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

Final Decision and Order

CLOSED HEARING
ODR File Number: 19752 17 18

Child's Name: N. M. **Date of Birth:** [redacted]

Dates of Hearing:
10/23/17

Parent:
Parent(s)

Counsel for Parent
Pro Se

Local Education Agency:
Upper Darby School District
601 N. Lansdowne Avenue
Drexel Hill, PA 19026

Counsel for the LEA
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Hearing Officer: William Culleton Esquire, Certified Hearing Officer

Date of Decision: 10/31/17

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] is an eligible resident of the District. Student is identified with Other Health Impairment pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Until September 2017 in the current school term, Student attended Student's neighborhood school. However, in September 2017, the District suspended Student with intent to expel for bringing a knife to school in violation of a student code of conduct.

The District met with Parents to review information, as required by the IDEA.[2] The District then determined that Student's behavior was not a manifestation of Student's disability. Parents disagreed, and asked the District for a due process hearing without filing the IDEA required Complaint Notice.[3] The District then filed the present complaint. Parents and the District have agreed to place Student in an alternative school pending the resolution of this matter.

The District asks this hearing officer to find that its manifestation determination and proposal to change Student's placement were correct. Parents ask this hearing officer to find that the Student's behavior was a manifestation of Student's Other Health Impairment; they request an order requiring the District to continue Student's placement in Student's neighborhood school.

The hearing commenced within an expedited time frame.[4] It concluded in a single session. I have considered and weighed all of the evidence of record. I conclude that the District's manifestation determination was appropriate. I will not order the District to keep Student in Student's neighborhood school or prevent it from changing Student's placement as appropriate.

[1] Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.
[2] 34 C.F.R. §300.530(e).
[3] 34 C.F.R. §300.507.
[4] Due to the immutable time line in this matter, this hearing officer was constrained to insist on convening the hearing without granting Parents' request – made a few days before hearing - for more time to retain a lawyer.

ISSUES

1. Was the District's manifestation determination appropriate?

2. Should the hearing officer order the District to continue Student's placement in Student's neighborhood school?

FINDINGS OF FACT

1. Student is an eligible resident of the District and was enrolled in a District middle school prior to a disciplinary incident in September 2017. (S 1.)[5]

2. Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and exhibits symptoms across environments – in the home, the community and the school - including inattention to task, distractibility, difficulty controlling impulses, difficulty planning, difficulty organizing daily activities. Student takes medication for this disorder. (S 1, 2.)

3. Student has average intellectual ability. (S 1.)

4. Student also has a history of bullying others (including physically assaulting a peer outside the school building), impulsiveness (such as calling out in class, cursing when frustrated or running in the hall), disrupting classes and disrespect for adult authority. (NT 69; S 1, 3.)

5. In April 2017, Student brought [items] to school. This behavior is not known to have been impulsive. (NT 88-89; S 3.)

6. Student's history includes exhibiting anxiety due to Student's [parent's military] service, which requires [that parent] to be absent from home for extended periods of time. (S 1.)

7. Student has exhibited the behavior of lying to get out of trouble. (S 1.)

8. The District identified Student in March 2017 with Other Health Impairment due to ADHD and the IEP team agreed to implement an IEP in April 2017. (S 1, 5.)

9. The Student's IEP did not provide for an extra set of books to keep at home. (NT 47-48; S 5.)

10. On September 19, 2017, Student brought a knife into school. The blade was two and one-half inches long. (S 3, 6.)

[5] Most of the exhibits in this matter are marked "SD-[numeral]". For ease of reference I will cite them as "S [numeral]". Parents introduced one exhibit, referenced as "P 1."

11. Student lost the knife and it was found [redacted] by another student, who gave it to the hallway monitor. [Redacted.] Student was brought to the school principal's office, where Student admitted bringing the knife to school and stated that Student brought it for safety because of an altercation on the day before. (S 3, 6; P 1.)

12. Student also stated that Student had had the knife for more than one day prior to bringing it to school. (NT 48.)

13. The School notified Student's Parents and Student was arrested and confined by the police until Parents took custody later. (S 3.)

14. The School suspended Student for ten days. (S 3.)

15. On September 22, 2017, the school principal held an "informal due process hearing" to inquire further into the facts surrounding the incident. At that time, Parents conveyed to school officials that Student had lied about feeling unsafe because of an altercation on the day before bringing the knife to school. (NT 44; S 6.)

16. The District convened a meeting on September 25, 2017 to determine whether Student's behavior in bringing the knife to school was a manifestation of Student's ADHD. Student's Parents attended, along with an experienced, certified school psychologist, special education coordinator, lead and regular education teachers, special education teachers and administrators. (NT 45; S 3, 6.)

17. In the meeting, the school psychologist provided her opinion that Student's behavior was not a manifestation of Student's disability. The psychologist based this opinion upon corroborated and uncontroverted facts: 1) that Student had noticed that Student did not have the knife, thus showing awareness that Student had brought the knife into school; 2) that Student was aware that Student should not have the knife in school, as evidenced by [an] attempt to retrieve the knife [redacted]; 3) Student expressed a mindset of wanting to be safe, implying both awareness and choice regarding having the knife in school. (NT 74-75, 81, 93, 95, 110,115-119.)

18. Impulsivity is a momentary thing, and awareness that having a knife is wrong, as well as intending to possess it in school to feel safe, are not impulsive behaviors. (NT 77-80.)

19. The Student's executive functioning difficulties were not involved in Student's behavior regarding possessing the knife in school. (NT 93-101.)

20. The psychologist expressed no opinion as to whether or not Student's initial taking of the knife was impulsive; rather, the psychologist's opinion was that some of the Student's actions subsequent to doing that were not impulsive. (NT 83-89.)

21. The parties agreed that Student would attend the District's cyber-school during pendency of due process. (S 3, 4.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[6] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[7] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – that is, when the evidence on each side has equal weight. The Supreme Court in Schaffer called this "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the District, which initiated the due process proceeding. I find that the District has presented more persuasive evidence proving the facts that it has alleged; therefore, the evidence is not in "equipoise", and the burden of proof is not a determinative issue.

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[6] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[7] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

IDEA PROTECTIONS FOR CHILDREN SUBJECT TO SCHOOL DISCIPLINE

The IDEA, 20 U.S.C. § 1415 (k), and its implementing regulations, 34 C.F.R. §300.530-534, provide specific protections to eligible students who are facing a change of placement due to violation of a student code of conduct. If a child is eligible for special education, the school district cannot impose a change of placement unless it first holds a meeting and determines that the child's conduct in violation of the code of conduct was not a "manifestation" of the child's disability. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e). If the conduct is found to be a "manifestation" of the child's disability, the child must be returned to the placement from which he or she was removed. 20 U.S.C. §1415(k)(1)(F)(iii); 34 C.F.R. §300.530(f)(2).

Parents can request due process in order to contest the school district's manifestation determination. 34 C.F.R. §300.532(a). A hearing officer can issue an order returning a child to the original placement. 34 C.F.R. §300.532(b)(2)(i). A District can request due process regarding an issue relating to placement. 34 C.F.R. §300.507(a)(1) and (2). The hearing officer is vested with discretion to issue an appropriate order in response to such a request. See Swope v. Central York Sch. Dist., 796 F. Supp. 2d 592 (W.D. Pa. 2011). In this case, the District has requested such an order, albeit in response to Parents' desire to contest the manifestation determination in due process. Accordingly, I will address all of the issues presented by the parties.

DEFINITION OF "MANIFESTATION" – APPLICATION TO THIS MATTER

The crux of this matter is whether or not Student's course of behavior with the knife was a "manifestation" of Student's ADHD, as "manifestation" is defined in the IDEA. That statutory

definition, as it pertains to this matter[8], is whether or not "[T]he conduct in question was caused by, or had a direct and substantial relationship to, the child's disability … ." 34 C.F.R. §300.530(e)(1)(i). I conclude that the evidence is preponderant that Student's conduct was not caused by Student's ADHD and that it did not have a direct and substantial relationship to ADHD.

On the record before me, the only definition of ADHD is that given by the school psychologist, who testified at length and credibly. The psychologist defined ADHD as an impairment of a child's executive functions, which include among other things the ability to keep attention to task, to resist distractions, to control impulses and to plan actions in pursuit of a goal. The psychologist further defined the impairment of impulse control, or "impulsive" behavior as instantaneous or in the "moment". Thus, evidence of intention to do something or knowledge that one is doing something shows that such an action was not impulsive. Moreover, the psychologist defined the various executive functions commonly defined in the field of psychology in such a way as to convince this hearing officer, on the basis of her testimony and its corroboration by Student's other educators who testified, that these psychological disabilities were not related to Student's behavior.

The documentary evidence corroborates the testimony of several witnesses that the psychologist presented these opinions to the manifestation meeting participants, including Parents. It was her judgment as well as that of the other participants (except for Parents) that Student's [effort] to find the knife showed that Student knew that Student had brought it to school, and that Student intended to possess it at school. The psychologist and the team concluded that this evidence showed that Student's bringing the knife to school was not impulsive, and that it did not implicate any of the other executive functions as defined by the psychologist. Parents did not

[8] As discussed below, Parents raised a second part of the definition regarding implementation of the IEP, 34 C.F.R. §300.530(e)(1)(ii), but provided no evidence to support their assertion.

present any other evidence to those in the meeting that would contradict the psychologist's definitions, opinions and conclusions.

The District representatives at the manifestation meeting had appropriate information, including the psychologist's input, to support their conclusion that Student's behavior was not a manifestation, in that it did not cause Student's behavior. Indeed, the only cause of which there was evidence – Student's repeated statements that Student wanted the knife in order to feel safe – demonstrated that the cause was a need for a feeling of security, not the operation of a disabling impulse.

On this record, Student's disability does not by itself prove that Student was unable to comply with adult authority and known rules of appropriate behavior. There must be more specific and direct evidence to show that Student was impeded in using appropriate judgment in view of the rules. There was none here.

Similarly, the participants' determination that Student's conduct had no "direct and substantial relationship" to ADHD was grounded in appropriate information. They were aware of cognizable evidence that Student possessed the knife in order to feel safe; thus any relationship to ADHD was not "direct" based upon this record. Moreover, based upon the psychologist's input, they knew that any theory of impulsivity or impaired executive functions was not related significantly to the behavior – indeed there was no evidence to imply that it was a related at all, based upon what they knew at the time of the manifestation meeting.

Having heard many of the participants at the meeting, I conclude that the District's manifestation determination remains appropriate at this time. Parents proffered a number of theories to explain their child's behavior and show how it could have been impulsive throughout, or the result of other impairments inherent in ADHD. As knowledgeable as Parents are, however,

and as plausible their theories, Parents provided no testimony or other evidence to contradict the psychologist's definitions and conclusions. Thus, I conclude by a preponderance of the evidence that the Student's behavior was not a manifestation of Student's disability, and that the District is legally authorized to proceed to change Student's placement as appropriate.

The most contrary evidence that Parents mustered was two written documents which they offered as contrary opinions.[9] I excluded these documents because, despite my written instructions that they must do so – provided to Parents well ahead of the hearing date as Parents acknowledged – Parents failed to convey at least the substance of those opinions to the District through its counsel two days before the hearing. The District objected and it was within its rights to do so. 34 C.F.R. §300.512(b). To admit these documents in an expedited hearing that cannot be delayed would have been very unfair to the District. Given my explicit instructions and the clarity of the statute as to Parents' duty in this regard, I concluded that exclusion was necessary.

Even if these documents had been admitted, they were offered as expert opinions from individuals not present, and thus hearsay. There would have been no way to corroborate the assertions in these documents and thus I could have given them little if any weight. On the record as it stands now, even if these opinions had asserted that Student's behavior was impulsive or significantly related to executive functioning impairment, such assertions would not have outweighed the school psychologist's testimony, presented in person and under oath, with full cross examination by Parent and substantial examination by the hearing officer.

As a result, Parents offered nothing but speculation as to what was going on in Student's mind as Student stole [the] knife [redacted], placed it in Student's pocket, kept it while walking to school, possessed it in school, discovered that it was lost, [and attempted to retrieve it]. While [the

[9] NT 11-14.

parents are] obviously very concerned and knowledgeable about Student as the record shows, [the parents were] not there and could not have any personal knowledge of these events. What Student said to [one of the parents] contradicted what Student said to school officials, so even what [the parents] found out later carries very little weight as evidence.

The document marked "P-1" – a written account of the incident prepared obviously for purposes of this matter and assisted by a therapist who did not testify – has little weight, because these circumstances of its preparation suggest a great likelihood of confusion and misstatement, and because "P-1" contradicts what Student said more spontaneously at the time of admitting Student's actions to the principal.

In sum, the record here shows that the manifestation determination was and is appropriate, based upon appropriate procedures and the facts of record. A meeting was convened to obtain input from Parents and a number of educators familiar with Student and the incident in question. Educational records were reviewed, including an evaluation report and an IEP. The school psychologist informed the meeting as to the psychological processes involved and her opinion was based upon verified facts. Thus the District's manifestation determination is upheld.

Parents attempted to show that Student's conduct was due to a failure to implement Student's IEP, as provided in the statutory definition of "manifestation". 34 C.F.R. §300.530(e)(1)(ii). However, Parents were unable to produce any evidence of a failure to implement the IEP that would have any causal connection to Student's behavior. Thus, I conclude that this part of the definition of "manifestation" does not apply in the present matter.

CONCLUSION

I conclude that the District's manifestation determination was correct and that it is authorized to change Student's placement as appropriate. Accordingly I order the relief that it seeks, and will not prohibit it from proceeding as proposed.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District's manifestation determination was appropriate.

2. The District is not precluded from determining Student's appropriate placement at this time, including any appropriate change of placement.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are hereby denied and dismissed.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

DATED: October 31, 2017