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:

20513/17-18/KE

Child's Name: A.W.

Date of Birth: [redacted]

Dates of Hearing:

4/19/18, 4/24/18

Parent:
[redacted]

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Hearing Officer: Joy Waters Fleming, Esquire **Date of Decision:** May 9, 2018

INTRODUCTION AND PROCEDURAL HISTORY

The Student is a high school-aged child residing in the District (District). The Parent (Parent) requested an expedited due process hearing after Student was subject to a series of school suspensions for various violations of the District's code of conduct. In the Complaint, the Parent[1] asserts that Student is entitled to protections under the IDEA because the District, had knowledge that Student was child with a disability before the behavior that precipitated the disciplinary actions. Parent also contends that in April 2018, the District improperly proposed to remove Student to an alternative education setting and that the imposed suspension resulted in a change of placement. In addition to a determination that the District had knowledge that Student is a child with a disability, Parent, also requests independent evaluations (IEE), a stay of expulsion proceedings, a functional behavioral assessment and compensatory education. The District has agreed to provide an expedited evaluation – which will address the need for a functional behavioral assessment, the District did not pursue an expulsion of Student and Parent presented no evidence or argument in support of a demand for compensatory education. These issues will not be addressed within this decision.

The District filed a Motion to Dismiss on grounds that the Complaint was improperly filed as expedited because Student was not suspended beyond ten days, and that Student is not entitled to disciplinary protections and relief as a "thought to be eligible" child. The Motion to Dismiss was denied; however, the Hearing Officer determined that the District's request to deny the Parent's requested IEE was not ripe for determination[2].

For the reasons set forth below, the Parent has met her burden preponderantly establishing that since November 13, 2017, the District had knowledge that Student is a child with a disability. The Parent has not established that the District had knowledge that Student was a child with a disability before November 13, 2017 or that a "pattern" of disciplinary removals constituting a change in placement occurred.

ISSUES

1) Is Student eligible or thought to be eligible for special education and related services under the IDEA?

2) If Student is determined to be eligible or thought to be eligible for special education and related services, is Student entitled to the disciplinary protections afforded under the IDEA?

[1] Parent in this case refers to the natural mother. Natural mother and father are divorced, sharing legal custody of Student. Before the hearing, the natural father, in writing declined to formally participate in these proceedings, delegating authority to the natural mother.

[2] The Parent request for an IEE became moot by the first hearing date as the District and Parent stipulated that Student would receive an "expedited" evaluation. (N.T. 14, 17)

FINDINGS OF FACT

1. From an early age, Student exhibited poor coping skills, violent outbursts and rages. (N.T. 44)

2. Since 2015 Student has received weekly outpatient mental health counseling. (N.T. 42, 98)

3. During the 2016-2017 school year, Student was in the 8th grade in the District. (N.T. 53)

4. During the 2016-2017 school year, Student's 8th grade guidance counselor contacted Parent about Student exhibiting, self-injurious, "cutting behaviors". (P-4, N.T. 44, 48, 102)

5. In March 2017, Student received an evaluation from a child and adolescent psychiatrist and was diagnosed with major depressive disorder, generalized anxiety disorder, parent-child relational problems, adverse effects of medication, disruption of family by separation or divorce, high expressed emotional level in the family and obesity. (P-5; N.T. 42, 343-365)

6. Student's psychiatric evaluation recommended assessment for an IEP, school-based emotional support services and assistance with bullying issues. (P-4)

7. At the end of the 2016-2017 school year, while in the 8th grade, Student was involved in an altercation with another student, fled the school building, resisted arrest and assaulted a police officer. (N.T.53, 311)

8. Student is in the 9th grade in the District high school for the 2017-2018 school year. (S-1)

9. On August 24, 2017, during high-school enrollment, Parent completed a District "Health Information Form" for the 2017-2018 school year indicating Student had treatment and medication for mental health diagnoses. (S-1)

10. On September 28, 2017, Student received a three-day, out of school suspension, for using vulgar language toward another teacher [redacted] and swearing at two principals trying to intervene. (P-8, S-13, p.4; N.T. 54, 61, 69)

11. On September 28, 2017, Parent met with the high school principal and asked for help with the behavioral issues she was having with Student. (N.T. 266)

12. Student disclosed to the psychiatrist that Student has been bullied in school. (N.T. 347, 350-351)

13. Parent communicated to the District concerns regarding bullying of the Student. (N.T. 39, 51)

14. On November 6, 2017, Student's psychiatrist provided Parent with a letter, referencing Student as under her care, and requesting that Student be evaluated for an IEP and emotional support services. (P-5, N.T. 54, 82)

15. On November 7, 2017, Parent contacted the guidance office to request that Student receive an IEP. (N.T. 55, 216)

16. On November 7, 2017, Student's guidance counselor contacted the high school principal after receiving a phone call from Parent expressing that Student was diagnosed with "high anxiety, major depression and behaviors associated with discipline issues". (S-4, p.7, N.T. 55)

17. The guidance counselor referred Parent to the Special Education Director. (S-4, p.7)

18. On November 13, 2017, the District met with Parent to discuss her concerns regarding Student's behavior. (S-2, P-5; N.T. 57)

19. Before the November 13 meeting, Parent provided the District with the letter from Student's psychiatrist indicating the need for an IEP and requesting an evaluation. (P-5; N.T. 56)

20. At the end of the November 13 meeting the District presented Parent with a NOREP indicating a refusal to initiate an evaluation. (S-2)

21. The NOREP indicated that Student was doing well and that no behavior issues had arisen to date. (S-2; N.T. 58)

22. The NOREP indicated Student progress and lack of school behavioral concerns as the reason for not proceeding with the Parent requested evaluation. (S-2)

23. Parent understood that the District would not be taking further action regarding her concerns because Student's grades were "okay". (N.T. 60, 82)

24. Parent signed the NOREP approving the recommendation of the District. (S-2; N.T. 82)

25. On January 26, 2018, Student received a three-day, out of school suspension, after [an incident of physical aggression]. (P-8; N.T. 72)

26. On February 20, 2018, Student received a one-day, in school suspension for threatening [physical aggression toward] another student and using vulgar language. (P-8; N.T. 72)

27. [Redacted] Student was hospitalized and received inpatient, mental health treatment from March 25, 2018 to April 4, 2018. (S-5, N.T. 47)

28. On March 26, 2018, Student's inpatient educational program sent a consent to release/consent to obtain educational information from the District. (S-5)

29. An educator from the inpatient educational program, where Student was receiving treatment, contacted the District about Student's hospitalization a day or two after the admission, spoke to the guidance counselor and described the facility as a psychiatric inpatient facility. (N.T. 206, 225, 226)

30. On April 5, 2018, a day after discharge from the inpatient facility, Student returned to school and received a five-day, out of school suspension after [an incident of physical aggression]. (P-7, P-8; N.T. 73, 84)

31. On April 10, the District Assistant Principal telephoned Parent and conveyed various options for Student's return to high-school, including a 45-day alternative education program housed in the basement of the high school. (S-13, p.2: N.T.35-37)

32. On April 6, 2018, the District initiated an Alternative Education for Disruptive Youth, (AEDY) referral for Student. (S-13, p.3)

33. The District did not finalize the AEDY referral of the Student. (S-13, p.3)

34. On April 11, 2018, the District conducted an informal hearing with Student, Parent, Assistant Principal and the building Principal. (S-10, p.1)

35. On April 11, 2018, the District implemented a safety plan for Student addressing crisis situations identified as self-harm and threats or physical aggression toward others or property. (S-9, p.1, N.T. 77)

36. On April 11, 2018, Parent requested an expedited due process hearing. (S-14)

37. On April 12, 2018, the District agreed to provide Student with an expedited initial evaluation. (S-11; N.T. 87)

38. Student has returned to school, in regular education, with the safety plan. (N.T. 87)

39. Between the first day of school and the date of the due process hearing, Student received eleven days of out of school suspension and one day of in school suspension. (P-7, P-8)

40. Since November 2017 and the date of the due process hearing, Student has received eight days of out of school suspension and one day of in school suspension. (P-7, P-8)

APPLICABLE LEGAL PRINCIPLES

Burden of Proof

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 burden of persuasion lies with the party seeking relief, in this case the Parent. *Schaffer v. Weast,* 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education,* 435 F.3d 384, 392 (3d Cir. 2006). 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.

Credibility

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board,* 516 F.3d 254, 261 (4th Cir. Va. 2008). Overall, this hearing officer found each of the witnesses to be credible, testifying to the best of their recollection to the relevant events. In reviewing the record, the testimony of every witness and the content of each exhibit were carefully considered.

Child Find

Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where *learning or behaviors* indicate that a child may have a disability [emphasis added]. *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1996). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. *See Richard v. City of Medford,* 924 F.Supp. 320, 322 (D.Mass.1996). The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125.

Thought to be Eligible

A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct, may assert any of the protections afforded to children with disabilities if the school district had knowledge, or is deemed to have had knowledge, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. Under the IDEA, 20 U.S.C. § 1415(k)(5), 34 C.F.R. § 300.534 and Chapter 14 there are three circumstances under which a school district has pre-existing knowledge or is deemed to have pre-existing knowledge, that a child might be eligible for special education and concomitant disciplinary protections.

Specifically, a school district may be deemed to have had pre-existing knowledge that the student was a child with a disability if:

1) the student's parent expressed to the teacher or to supervisory or administrative personnel a written concern that the child was in need of special education and related services;

2) the student's parent requested an evaluation; or

3) the child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, either directly to the director of special education or to other supervisory personnel of the agency. 20 USC §1415(k)(5); 34 CFR §300.534

However, a school district is not deemed to have knowledge if the parent of the child:

(i) Has not allowed an evaluation of the child pursuant to §300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

Disciplinary Protections

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.*, and its implementing regulations provide for specific protections to eligible students who are facing a change in placement for disciplinary reasons. Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's

file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or that the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 20 U.S.C. § 1415(k)(E)(i). *See also* 34 C.F.R. §300.530(e).

If the local educational agency, the parent, and IEP team members decide that the conduct had a substantial relationship to the child's disability or was the result of failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. §1415(k)(E)(ii). If the conduct is determined to be a manifestation of the child's disability, the IEP team must take certain steps including conducting a functional behavioral assessment, implementing a behavioral intervention plan and in most circumstances returning the child to the placement from which the child was removed. 20 U.S.C. §415(k)(1)(F); 34 CFR 300.530(f).

By contrast, if school personnel determine that the behavior which resulted in discipline was not a manifestation of the student's disability, school personnel may apply the same disciplinary procedures applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education. 20 U.S.C. § 1415(k)(1)(C) and (D); 34 C.F.R. § 300.530(c) and (d).

Disciplinary Removal

The IDEA and its implementing regulations provide for specific protections to eligible students who are facing a disciplinary change in placement. 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530-300.536. When a parent disagrees with a disciplinary change of placement, they may request an expedited due process hearing. 20 U.S.C. §§ 1415(k)(3)(A), 1415(k)(4)(b). However, "[s]chool personnel … may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting (AES), another setting, or suspension, for not more than ten school days (to the extent such alternatives are applied to children without disabilities)." 20 U.S.C. § 1415(k)(1)(b). The removal is a change in placement, and subject to those IDEA protections, when it is for a period of more than ten consecutive school days or constitutes a pattern of removal because the series exceeds ten school days in one school year, the removal was based on substantially similar behavior, and the totality of other factors warrant such a finding. 34 C.F.R. § 300.536(a).

DISCUSSION

Parent contends that Student is entitled to protections under the IDEA because the District had knowledge that Student was child with a disability before the behavior that

precipitated the series of suspensions. Parent also contends in April 2018, after the most recent suspension, the District improperly proposed to remove Student to an alternative education setting and that the totality of disciplinary removals constituted a "pattern" under 34 C.F.R. § 300.536(a)(2).

Thought to be Eligible

In April 2018, Student received a five-day out of school suspension, after [an act of physical aggression]. After the April disciplinary incident, Parent was contacted by the District and during that communication the issue of expulsion from school was discussed along with transfer of Student to an alternative education setting. The District denies that it intended to expel or place Student in an AES and states that this sanction was simply a possibility as it would be for any Student. Parent credibly contends that this discussion framed the basis for her expedited request for due process. The record evidence conclusively established that paperwork to place Student in an AEDY setting was initiated, although not finalized. Before the due process hearing, and after the suspension, Student was returned to regular education with a safety plan and Parent was offered and consented to an evaluation of Student. The concern of a pending expulsion or transfer to an alternative education setting has been resolved temporarily. In light of the series of events, Parent has established the need for an expedited due process hearing.

Parent sought school-based interventions, as far back as middle school, because of "cutting" behaviors brought to her attention by the Student's guidance counselor. Instead of stabilizing, by the end of 8th grade, Student was arrested in front of the school after [an act of physical aggression toward an adult]. At the time of enrollment in the 9th grade, Parent candidly indicated on the school health form that Student was receiving mental health treatment, attributing some of Student's behavioral issues to "family separation and divorce of mother & father". The evidence is uncontroverted that Parent sought and received various out of school interventions including psychiatric care for Student because of increasing anti-social and violent behaviors. Student's mental health interventions included therapy as well as medication management and consultation with a pediatric psychiatrist in March 2017.

In September 2017, Student received the first three-day, out of school suspension, from behavior that resulted in disruption to the school day. After that incident, Parent testified credibly that she tearfully expressed her concerns to the high school principal about efforts to receive assistance and asked for help. However, Parent did not share the psychiatric evaluation with the District, at this time. In November 2017, after receiving a letter from Student's psychiatrist outlining various diagnoses and suggesting school-based interventions – including an "IEP and emotional support services", Parent contacted the guidance office, summarized the psychiatric diagnoses and requested that Student receive an IEP.

The parties urge two different results from the events following the outreach and request made by Parent to the guidance counselor. In response to Parent's request for evaluation, the guidance office referred Parent to the Director of Special Education. Within one week, the Parent was invited to and participated in a meeting with District administration to address the issues she raised with the guidance office and ostensibly to discuss an evaluation of Student. However, the meeting was brief and at the end of the meeting, Parent was presented with a typed NOREP, indicating the District's refusal to initiate an evaluation of Student. Parent checked the box indicating agreement with this recommendation. The District argues that Parent's action triggers application of two of three exceptions under §300.534 (c) because by signing the NOREP, accepting the District's recommendation not to proceed to evaluation, Parent did not permit evaluation and refused services.

I disagree with the District's interpretation and suggested application of this provision. Parent credibly testified about the efforts and lengths she explored, with school personnel to find assistance for Student. The record is replete with evidence of Student's school-based difficulties from middle school until the present, behavioral challenges that spilled from the home to the school environment, compromising not just this Student but others as well. It is confounding to think that Parent after emotionally imploring the District for help with Student's out of control behaviors and seeking community based mental health and psychiatric interventions would refuse any offered assistance for Student. However, this is precisely the position the District takes.

If the District analysis is adopted, Parent's failure to challenge the District's recommendation, potentially nullifies any further consideration that Student is "thought to be" or might be eligible for special education as a Student with a disability. This would mean that no matter how egregious Student's behaviors became with the school setting, the District could have the ability to assert the signed NOREP as a defense that it lacked knowledge that Student could be disabled, removing the ability of the Parent to assert any federally mandated disciplinary protections. In this case that is precisely what occurred.

After the November meeting, Student's behavior continued to spiral downward resulting in a multi-day suspension in January for [a physical assault], a February one-day, in school suspension for vulgar language, culminating in the fateful April 2018 [incident of physical aggression]. Sadly, the April suspension came the day after Student was discharged from a ten-day psychiatric, inpatient facility. The District's position that Student's issues are confined to the home, do not impact education and resultantly do not require special education is unfounded. The Parent has established by a preponderance of the evidence that Student's behaviors have impacted Student's ability to access education. Not only is Student's access to education disrupted by the aggressive behaviors, school administrators must stop and intervene while other students are impeded and placed in peril by Student's outbursts. This Student needs emotional

support in school. Nothing could be clearer. I believe Parent's testimony to be credible. She requested the intervention, attended the meeting and wanted to discuss options available for Student. Parent's intention was never to refuse a school-based evaluation of Student. No evaluation was ever offered to her to reject.

I find that as of November 13, 2017, the District is deemed to have had knowledge that Student was a child with a disability. By the time Student [engaged in physical aggression toward a] classmate in January, the District had a valid reason for re-examining the November decision and certainly had the grounds to initiate its own evaluation request. Up until November 2017, Parent sought and implemented various therapeutic measures to address what on the surface appear to be relational issues pertaining solely to her divorce. However, when read in conjunction with the psychiatric report, diagnoses and school behavioral performance, no other conclusion is possible. Student is disabled, as outlined in the psychiatric evaluation. By November 2017, the District knew conclusively of Student's treatment by a psychiatrist and diagnoses but never requested the underlying evaluation from the Parent.

During Student's ten-day psychiatric inpatient hospitalization in April, the District was contacted by the facility for educational information. Again, the District had a basis of knowledge in conjunction with the past disciplinary record for in school assaultive behaviors. The psychiatrist drafted letter requesting school-based intervention that Student might be eligible for special education. Based on the evidence presented, Parent has preponderantly established that the District had knowledge that Student was a child with a disability on November 13, 2017, before the January, February and April disciplinary actions.

Change in Placement

In the Complaint and request for an expedited hearing, Parent asserts that the cumulative suspensions, during the 2017-2018 school year constituted a change of placement and pattern of removals. 34 C.F.R. §300.536 (a)(2)(i) ii)(iii) A determination has just been made that as of November 2017, the District had knowledge that Student was disabled. In this case, between November 2017 and April 2018, Student received eight days of out of school suspension and one day of in school suspension because of three (January, February, April) separate disciplinary incidents. Parent has not established that Student's behavior is substantially like behavior in previous incidents that resulted in a series of removals **and** that additional factors of the length, amount of time and proximity of removals exist. Both elements must be established to demonstrate that a pattern of removals exists. Although Student received school-based discipline for fighting and disrespectful behavior, the suspensions occurred over a period of five months and varied in length from one to five days. The disciplinary removals were not indicative of a pattern.

CONCLUSION

For the reasons set forth above, I find that as of November 13, 2017, the District is deemed to have had knowledge that Student was a child with a disability.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that as of November 13, 2017, District knew and is deemed to have known that the Student was a child with a disability.

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

Joy Waters Fleming, Esq.
Joy Waters Fleming, Esq.
HEARING OFFICER

DATED: May 9, 2018