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: A.D.

Date of Birth: [redacted]

Dates of Hearing: May 20, 2010

CLOSED HEARING

ODR No. **01028-0910-AS**

Parties to the Hearing:	Representative:
Parent[s]	Bernard Schneider, Esquire 300 Weyman Road, Suite 320 Pittsburgh, PA 15236
Dr. Sharon Suritsky Upper Saint Clair School District 1820 McLaughin Run Road Upper St. Clair, PA 15241	Patricia Andrews, Esquire 1500 Ardmore Boulevard, Suite 506 Pittsburgh, PA 15221
Date Transcript Received:	May 25, 2010
Date of Decision:	June 4, 2010
Hearing Officer:	Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student[1] is currently [teenaged] and is a resident of the Upper Saint Clair School District (hereafter District). Student is eligible for special education. The incident which prompted the filing of the due process complaint in this matter occurred towards the end of April 2010 when Student was in possession of an instrument on school property which the District determined to be a weapon under its policy. Student was moved to an alternative placement for a period of 45 days.

Student and the parents filed a due process complaint challenging the District's decision to remove Student to an alternative placement for 45 days. A one-session hearing was held on May 20, 2010. The parties made various motions related to the evidence to be presented, and the precise issue presented for decision was clarified on the record. This hearing officer granted the District's request to exclude evidence of whether the conduct was a manifestation of Student's disability, but directed the District to present its evidence at the outset of the hearing, over objection of the District, finding this procedure to be more logical and efficient in light of the issue framed for decision. The parents' motion to exclude evidence of Student's behavior at school prior to the date of the incident in question was denied.[2] For the following reasons, I find in favor of the District.

ISSUE

Whether Student violated the law and policy of the District in bringing a weapon into school on April [], 2010, and whether the District thereafter properly removed Student to an alternative placement for 45 days.

FINDINGS OF FACT

1. Student, whose date of birth is [redacted], is a resident of the District and is eligible for special education by reason of diagnoses of autism, Oppositional Defiant Disorder, and Attention Deficit Hyperactivity Disorder. (Notes of Testimony (N.T.) 43-44, 49; Due Process Complaint at p. 1)

2. An Individualized Education Program (IEP) team meeting was held on April 23, 2010 to discuss Student's placement, and the team decided that Student would

[1] The name and gender of the Student are not used in the body of this decision in order to preserve the Student's privacy.

[2] I would further observe that evidence of Student's behavior prior to the date in question was also contained in Student's current Individualized Education Program (IEP), which was admitted as School District Exhibit (S) 1 without objection. (N.T. 49-50)

spend a portion of the school day in the high school emotional support classroom. The parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 49, 53-55; School District Exhibits (S) 1, 2)

3. Due to concerns over Student's behavior at school, Student's IEP team agreed that Student would be searched upon entering the school building. On the morning of April [], 2010, Student went to the office and was searched, as was Student's backpack. (N.T. 83, 95, 108)

4. A short time later during the morning of April [], 2010, Student was in the emotional support classroom working on a math assignment and reached into Student's backpack for a calculator. Student discovered a Swiss army knife in the backpack and immediately advised a mental health therapist in the room, and then gave her the knife. Student understood that students are not permitted to have instruments such as the knife at school. (N.T. 66-67, 73-74, 108-10; School District Exhibit (S) 4)

5. The knife belonged to a friend of Student, and Student had possession of it for a week or two before the date of the incident and had misplaced it. Student did not know the knife was in the backpack on April [], 2010 until it was discovered in the classroom. Student never showed it to any other students in the classroom after finding it in the backpack. (N.T. 72, 112-15)

6. The knife in question contained two blades. One blade measured 2½ inches and the other measured 3 inches. (N.T. 83-84)

7. The therapist notified the high school principal and police officer who met with Student the next day. The District determined that Student had violated the school weapons policy and unilaterally placed Student in an alternative placement for 45 days. (N.T. 85, 88)

8. The District's weapons policy provides for the expulsion of a student who brings a weapon, as defined by 24 P.S. § 13-1317.2, onto school property. The weapons policy is part of the Parent/Student Handbook and is reviewed each school year in all students' social studies classes. (N.T. 80-82; Parent Exhibit (P) 1)

9. The knife was made available at the due process hearing but, over objection of the parents, was returned to the District at the conclusion of the hearing. This hearing officer did physically examine the knife off the record before returning it to the District representatives, and a photocopy of the knife was admitted as an exhibit. (N.T. 141-43; S 3, 9) The knife did have functional attachments such as a screwdriver and corkscrew in addition to the blades.

10. The following exhibits were admitted at the due process hearing on May 20, 2010: P 1, and S 1, 2, 3, 4, 5, 7, and 8. (N.T. 139-40)

DISCUSSION AND CONCLUSIONS OF LAW

Ordinarily, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case should rest with the parents who requested the hearing in this case. Nevertheless, after hearing the parties' articulation of the issues, this hearing officer determined that the logical order of presentation required the District to proceed first, and that the burden of proof also rested with the District to establish that it complied with the law in making the determination to remove Student to an alternate placement for 45 days. Because application of the principle of the burden of proof determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise," the outcome of a due process hearing is much more frequently determined by which party has presented preponderant evidence in support of its position. As more fully discussed below, the actual assignment of the burden of proof had little impact on this proceeding.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony overall was essentially consistent with the testimony of other witnesses, except as specifically noted in this decision.

The parents' due process complaint challenged the District's decision to remove Student to the alternative placement for 45 days after the April [], 2010 incident.[3] Pursuant to 34 C.F.R. § 300.532(a) and (c), the parents had the right to challenge any decision regarding such a placement in an expedited due process hearing. It is significant to note here that, whether or not there was a manifestation determination made with respect to this incident, this expedited proceeding did not involve such a decision.

The relevant disciplinary regulation provides as follows.

> *(g) Special circumstances*. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—
>
> > (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA.

34 C.F.R. § 300.530(g). The definition of "weapon" in the regulation is that set forth in Section 930 of the U.S. Code: "a weapon, device, instrument, material, or substance,

[3] The complaint also raised other claims which were assigned a different case number by the Office for Dispute Resolution.

animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of *less than 2 ½ inches in length*." 18 U.S.C. § 930(g)(2) (emphasis added).

The evidence clearly establishes that Student had possession of the Swiss army knife at school on April [], 2010. (Findings of Fact (FF) 4, 5) The parents first contended that the District was also required to establish that Student had the intent to carry the knife to school. Secondly, the parents asserted that there is a second issue of whether the conduct in question was a manifestation of Student's disability. This hearing officer reviewed the regulation set forth above and concluded that the language "without regard to whether the behavior is determined to be a manifestation of the child's disability" rendered not relevant any evidence of whether Student's conduct was a manifestation of a disability. (N.T. 26-27) I did, however, permit both parties to present evidence on Student's intent in the interest of having a complete record on which to base my decision. (N.T. 34-42)

Section 300.530(g)(1) makes no mention of intent, nor does the definition of weapon to which Section 300.530 refers, 18 U.S.C. § 930. By contrast, Section 530.300(g)(2) permits a school district to remove a student for 45 days if he or she "[k]nowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance" on school property. The District argued that if Congress had intended to include a state of mind with respect to possession of a weapon, it would have included such a term in Section 300.530(g)(1). I agree. Here, the applicable provision contains no requirement of intent and, accordingly, this hearing officer finds no basis to read such an element into that subsection of the regulation.

Similarly, the District's policy (P 1) makes no reference to intent, nor does the cited section of the Public School Code, 24 P.S. § 13-1317.2. The District's policy permits expulsion for bringing a weapon onto school property as defined by Public School Code Section 13-1317.2(g), which defines a weapon to include "any knife [or] cutting instrument." 24 P.S. § 13.1317.2(g). Thus, regardless of the fact that the instrument includes tools which could serve useful purposes (FF 9), the item in question contained cutting blades of 2 ½ and 3 inches in length and was unquestionably a knife under both the Public School Code and the federal statutory definition referenced in Section 300.530 (18 U.S.C. § 930(g)(2)).

The parents cited to *Boldin v. Chartiers Valley School District*, 869 A.2d 1134 (Pa. Commw. 2005), which involved an interpretation of whether the definition of "weapon" in the Pennsylvania Crimes Code includes a state of mind element. *Boldin* addressed the suspension of a public employee for violating the Pennsylvania Crimes Code and is easily distinguishable on the facts. Moreover, the applicable statutory and regulatory provisions in *Boldin* are wholly different than those at issue here. Based upon a fair reading of the language of the provisions applicable to this case, I conclude that intent is not an element of the conduct of possessing a weapon on school property for purposes of a 45-day disciplinary placement under Section 300.530(g)(1).

The parents also suggested that the District's determination that a 45-day alternative placement, rather than some shorter time period, is subject to review. This hearing officer concludes that, again based upon the clear language of the applicable provisions, it is the District which has the discretion to determine the length of the alternative placement up to 45 days where a weapon is possessed. 34 C.F.R. § 300.530(g)(1). Student did possess an instrument which constitutes a weapon on school property. (Findings of Fact 4, 6, 8, 9) Whether or not I might have reached a different determination on the length of that removal, I cannot conclude that I have the authority to usurp the District's ability to remove Student for 45 days as permitted by the regulations.

CONCLUSION

For all of the foregoing reasons, I conclude that the District had the authority to remove Student to an alternative placement for 45 days.

ORDER

In accordance with the findings of fact and conclusions of law as set forth above, the District appropriately removed Student to an alternative placement for 45 days and is not required to take any further action regarding the issue addressed in this hearing.

Cathy A. Skidmore

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Cathy A. Skidmore
Hearing Officer

June 4, 2010