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Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: J. Z., a student in the  
Franklin Area School District

Date of Hearing: September 25, 2008

CLOSED HEARING

ODR Case # 9260/08-09 AS

Date Record Closed:	October 6, 2008
Date of Decision:	October 10, 2008
Hearing Officer:	Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

J.Z. (“student”) is a high school student residing in the Franklin Area School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. The District seeks to expel the student based on a behavioral incident. The parents oppose the expulsion.

Parents filed a complaint on September 12, 2008 after the finding of a manifestation determination review that the behavioral incident was not a result of the student’s disability under the IDEIA. Parents disagreed and sought to have the determination overturned, and the student assigned to a new placement.

Because parents’ complaint regards a disciplinary change in placement, this decision is on an expedited timeline.<sup>2</sup> The hearing was conducted in one session on September 25, 2008. The decision is due within ten school days of the hearing<sup>3</sup> but no later than 30 calendar days after the filing of the complaint.<sup>4</sup> In a discussion with District personnel at the end of the hearing, it was determined that the 10-school day

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

<sup>2</sup> 34 C.F.R. §300.532(c); 22 PA CODE §14.162(q) (4).

<sup>3</sup> 34 C.F.R. §300.532(c)(2).

<sup>4</sup> 22 PA CODE §14.162(q) (4).

timeline expired on October 13, 2008.<sup>5</sup> The thirtieth day after the filing of the complaint, however, is October 12, 2008. Therefore, this hearing officer considers the decision due no later than October 12, 2008.

Written closing arguments were due from counsel, and the record therefore closed, on October 6, 2008. Both parties filed timely closing arguments.

This decision was rendered on October 10, 2008. For the reasons set forth below, I find in favor of the District regarding the result of the manifestation determination review. Provisions of the order, however, concern future obligations by the District and IEP team regarding the student's program/placement.

### **ISSUE**

Was the manifestation determination finding that the student's behavior was not a manifestation of his disability correct?

### **FINDINGS OF FACT**

1. The student is a high school [student] residing in the District.  
(School District exhibit ["S"]-3; NT at 21-22).

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<sup>5</sup> Notes of Testimony ("NT") at 175-176.

2. The student is qualified under the terms of the IDEIA with diagnoses of a specific learning disability in reading and an other health impairment, namely attention deficit hyperactivity disorder (“ADHD”). (S-2, S-3).
  
3. In 3<sup>rd</sup> grade in a different school district, the student received a Section 504 plan/Chapter 15 service agreement<sup>6</sup> (“Section 504 plan”) to address the student’s ADHD. The student moved into the District in 4<sup>th</sup> grade. The District maintained and implemented the Section 504 plan until 7<sup>th</sup> grade. (Parents’ Exhibit [“P”]-2 at page 6).
  
4. In January 2005, there was a serious behavioral incident involving the student. At that time, given the student’s reading difficulties and behavior, an evaluation for eligibility under IDEIA was underway. As a student thought-to-be-eligible, the District convened a manifestation determination hearing. Because the student was undergoing an evaluation and the District was not sure of how the diagnoses might have played a role in the behavior, the student’s behavior was found to be a manifestation of disability. As a result of the evaluation, the student was identified as a student with a specific learning disability and an other health

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<sup>6</sup> See the Rehabilitation Act of 1974 and 22 PA CODE §§15.1-15.11.

- impairment, particularly ADHD, that qualified the student as a student with a disability. (P-2; NT at 24-25, 138-142, 160-161).
5. The initial evaluation report (“ER”) was issued on January 17, 2005. In terms of the student’s behavior, the ER used teacher reports, parent reports and student self-reports, and a student self-assessment. (P-2).
  6. The student’s self-report and other assessments showed elevated or clinically significant self-assessment scores on various social, anxiety, and depression scales (P-2 at pages 4-6).
  7. Four of the student’s teachers completed teacher reports. The teacher’s reports showed elevated or clinically significant scores on various social, anxiety, depression, rule-breaking, and aggression scales. (P-2 at page 3-4).
  8. A parent report showed elevated or clinically significant scores on school experience, attention, and activities. (P-2 at page 4).
  9. The District completed a re-evaluation in November 2007 that found the student still qualified as a student with a specific

- learning disability and an other health impairment in the form of ADHD. (S-2).
10. The student's individualized education plan ("IEP") team last met on May 6, 2008. In the IEP, two of the student's nine annual goals were in the areas of organization and behavior. (S-3).
  11. An attachment to the IEP included certain adaptations and modifications to the regular education curriculum regarding the student's behavior. These included "provide opportunity for (the student) to interact with authority figures in a positive manner", "praise in public, correct in private" with this included as an explanation on this point "(the student) will internalize general teacher directives and frequently respond inappropriately causing disruption and disrespect", and "(the student) needs a 'buffer' person...in the office during disciplinary (meetings) and investigatory (meetings) to lessen...anxiety and guide (the student) through the acceptance of the consequences". (S-3 at page 22).
  12. The IEP also included a behavior program. The behavior program targeted the student's behavior as following classroom and school rules and complying with adult requests. The six progressive steps of the student's behavior plan included (1)

redirection, (2) offer of choices and consequences, (3) levying of classroom consequences, (4) consultation with office, (5) parental contact, and (6) police contact. (S-3 at pages 22-23).

13. Since obtaining an IEP in 7<sup>th</sup> grade, the student has been involved in numerous behavioral/disciplinary incidents each school year. The District's supervisor of special education estimated that the student averaged ten days of suspension each year. The behavioral/disciplinary incidents included one or two "major incidents" each year. These "major incidents" normally involved interacting with authority figures or fights with other students. (NT at 24, 146, 153-154, 162-164).
  
14. In 10<sup>th</sup> grade, the student was suspended from school for fifteen days. The high school assistant principal characterized most of the behavioral incidents in 10<sup>th</sup> grade as rooted in the student's impulsivity. (P-1, NT at 102-103).
  
15. The IEP team has discussed emotional support for the student but has not conducted an evaluation for emotional disturbance. The District's supervisor of special education has multiple years of experience as an emotional support teacher. (NT at 135-136, 168-169).

16. The student took part in a District extracurricular activity in August 2008. (NT at 43).
17. Tuesday, August 26, 2008 was the last day of that activity. The student was late that day and was not acting appropriately, behaviors which had not occurred at the activity in prior days. (NT at 40, 43-44, 104).
18. The activity lasted from 8 AM to noon. At approximately 10 AM, there was a 10-minute break. (NT at 41, 46, 104).
19. During the break, the student allegedly contaminated a water bottle with a foreign substance. (NT at 41-42, 46-47).
20. The student offered the water bottle to two students in succession who each declined to drink from the bottle. To protect the ruse, the student drank from the bottle as it was offered. (NT at 41-42, 48-55).
21. The student then offered the bottle to a third individual. That student drank from the bottle. The third individual noted that the water's taste was somewhat different. When asked by this



- individual about the contents of the bottle, the student denied tampering with the water. (S-1 at page 7; NT at 42, 56-58).
22. The student testified that the incident was meant as a prank. (NT at 48, 56, 58).
23. The student testified that the entire incident lasted two to three minutes. (NT at 42-43).
24. Given the non-testimonial evidence in the form of written statements/reports by witnesses and judging the credibility of the student at the hearing, it is found as a matter of fact that the student initiated a plan to pull the prank shortly into the 10-minute break, that the student did, indeed, contaminate the water bottle, and that the entire incident took in excess of two to three minutes, consuming a majority of the 10-minute break. (S-1 at page 9 and 11 and, generally, at pages 7-13).
25. Later in the afternoon of August 26<sup>th</sup>, after the activity had ended, the victim of the prank and that person's mother reported the incident to a teacher. The high school assistant principal was contacted and accepted a written incident report from the victim of the prank. (S-1 at page 7; NT at 73-75).

26. The investigation continued on Friday, August 29<sup>th</sup> when the assistant principal spoke with students who witnessed or were otherwise involved in the incident. Written incident reports were submitted by these students. The assistant principal delayed the investigation because students were not at school on August 27<sup>th</sup> or 28<sup>th</sup>, and the assistant principal wanted to guard against students collaborating on their stories. (S-1 at pages 7-13; NT at 74-75, 104-105).
27. The state police were informed of the incident. (S-1 at page 17).
28. As a result of the investigation, the student was immediately suspended for ten days. The District also sought to expel the student. (S-1 at pages 2-3; NT at 128).
29. Because the student is identified as a student with a disability under federal and Pennsylvania special education law, the District's decision to expel the student triggered the procedural safeguards of a manifestation determination review. (NT at 127-128).

30. Pursuant to 34 C.F.R §300.530(e) and 22 PA CODE §14.162(q), on September 11, 2008, the IEP team held a manifestation determination review. The team consisted of the parents, the supervisor of special education, the high school principal, the high school assistant principal, a school psychologist, a regular education teacher, a special education teacher, and an individual noted as “mentor parent program”. (S-4).
31. The manifestation determination review found that the incident was not a manifestation of the student’s disabilities, specifically that “the incident in question was not a result of an impulsive act but rather a planned event with other students.” Furthermore, the review found that the incident was not a direct result of the District’s failure to implement the student’s IEP. (S-4 at pages 5-6).
32. Parents disagreed with the manifestation determination review and requested expedited due process. (S-4 at page 7).
33. Should the manifestation determination review be upheld, the District will suggest that the student be placed in an alternative educational setting. The program would deliver the

student's academic program through the IEP and would include weekly therapy for anger management and other issues. The student's progress in the program would be monitored and, every twelve weeks, a determination will be made to see if the student can return to the regular education setting. (NT at 131-132).

34. Parents feel that the student should be placed in a partial hospitalization program. It is unclear at the time of the hearing whether this program has formally evaluated the student and whether the program feels it can offer the student an appropriate course of treatment. (NT at 33-34, 36-37, 133-135, 169-170).

### **DISCUSSION AND CONCLUSION OF LAW**

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.<sup>7</sup> Under these laws, students with disabilities have protections regarding school district discipline.<sup>8</sup> When a student with a disability is suspended from school in excess of 15 cumulative school days in a school year,<sup>9</sup> or in excess of 10 consecutive school days,<sup>10</sup> that disciplinary action constitutes a change

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<sup>7</sup> 34 C.F.R. §§300.1-300.818; 22 PA CODE §§14.101-14.

<sup>8</sup> 34 C.F.R. §§300.530-300.536; 22 PA CODE §§14.162(q).

<sup>9</sup> 22 PA CODE §14.143(a).

<sup>10</sup> 34 C.F.R. §300.536(a)(1).

in the student’s educational placement. An intricate series of protections must be observed before a school district can impose the discipline.<sup>11</sup>

Pursuant to the applicable federal regulations, 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 (school district’s) failure to implement the IEP.”<sup>12</sup> This is referred to a manifestation determination review. The team must determine if the behavior was a manifestation of the student’s disability.

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 (school district), the parent, and relevant members of the child’s IEP team.”<sup>13</sup> 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.”<sup>14</sup>

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

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<sup>11</sup> *Id.* §300.530.

<sup>12</sup> *Id.* §300.530(e) (1) (i-ii).

<sup>13</sup> *Id.* at §530(e)(1)

<sup>14</sup> *Id.*

ensure that the child is provided with a free, appropriate public education, continues to participate in the general curriculum in the alternative setting, and continues to make progress toward achieving his/her IEP goals.<sup>15</sup> If the manifestation determination review results in upholding the school district's recommendation for an alternative placement, the IEP team determines the alternative setting.<sup>16</sup>

A parent who disagrees with the results of the manifestation determination review or with the alternative placement decision is entitled to appeal by means of a due process hearing.<sup>17</sup> If the hearing officer determines that the district violated the manifestation determination procedures, or that the behavior was a manifestation of the child's disability or the school district's failure to implement the IEP, the hearing officer may (1) return the child to the original placement or (2) order a change of placement to an alternative placement for 45 school days upon determining that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others."<sup>18</sup>

In this case, the District has complied with the procedural requirements of the manifestation determination process. Appropriate members of the IEP team convened a timely meeting and reviewed all

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<sup>15</sup> *Id.* at §300.530(c),(d).

<sup>16</sup> *Id.* at §531.

<sup>17</sup> *Id.* at §532(a).

<sup>18</sup> *Id.* at §300.532(b)(1),(2)

relevant information concerning the student in terms of the behavioral incident.<sup>19</sup>

While the District attempts to characterize the incident of August 26<sup>th</sup> as wholly premeditated, the student’s behavior as it unfolded over those minutes was, to the mind of this hearing officer, rooted in the student’s ADHD. It was impulsivity that engendered it, and impulsivity/inappropriate peer interaction which fueled it. Where the parents fail, however, is in showing that the behavior was wholly “caused by, or had a direct and substantial relationship to” the student’s ADHD.<sup>20</sup> In this regard, both parties misjudge the strength of their arguments—the student’s ADHD played a role, arguably even a large role, in the incident but not the point of causation/directness/substantiality. Given that, the manifestation determination review must be upheld as a matter of law.<sup>21</sup>

Likewise, the parents’ argument that the District failed to implement the student’s IEP fails. The teacher overseeing the extracurricular activity implemented the IEPs behavior management protocols (mainly through redirection).<sup>22</sup> While the student’s behavioral difficulties over the years had emerged in unstructured settings, there were other incidents which unfolded in classroom settings and other

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<sup>19</sup> *Id.* at §300.530(e)(1).

<sup>20</sup> *Id.* at §300.530(e) (i).

<sup>21</sup> *Id.*

<sup>22</sup> S-4 at page 4.

settings with adults present.<sup>23</sup> There was no failure to implement the IEP, as written, on the part of the District.<sup>24</sup>

The record raises very troubling questions, however, regarding how the District handled the student's behavior. In January 2005, the student was involved in a behavioral incident serious enough to trigger a manifestation determination proceeding.<sup>25</sup> The nearly contemporaneous evaluation that found the student to be an eligible student under federal and Pennsylvania special education laws included results that showed consistent and broad clinical/at-risk/elevated findings of behavioral and depression measures from parent, teachers, and the student himself.<sup>26</sup>

What followed were four years (7<sup>th</sup>-10<sup>th</sup> grades) filled with an average of ten days of suspension per year, including at least one "major incident" each year.<sup>27</sup> In 10<sup>th</sup> grade, the most recent school year, the student was suspended for fifteen days, the maximum allowable before triggering a manifestation determination hearing.<sup>28</sup> In sum, over the span of approximately 33 months that school was in session from January 2005 through August 2008, the student has been suspended for dozens and dozens of school days and been involved in two manifestation determination hearings. To the mind of this hearing officer, it seems

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<sup>23</sup> NT at 138, 153-154.

<sup>24</sup> 34 C.F.R. §300.530(e) (ii).

<sup>25</sup> P-2; NT at 24-25, 138-142, 160-161.

<sup>26</sup> See findings of fact 5-13. Of particular concern are the student's results on the Children's Depression Inventory at page 6 of P-2.

<sup>27</sup> NT at 24, 146, 153-154, 162-164.

<sup>28</sup> P-1.



appropriate to ask whether something more than impulsivity is at play in the behavior of this student.

The District has discussed the possibility of an emotional support setting for the student although it has not sought an evaluation for emotional support.<sup>29</sup> Given the results of the ER of January 2005 and the behavioral/disciplinary history of the student since middle school, it seems appropriate to seek a more formal evaluation on the question of emotional disturbance. While it may or may not rise to the level of misidentification, an evaluation seems to be in order, and this hearing officer will include a provision for such an identification in the order.

### **CONCLUSION**

The Franklin Area School District committed no procedural or substantive error in its September 11, 2008 manifestation determination review of the behavioral incident involving the student which took place on August 26, 2008. Therefore, the manifestation determination review will not be overturned.

The possibility that the student may have been misidentified and that the exact nature of the student's placement is uncertain, this hearing officer is concerned that there is a substantial likelihood that the student may suffer an emotional and/or some other injury. As such, an order will be issued for an interim alternative educational placement

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<sup>29</sup> NT at 135-136. 168-169.

pending the results of an evaluation for emotional disturbance and the subsequent decision of the student's IEP team on the appropriate program and placement for the student.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the manifestation determination review of September 11, 2008 will not be overturned.

Because there is a possibility, fully supported by the record, that the student may have been misidentified and because the exact nature of the student's placement is not settled as a matter of fact, this hearing officer feels that these uncertainties pose a substantial likelihood that the student may suffer an emotional and/or other injury.

Therefore, pursuant to 34 C.F.R. §300.532(b) (2) (ii), the student's placement shall be at the alternative education program for 45 school days following the date of this decision.

Within 60 calendar days of the date of this decision, pursuant to 22 PA CODE §14.124(b), the Franklin Area School District shall perform an evaluation of the student, and issue an evaluation report, to

determine if the student should be diagnosed with an emotional disturbance. The student's IEP team shall convene within 10 school days of the date of the evaluation report to consider the appropriateness of the student's IEP and the appropriateness of the student's placement, including whether the student's placement should continue at the alternative education program, should be changed to another out-of-school placement, or should be a return to an appropriate placement within the Franklin Area School District.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

October 10, 2008