

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: D.J.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 18588-16-17 KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Pocono Mountain School District
135 Pocono Mountain School Road
Swiftwater, PA 18370

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Date of Hearing:

January 25, 2017

Date of Decision:

February 5, 2017

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student in the Pocono Mountain School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a Due Process Complaint against the District in late December 2016 asserting, among other things, that it failed to comply with the IDEA when it imposed certain disciplinary measures on Student during the 2016-17 school year.³ The case proceeded to a single-session, expedited due process hearing for the reception of evidence on the discipline issues presented.⁴

For the reasons set forth below, the Parents have not established a violation of the IDEA on the narrow expedited issue presented in this portion of the bifurcated proceeding. Nevertheless, the circumstances surrounding the discipline in this case are quite concerning and indicate a significant need for concrete steps to be taken toward revising Student's educational program, particularly the behavioral concerns. Accordingly, the District will be directed to convene another manifestation determination meeting so that the parties may together consider

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page of and elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482.

³ The case was bifurcated so that the issues that were not considered to be expedited under 34 C.F.R. §§ 300.530 – 300.536 could proceed under the ordinary timelines. A new file number has been assigned to those issues that will be heard at a later date.

⁴ Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. The timelines and issues were confirmed in HO-3. At the conclusion of the hearing, the admission of P-2, P-3, P-4, P-5, and P-6 was taken under advisement (N.T. 366-70). After review of the record, the District's objection to P-2, P-3, P-5, and P-6 is hereby sustained on the basis that they were not referenced in the record and the source of each of those documents is unknown (with the exception of P-3, a partial document to which an objection was sustained at N.T. 126); thus, those exhibits are excluded from consideration. The District's objection to P-4, an attendance report that is clearly a District record, is hereby overruled and P-4 is admitted.

all available alternatives for addressing Student's behavior.

ISSUES

1. Whether the District violated its IDEA obligations to Student in imposing discipline during the 2016-17 school year; and
2. Whether the District's discipline records for Student are inaccurate.

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District and is eligible for special education under the IDEA. (N.T. 32-33)
2. Student was first enrolled in the District at the start of the 2016-17 school year, having previously attended school in another state. The District did not have Student's Individualized Education Program (IEP) from the other school until after the school year started. (N.T. 82, 215, 311-12)
3. A meeting convened in October 2016 where the parties had a discussion regarding Student's educational needs and how the District would address them. A full-time paraprofessional was assigned to Student around that time. (N.T. 38-40, 119-20, 233, 261-62)
4. In the school that Student attends, classroom teachers handle disciplinary concerns as they are able; for those that cannot be resolved at the classroom level, the teacher can submit a discipline referral for an administrator to review and take further action. Further action can involve a range of disciplinary measures depending on the severity of the conduct. (N.T. 249-50, 264)
5. Student was subject to restricted movement at times due to disruptive behavior in the hallway. Students under restricted movement do not go to the next class until the hallway is clear of other students. (N.T. 108-10, 256, 318-19, 324; S-2 pp. 1)
6. Student's behavior sometimes resulted only in contacts with the Parents. (N.T. 52-54, 69, 268-69, 278; P-1 p. 16; S-2 pp. 25-27, 42-43)
7. Student was subject to lunch detentions for six days at the end of October 2016 for disruptive behavior in the hallway. Students who have lunch detention may bring their own lunch or are provided menu items for the meal taken in the ISS room, then they return to their next class. (N.T. 66, 136-37, 266; P-1 p. 5; S-2 pp. 21-22)
8. Student was subject to "time out" in detention or a meeting with an administrator before returning to class (N.T. 258-59, 296) on the following dates:

- a. On September 27, 2016 for the remainder of the class period for disruption and failure to follow teacher directions in class (S-2 pp. 11-12);⁵
 - b. On November 17, 2016 for the remainder of the class period for disruption and failure to follow teacher directions in class (S-2 pp. 38-39);
 - c. On November 18, 2016 for disruption in class (P-1 p. 13; S-2 pp 42-43);
 - d. On January 12, 2017 for failure to follow teacher directions during lunch detention (P-1 pp. 20-23; S-2 pp. 63-66).
9. Student received the following in-school suspensions (ISS):⁶
- a. On September 16, 2016 due to behavior in the hallway (S-2 pp. 1-2);
 - b. On September 26, 2016 due to behavior in the classroom and outside of the school building (P-1 pp. 1-2; S-2 pp. 8-10);
 - c. On September 29, 2016 for disruptive behavior in class and in the hallway (P-1 p. 4; S-2 pp. 13-15);⁷
 - d. On November 17, 2016 for making a threatening comment to a peer and for disruptive behavior in class and in ISS (P-1 pp. 10-12; S-2 pp. 36-37, 40-41).
10. A special education teacher is in charge of the ISS classroom. Students in ISS address the behavior that resulted in the discipline with a teacher, and are also required to complete schoolwork over the course of the school day. Student's IEP was implemented during ISS. (N.T. 111-12, 254-55, 277)
11. Student received the following out-of-school suspensions (OSS):
- a. On October 3, 2016 for disruptive behavior in ISS (S-2 pp. 16-17);
 - b. On October 11, 2016 for physical contact with a peer and refusal to follow teacher direction in the hallway and in ISS (S-2 pp. 18-20);
 - c. On October 24, 25, and 26, 2016 for inappropriate contact with a peer (P-3 pp. 6-7; S-2 pp. 23-24);
 - d. On November 7, 2016 for multiple instances of disrupting class and refusing to follow teacher directions (P-1 p. 8; S-2 pp. 28-32);
 - e. On December 20, 21, and 22, 2016 for making an inappropriate comment to a peer, disruption on the school bus, and disruption in class (P-1 pp. 15, 17 18; S-2 pp. 53-60);

⁵ The date of the infraction was erroneously noted to be September 28, 2016 on one page of the report. (S-2 p. 11)

⁶ The District uses phrases other than "in-school suspension" to mean the same thing (N.T. 253-55, 261, 277). However because that is the commonly understood term that was used by the District at times, ISS will be used in this decision.

⁷ Although the ISS was apparently served on September 29, 2016, documentation of the discipline imposed is dated September 30, 2016. (*Compare* P-4, S-1 p. 2 and S-2 p. 13 with S-2 pp. 14-15)

- f. On January 3, 2017 for physical aggression toward a peer on the bus (P-1 p. 19; S-2 pp. 61-62).
12. Student was suspended from the bus on two days in November 2016 for disruptive and aggressive behavior as well as distracting the driver; on three days in December 2016 for disruptive behavior including distraction to the driver; and on three days in January 2017 for physical aggression toward a peer on the bus. (P-1 p. 9; S-2 pp. 33-35, 46-49, 61-62)
 13. On a number of occasions, someone at the District called Student's father to come to school to address Student's behaviors. On at least one occasion, Student's father was asked to take Student home and did so. On other occasions, Student's father picked Student up then returned Student to school. (N.T. 46, 48, 52-53, 56-57, 59-60, 67-68, 279, 340-41)
 14. Student frequently admitted to behaviors that resulted in discipline referrals when asked about them, but did not provide any explanations for the conduct. Student at times denied engaging in the behaviors described. (N.T. 253, 257, 259, 272, 316-17, 320, 322-23, 326, 334, 340)
 15. Student meets with the guidance counselor each week as specified in Student's IEP. (N.T. 326-27)
 16. Student is not provided with bus transportation as a related service in Student's IEP. (N.T. 272)
 17. There was an IEP/manifestation determination meeting held on January 20, 2017.⁸ The Parents did not respond to the invitation to attend that meeting on any of several dates. The District held the meeting on the final date offered, in their absence, but the Parents were unaware of a meeting to be held on January 20, 2017 until that date and therefore were not able to attend. The IEP team concluded that Student's behavior was a manifestation of Student's disability. (N.T. 226-27, 343, 352-53)
 18. The Parents have not consented to a functional behavioral assessment (FBA) and none has been conducted. (N.T. 263)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the

⁸ The record is unclear whether a new disciplinary incident prompted this meeting, and the evidence is insufficient to support a finding that there was another day of removal after January 3, 2017. (N.T. 251, 313-15)

burden of persuasion lies with the party seeking relief.⁹ Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify.¹⁰ This hearing officer found each of the witnesses to be generally credible and testifying to the best of his or her recollection with respect to the issues necessary to decide the narrow issue presented; credibility is discussed below as relevant. The parties did present with quite divergent viewpoints on whether and to what extent the discipline imposed on Student was appropriate and necessary; however, the issue to be decided relates solely to the District’s obligations under the IDEA.

In reviewing the record, the testimony of every witness, and the content of each admitted exhibit, were thoroughly considered in issuing this decision.

IDEA DISCIPLINARY PRINCIPLES

The Parents’ Due Process Complaint challenges the District’s imposition of discipline in the first half of the 2016-17 school year that they contend amounted to a change of placement. Pursuant to the IDEA and its applicable regulations,¹¹ the Parents had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing.¹²

⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

¹⁰ *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

¹¹ 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c).

¹² 20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532(a).

A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students.¹³ An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a “change of placement.”¹⁴ A “change of placement” based on disciplinary removals is defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a “pattern”.¹⁵ The LEA must determine, on a case by case basis, whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement.¹⁶ A pattern may arise if three factors exist: (1) the series of removals totals more than ten school days in the school year; (2) the child’s behavior is “substantially similar” to previous incidents that led to removals; and (3) additional factors such as the length of each removal, total amount of time of removal, and proximity in time support a conclusion that there is a pattern.¹⁷ The relevant Pennsylvania regulations explicitly provide that disciplinary exclusion of a child with a disability that exceeds fifteen days in the same school year is deemed a pattern and, thus, a change in placement.¹⁸ “Any unique circumstances” of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct.¹⁹

Once a decision is made to change the placement of a child with a disability for violating

¹³ 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b).

¹⁴ 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b).

¹⁵ 34 C.F.R. § 300.536(a).

¹⁶ 34 C.F.R. § 300.536(b).

¹⁷ 34 C.F.R. § 300.536(a)(2).

¹⁸ 22 Pa. Code § 14.143(a).

¹⁹ 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct “was caused by, or had a direct and substantial relationship to, the child’s disability; or ... was the direct result of” the LEA’s failure to implement the child’s IEP.²⁰ The manifestation determination must be made within ten school days of any decision to change the 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).”²¹ If the team determines that the behavior was a manifestation of the child’s disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan.²² If the team determines that the behavior was not a manifestation of the child’s disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability is entitled to special education services.²³

APPLICATION TO THE DISCIPLINE IMPOSED

From mid-September 2016 through early January 2017, Student was subject to a number of forms of discipline for multiple instances of conduct that generally amounted to disrupting the educational environment, typically including some verbal and physical behavior, and at times reflected failure to comply with teacher directives. The record establishes a total of ten non-consecutive days of OSS. That number does not amount to a change in placement within the meaning of the IDEA disciplinary provisions unless the series of removals presents a “pattern.” It merits mention, nonetheless, that the Office of Special Education Programs has recently

²⁰ 20 U.S.C. § 1415(k)(E)(i); *see also* 34 C.F.R. § 300.530(e).

²¹ 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E).

²² 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f)

²³ 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.530(c) and (d).

reiterated its longstanding position that LEAs should consider whether a student's educational program needs to be revisited even before the child has accumulated ten days of disciplinary removal,²⁴ particularly if there is a recurring denial of access to instruction.

The primary issue, thus, is whether the District was required to convene a manifestation determination review meeting prior to the filing of the Due Process Complaint. The Parents have suggested that the District's response to Student's infractions has been unwavering, and strongly suggests a pattern of removing Student from the classroom and ultimately from the school building that Student attends. As noted above, the federal regulations define the factors that are to be considered in determining if such a pattern exists: (1) whether the series of removals exceeds ten school days in that year; (2) whether the child's behavior is "substantially similar" to previous conduct leading to removals; and (3) whether additional circumstances such as the length of each removal, total amount of time of removal, and proximity in time suggest a pattern.

With respect to the first factor, the record establishes ten days of removal from school through OSS. In addition, there was further evidence that Student was required to miss instructional time as a result of discipline imposed. Most compellingly, while the testimony was conflicting over how frequently Student's father was called to pick Student up and what happened when calls about Student's behavior at school were made to him (N.T. 46, 48, 52-53, 56-57, 59-60, 67-68, 69-70, 279, 340-41), in lieu of formal discipline, Student was asked to leave the school building because of Student's behavior. It is not necessary to resolve the discrepancies in the testimony on how many times that occurred; for purposes of the issue presented in the expedited hearing, even a single instance of calling the Parents to remove the child from the school because of an inability to manage the behaviors exhibited satisfies the first

²⁴ Dear Colleague Letter, 68 IDELR 76 (OSEP 2016), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html?exp=1#> (last visited February 1, 2017).

factor in this case. This circumstance further strongly suggests that it is critical that the IEP team meet and discuss revisions to Student's educational program because the current interventions are clearly not meeting Student's behavioral needs.

With regard to similarity of the behavior, the second factor, Student's actions that were referred for discipline varied in many ways, although the majority of the conduct falls within the general umbrella of disruption and refusal to comply with directions. However, even if one were to conclude that the behaviors in question were "substantially" similar and therefore satisfied the second factor, the evidence simply does not preponderantly establish the third factor requiring review of circumstances such as the length of each removal, the total amount of time involved, and the proximity of the removals. Simply put, even accepting for purposes of this decision the assertions that the Parents were asked on multiple occasions to pick up and take Student home, the generalities in that testimony are insufficient to permit evaluation of any additional circumstances including those set forth in the regulations.

Accordingly, this hearing officer concludes that the record does not establish that a change in placement occurred that should have invoked the disciplinary protections under the IDEA. Nevertheless, it merits repeating that, had there been a change of placement subject to the IDEA disciplinary protections, the appropriate response by the District would have been to convene a manifestation determination review meeting within ten school days. Such a meeting did occur in January 2017, but, unfortunately, was held without the Parents. Despite a conclusion that the District did not violate the IDEA in this regard, pursuant to this hearing officer's remedial authority, the District will be ordered to invite the Parents to a new meeting to consider whether Student's behavior constitutes a manifestation of Student's disability, so that they may be given the opportunity to participate in that important process to include

consideration of whether an FBA is necessary and whether Student's behavior plan should be revised.

The Parents also challenged the veracity of the discipline referrals, asserting that the District improperly referred Student for discipline. (N.T. 49, 51, 54, 80, 222-23, 240-41) While it is understandable to assume that the IDEA disciplinary protections would extend to issues of whether, for example, an LEA could impose discipline on students with disabilities through overzealous enforcement of its code of student conduct, the U.S. Department of Education has explained that the authority over a fair disciplinary process is properly left to the LEA that has the obligation to protect all children in its schools.²⁵ This was not the type of discipline proceeding wherein students facing a suspension or expulsion would be entitled to notice and an opportunity to be heard regarding the basis of the exclusion from school.²⁶ And, while such evidence might directly relate to questions regarding a manifestation determination process,²⁷ there is no such issue before this hearing officer in this case.

The remaining issue is whether the disciplinary records are deficient, based upon the Parents' concerns that some of the referral forms lacked information. (*See, e.g.*, N.T. 65-66, 73, 77-79, 235-37) While there do appear to be some inconsequential discrepancies and omissions in Student's disciplinary records (*see, e.g.*, n. 6, *supra* and S-2 p. 11 (missing signature)), and the District may wish to review Student's discipline records to ensure that they are complete and accurate, this hearing officer cannot conclude that the minor errors that have been made part of the evidence in this case amount to a fatal flaw under the IDEA's disciplinary provisions.

²⁵ 71 Fed. Reg. 156, ¶ 46714 (August 14, 2006).

²⁶ *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); 22 Pa. Code §§ 12.6 – 12.8.

²⁷ *Z.B. v. Bristol Township School District*, 2016 U.S. Dist. LEXIS 4626 (E.D. Pa. 2016). It is noteworthy, however, that Student conceded during testimony to having engaged in many of the behaviors that led to the various disciplinary measures, although Student at times did not agree with the language used to describe the conduct that appears in the incident reports. (*See, e.g.*, N.T. 115-16, 133-34)

Accordingly, this claim must fail.

This hearing officer also observes that the parties appear to agree, and it is clearly beyond question, that Student's current special education program requires revision. An FBA would certainly provide crucial information to the IEP team participants to guide those discussions; and, the Parents should be provided with an explanation of that process and how it would assist the team's decision-making. The parties are encouraged to keep an open mind, at the ordered manifestation determination review and all subsequent meetings regarding Student's educational program, to the continuum of services that are and must be made available to Student and the District to meet Student's needs.²⁸ The parties are further urged to make every effort to return to working collaboratively together now and into the future.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, the District did not violate the IDEA disciplinary provisions in removing Student through the date of the due process hearing. However, the District will be required to invite the Parents to a new manifestation determination meeting so that they have the opportunity to participate in that process.

ORDER

AND NOW, this 5th day of February, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not violate the IDEA's discipline protections during the 2016-17 school year through the date of the due process hearing on January 25, 2017.

²⁸ 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.115, 300.116.

2. The District is directed to invite the Parents to a new manifestation determination review meeting to convene within ten school days of the date of this Order.
 - a. Within three school days of the date of this Order, the District shall offer to the Parents no less than three dates for a manifestation determination meeting within ten school days of the date of this Order.
 - b. If the Parents attend a new manifestation determination meeting, the team including the Parents shall together make a determination on whether Student's conduct was a manifestation of Student's disability. The team may only change the determination made at the January 20, 2017 meeting if the Parents agree.
 - c. If the Parents fail to respond to the dates offered or to attend a new manifestation determination meeting, no new manifestation determination need be made; and, the conclusion reached at the January 20, 2017 meeting shall stand.
3. If the conclusion is reached or maintained that Student's conduct was a manifestation of Student's disability, the participants at the meeting shall consider whether and how to modify Student's behavior plan. The District shall also seek the Parents' consent to conduct an FBA to guide educational programming for Student.
4. Nothing in this decision should be read to prevent the parties from mutually agreeing to alter the terms of this Order, including the scheduling of a meeting to discuss any aspect of Student's special education programming and placement.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and Order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

ODR File No. 18588-1617KE