a manifestation of an as yet unidentified disability. Moreover, Student's Mother had no real opportunity to question whether the District was appropriately implementing Student's behavior plan. (S-6) Consequently, the District's conduct in failing to notify Student's Mother that the IEP team meeting of June 5, 2008 would include a manifestation determination review had a substantially negative effect on Student's substantive educational rights. Such procedural violation, along with the failure to review all records at the manifestation determination review with Student's Mother present, are sufficient to support a decision in favor of Parent and against the District in accordance with 34 C.F.R. §§530, 532.

The District's conduct in this matter turned the Manifestation Review process mandated by the IDEA statute and regulations into an empty "letter

of the law” exercise, and resulted in a conclusion that amounted to a substantive travesty as obviously dishonest as Student’s denials that Student [engaged in the behavioral incident]. Educating students successfully and appropriately requires far more than instruction in academics. Effective education also requires good example, especially conduct which demonstrates educators’ convictions that the District is as committed to following the rules that apply to it as it is to assuring that students adhere to the good conduct required by the school code.

As to the appropriateness for Student of a placement in the Alternative Program, the District witnesses agreed to it, verbally, when questioned at the due process hearing, and signified their agreement by signing the Manifestation Determination Worksheet. (F.F. 7) Nevertheless, it was quite apparent from the demeanor of Student’s case manager, including an inordinately long pause before answering that question when posed by the District’s counsel, that he did not truly agree. In other words, although the case manager’s lips and voice gave the answer “Yes” (N.T. p. 65), his “body language” said “No” far more convincingly.

In addition, in response to the same question, the District’s special education director agreed that the placement is appropriate for Student “considering the alternative of expulsion.” (N.T. p. 83, l. 1, 2) The

testimony of both District witnesses who testified on the issue whether the proposed alternative disciplinary placement would be appropriate for Student was far from an endorsement of the Alternative Program for Student and cannot reasonably support such a conclusion.

In the end, however, the appropriateness of the Alternative Program is irrelevant at this point. The substantive and procedural deficiencies of the District's Manifestation Determination Review, as well as the documentary evidence of Student's extensive behavioral issues, preclude the District from proceeding with its plan to assign Student to the alternative setting for even a 45 day placement. The incident/behavior in question is either related to a disability which has not yet been appropriately identified, or to a need that has not yet been appropriately addressed in Student's IEP and behavior plans, or to the District's failure to appropriately implement the IEP and/or behavior plans. There was no convincing evidence to establish that the District actually and effectively implemented Student's behavior plan. *See*, F.F. 15<sup>1</sup>

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<sup>1</sup> In a question addressed to the teacher in the classroom where Student was scheduled to be at the approximate time of the incident, Student's Mother stated that the IEP in effect at the time of the incident provided that if Student was not in the classroom prior to the bell, someone was get Student. (N.T. p. 79). The teacher responded that she "wouldn't have known where to try to locate Student." (N.T. pp. 79, l. 25, 80, l. 1, 2) The teacher acknowledged, however, that Student's Mother was correct in stating that the IEP provided that Student was not to be left with unsupervised "down time," stating, "That's why I don't write passes for Student except for bathroom and nurse." (N.T. p. 80, l. 1,

Finally, a real review of Student's school records related to the IDEA eligibility establishes that a comprehensive psycho-educational evaluation is overdue. Without a comprehensive evaluation, it is impossible to determine precisely the origin or reason for the behavior, particularly the conduct with respect to the recent incident. Student's last evaluation was in 2006 and included only a review of records. (S-3) The District, therefore, will be ordered to conduct a comprehensive psycho-educational evaluation which includes standardized behavior assessments and an examination by a clinical psychologist or a psychiatrist to determine whether Student has any undiagnosed psychological or psychiatric ailment or condition that amounts to an additional disability category, and/or whether Student has additional educational/behavioral needs which must be addressed.

After the comprehensive evaluation report is issued, Student's IEP team will be ordered to develop a new IEP which addresses all of the identified needs with an effective program, including a comprehensive behavior plan, in a placement which can appropriately implement the IEP,

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14) The teacher further testified that "I don't know whether Student's absent or late until Student enters the room." (N.T. pp. 80, l. 25; 81, l. 1) This testimony leads to the inevitable conclusion that the District failed to appropriately implement Student's IEP.

In addition, the special education director could not confirm that Student's behavior plan was implemented, testifying only, "I'm saying that's the document that's provided to every teacher...regarding...Student's IEP." (N.T. p. 88, l. 11—16)



and with sufficient supports and services to assure that Student's program is fully implemented at all times.

In the interim, the District will be ordered to assure that the behavior plan admitted as S-6 at the due process hearing is fully and appropriately implemented every school day, by placing on Student's case manager the responsibility for monitoring, and documenting daily, the compliance with the behavior plan of every one of Student's teachers. Finally, in order to assure that a serious behavior incident such as the [redacted] does not recur before the evaluation and new IEP are completed, the District shall assure that Student is under the direct supervision of a responsible adult from the time Student enters the school building until the time Student leaves it, including having an aide or someone else accompany Student to at least the entry of the rest room and back to the assigned class on every occasion, as well as to the entry of the nurse's office and back to the assigned class at any time Student requires such care.

### **CONCLUSION**

The District did not appropriately determine that Student's conduct [redacted] near the end of the 2007/2008 school year was not a manifestation of Student's disability, in that the District considered only Student's identified learning disability and did not take into account Student's serious,

extensive and well documented behavior issues, including whether an evaluation is necessary to determine whether Student is IDEA eligible under an additional disability category.

In addition, the manifestation determination review process was so procedurally flawed as to constitute a violation of the IDEA regulatory requirements for manifestation determinations. Finally, there is insufficient evidence to establish that the District regularly and appropriately implemented Student's behavior plan as part of the IEP. The reasonable inference from the sparse testimony on that issue from District witnesses is that the behavior plan was not regularly and effectively implemented.

The District will not be permitted to assign Student to the Alternative Program alternative education program, will be required to undertake a comprehensive psycho-educational evaluation of Student and to implement Student's existing behavior plan until the evaluation and IEP processes are completed.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the District is hereby **ORDERED** to take the following actions:

1. Return Student to the resource room learning support program/placement specified in the June 5, 2008 IEP for the beginning of the 2008/2009 school year.

2. Assure that Student 's IEP (S-2) and behavior plan (S-6) are fully implemented for as long as they remain in effect, explicitly taking the following actions:
  - a. Require Student's case manager to monitor, and to document daily, the compliance of every one of Student's teachers with the behavior plan in each school period.
  - b. Assure that Student is accompanied by and under the direct supervision of a responsible adult from the time Student enters the school building until the time Student leaves it, including having an aide or someone else accompany Student to at least the entry of the rest room and back to Student's assigned class on every occasion, as well as to the entry of the nurse's office and back to the assigned class at any time Student requires such care.
3. Conduct a full psycho-educational evaluation of Student, in full compliance with 34 C.F.R. §§300.304—3.311, and specifically including standardized behavior assessments and an examination by a clinical psychologist or a psychiatrist to determine whether Student has any undiagnosed psychological or psychiatric ailment or condition that amounts to an additional disability category, and/or whether Student has additional educational/behavioral needs which must be addressed.
4. Convene Student's IEP team to review the evaluation results when completed in order to develop a new IEP which addresses all of the identified needs with an effective program, including a comprehensive behavior plan, in a placement which can appropriately implement the IEP, and with sufficient supports and services to assure that the program is fully implemented at all times.

Anne L. Carroll

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Anne L. Carroll, Esq.  
HEARING OFFICER

August 9, 2008