

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: R.H.

Date of Birth: [redacted]

Date of Hearing: January 3, 2011

CLOSED HEARING

ODR No. **01879-1011AS**

Parties to the Hearing:

Representative:

Parent[s]

Ms. Catherine Guzzo
Director of Special Education
Penn Hills School District
309 Collins Drive
Pittsburgh, PA 15235

Craig Alexander, Esquire
Bruce E. Dice & Associates, P.C.
787 Pine Valley Drive Suite E
Pittsburgh, PA 15239

Date Record Closed:

January 4, 2011

Date of Decision:

January 17, 2011

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a late-teen-aged eligible student in the Penn Hills School District (hereafter District). Student was suspended from school following an incident involving physical fighting. The District thereafter convened a meeting to determine whether Student's conduct was a manifestation of Student's disability, and the team concluded it was not.

The District filed a due process complaint seeking a determination that it could change Student's educational placement to an alternative education setting for a period of 45 days. For the following reasons, I conclude that its determination was proper and find in favor of the District.

ISSUE

Whether Student's conduct on [date] was a manifestation of Student's disability; and

If not, may the District place Student in an alternative education setting for a period of 45 days and then proceed with expulsion?

FINDINGS OF FACT

1. Student attends the District high school. (Notes of Testimony Vol. I (N.T. I) 23;² School District Exhibit (S) 9)
2. Student was last evaluated by the District at the end of the 2009-10 school year. The Re-evaluation Report (RR) concluded that Student remained eligible for special education by reason of a specific learning disability in reading which had first been determined in 1999. (S 12)
3. An Individualized Education Program (IEP) was developed on May 12, 2010. The IEP team determined that Student did not exhibit behaviors that impeded his/her learning or that of others. Goals addressed transition and reading comprehension, and program modifications and specially designed instruction were also included: extended time for tests taken in the resource room, adapted tests, small group testing at the request of

¹ Student's name and gender are not used in this decision to protect Student's privacy.

² References to the transcript for Student's due process hearing are referenced by N.T. I. The transcript of the hearing involving Student's sibling was incorporated into this hearing and are referenced by N.T. II. (N.T. I 7-8)

Student, and tests read aloud as requested by Student. Student's IEP provided for itinerant learning support. The Parent approved the Notice of Recommended Educational Placement (NOREP). (S 8, S 9)

4. Student's disciplinary record in the fall of the 2010-11 school year included one instance of fighting on [date]. Student was disciplined for this incident, receiving five days out-of-school suspension. (N.T. I 10; S 1)
5. On [four days after the fighting incident], Student's IEP team met to develop a behavior plan for Student to address the fighting incident. Pursuant to that plan, Student was provided with procedures to follow to avoid physical or verbal confrontations. (N.T. I 10-12; S 9)
6. On [date], Student's sibling was engaged in a verbal disagreement with another student in a classroom. Student's sibling left the classroom and went to get Student out of class. Student and Student's sibling in addition to another student went into the sibling's classroom and began to engage in verbal, then a physical, altercation with the first student. (N.T. II 13-16; S 2)
7. The teacher called other staff members and security to the classroom. The staff was able to break up the fight, and Student and Student's sibling were taken to an office where they discussed having "jumped" the victim. Student's Parent was called and picked Student up from school. (N.T. II 16, 20-21; S 1, S 2, S 3)
8. Student's conduct was a violation of the District's Student Code of Conduct. Student received three days out-of-school suspension and then seven additional days of out-of-school suspension. (S 1)
9. A manifestation determination meeting was held on [three days following the incident]. Student's Parent was present but left before the team made the manifestation determination. Before the Parent left the meeting, the team reviewed Student's RR and IEP and discussed the conduct in question with the Parent and Student. Student had not used the interventions in the behavior plan developed after the [first] fighting incident. The team then concluded that Student's conduct on [date] was not a manifestation of Student's disability. (N.T. I 11-12; N.T. II 23, 24-27, 28-31, 34-35, 41-42; S 1, S 4, S 5, S 6, S 7)
10. The District issued a NOREP on that same date, but the Parent and Student left before signing it. Student's Parent was also provided with a copy of the Procedural Safeguards. (N.T. II 31, 35; S 5)
11. If Student were placed in the alternative education setting, Student would continue to receive appropriate special education services. (N.T. II 36-37)
12. Student returned to school on [date] after the suspensions had been served. Student's caseworker and the principal revised Student's behavior plan with Student that day. The purpose of the plan was to allow Student the opportunity to avoid problems with other students before and after school and between classes. (N.T. I 12-13)

13. The Parent participated in a resolution meeting on [date] but no resolution was reached. (N.T. II 44-45)
14. The Parent did not attend the due process hearing held on January 3, 2011 despite notice of the proceeding, and efforts to reach the Parent that morning were not successful. (N.T. I 3; N.T. II 3, 51)

DISCUSSION AND CONCLUSIONS OF LAW

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 burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);³ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). 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 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 as a whole was essentially consistent. Credibility is discussed further in this opinion where necessary.

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.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 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--

³ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if 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 it is determined that the conduct in question had either the causal relationship with the disability or was a result of the 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). Additionally, if the conduct is determined to be a manifestation of the child's disability, the District must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(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).

Under Section 1415(k)(E)(i)(I), the clear language requires a determination that the conduct be "caused by" or have a "direct and substantial relationship to" the child's disability. A review of the Conference Committee Report when IDEA was last amended and reauthorized in 2004 provides some guidance on this determination:

The Conferees intend that in order to determine that the conduct in question was a manifestation of the child's disability, the local educational agency, the parent and the relevant members of the IEP team must determine the conduct in question be the direct result of the child's disability. It is intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability.

H. Rep. No. 108-779, at 225 (2004).

In this case, the District reviewed Student's IEP and ER and discussed the conduct in question with the Parent and Student before determining that Student's conduct on [date] was not a manifestation of Student's learning disability. (Finding of Fact (FF) 9) This hearing officer is compelled to agree. There is nothing in the record to suggest that Student's conduct, namely engaging in a physical fight with another student, was related in any way to Student's learning disability in reading. Furthermore, when Student's current IEP was developed, the team had determined that Student did not exhibit behaviors which impeded his/her learning or that of others. (FF 3) Student's only disciplinary incident during the 2010-11 school year prior to [date] did involve physical fighting (FF 4), and a behavior plan had been developed to permit Student to avoid confrontations. (FF 5) Student did not utilize the procedures in the behavior

plan on [date]. (FF 9) There is no evidence from which to conclude that Student's failure to adhere to the interventions in the behavior plan were the result of the District's failure to implement the IEP or to make those interventions available to Student. (N.T. I 10-12)

For all of these reasons, I conclude that the District properly determined that Student's conduct on [date] was not a manifestation of Student's disability. Accordingly, the District is permitted to remove Student to an alternative education placement and to pursue disciplinary procedures applicable to all children without disabilities, except that as a student with a disability, the District must continue to provide the educational services necessary for Student to receive a free, appropriate public education.

CONCLUSION

For all of the foregoing reasons, I conclude that the District has the authority to remove Student to an alternative placement for 45 days and pursue other disciplinary procedures applicable to all children without disabilities.

ORDER

In accordance with the findings of fact and conclusions of law as set forth above, the District may remove Student to an alternative educational placement for 45 days and pursue other disciplinary procedures applicable to all children without disabilities.

The District is not required to take any further action.

It is further ORDERED that any claims not addressed by this decision are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
Hearing Officer

January 17, 2011
ODR File No. 01879-1011AS