

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:

25452-21-22

Child's Name:

H.N.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Joseph Montgomery, Esq. and Bradley Flynn, Esq.
Montgomery Law
1420 Locust Street
Philadelphia, PA 19102

Local Education Agency:

Upper Darby School District
4611 Bond Avenue
Drexel Hill, PA 19026

Counsel for the LEA:

Alexis Shaw, Esq. and Michelle Mintz, Esq.
Fox Rothschild
10 Sentry Parkway
Bluebell, PA 19422

Hearing Officer:

James Gerl, CHO

Date of Decision:

October 18, 2021

BACKGROUND

The parent filed a due process complaint arguing that the school district should have convened a manifestation determination review to determine whether the conduct for which the student is being expelled was a manifestation of the student's disability because the student is entitled to IDEA discipline protections as a student not yet determined to be eligible. The parent also contests the stay put placement for the student. The school district contends that the student is not entitled to IDEA disciplinary protections and that the stay put placement for the student is and should remain the interim alternative educational setting. I find in favor of the parent with regard to the manifestation determination review issue and in favor of the school district concerning the stay put issue.

PROCEDURAL HISTORY

The expedited hearing for this matter was conducted in one virtual session. The parties were only able to agree to a small number of stipulations of fact, which unnecessarily prolonged the hearing.

Five witnesses testified during the hearing, and the parent testified twice when recalled for additional testimony. The parent withdrew parent Exhibit 7 subsequent to an objection. Parent Exhibits 1 through 6 and parent Exhibits 8 through 9 were admitted into evidence. School district Exhibits 1 through 39 were admitted into evidence.

At the conclusion of the expedited hearing, counsel for each party presented oral closing arguments. In addition, both parties were allowed to and did submit supplemental legal briefs within two days of the end of the hearing. Additionally, the parent filed a prehearing brief.

All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

Two issues were presented by the due process complaint and counsel submitted arguments on each of the two issues:

1. Whether the parent has proven that the student is entitled to a manifestation determination review before the school district expels the student under IDEA's provision regarding students not yet determined to be eligible?

2. Whether the parent has proven that the student is entitled to stay put protection?

FINDINGS OF FACT

Based upon the parties' stipulations of fact, as agreed to by counsel, I have made the following findings of fact:

1. The student is [a high school aged] student residing within the boundaries of the school district.
2. The student was born on [redacted].
3. On September 13, 2021, the student and the student's sibling were in a physical altercation with another student.
4. The parent filed the instant due process complaint on September 17, 2021.
5. The district convened an informal expulsion hearing on September 27, 2021, and as a result of the informal hearing, recommended expulsion of the student.
6. The school district has not yet convened a formal expulsion hearing.

Based upon the evidence in the record compiled at the expedited due process hearing, I make the following findings of fact:¹

7. The student is active in sports [redacted]. (NT 92 – 93)

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; and "J-1," etc. for joint exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT___").

8. The student suffers from anxiety and depression. The student has not seen a counselor or sought other treatment for anxiety or depression other than on one occasion after an incident with the student's mother on or about August 30, 2021. The student had previously been diagnosed with adjustment disorder and received treatment from November 2013 through 2015. (NT 60, 88 – 91; P-9)

9. The student's mother asked the school district to evaluate the student for special education in 2017. (NT 95; P-8)

10. The student's mother e-mailed the student's school counselor on approximately August 30, 2021. The student's mother informed the counselor [of a behavioral incident]. The parent noted that the police had to be called concerning this incident. The parent stated that the parent had been trying to get the student into outside therapy for months and had been unsuccessful. The student's mother asked the counselor for help with the student's situation. (P-3)

11. On September 1, 2021, the student's mother had a telephone conversation with the student's counselor in which the parent asked the counselor for help in locating outside therapeutic resources. The counselor and the parent discussed the school district's SAP referral process for this purpose. During this conversation, the student's mother did not ask the counselor for a special education evaluation or any other services for the student. (NT 123 – 124)

12. The student's mother e-mailed the student's counselor on September 9, 2021, with an allegation that the same student who was later involved in the fight with the student and the student's sibling had bullied the student on the school bus. The school district investigated the allegation of bullying and determined that it was unfounded. Instead, the school district concluded that the matter was an ongoing mutual conflict between

the three students. The mutual ongoing disagreement among the three students was not an instance of bullying. The student was not a victim of bullying. (S-6, S-25; NT 108-110, 120)

13. On September 13, 2021, the student and the student's sibling got into a violent fist fight with Student No. 1. The three students began arguing on a school bus a few days earlier, and the fight continued for a number of days. Eventually, the three students agreed to fight [redacted]. The fight took place [redacted]. None of the students involved had a class near [redacted], although the student needed to bring some papers to the center which is located on that floor. The fight began when Student No. 1 ran up behind the student and hit the student. The student and the student's sibling then hit Student No. 1. The initial determination by the administration was that the student would be suspended for three days because the student and the student's sibling appeared to be defending the student after Student No. 1 provoked the fight. Later, the school district reviewed social media videos of the fight, which revealed that after the initial portion of the fight, the student and the student's sibling continued to punch Student No. 1 [redacted] while Student No. 1 was on the ground. [Redacted.] After other students began to pull the students apart, all three students continued to engage in punching and flailing. (S-19, S-28, S-29, S-30, S-11; NT 77-78, 114-115)

14. After an informal hearing was conducted, the school district recommended that the student be expelled because of the September 13, 2021 incident. (S-26, S-27; NT 84)

15. After being suspended for the September 13, 2021 incident, the school district placed the student in its asynchronous learning model. The model is a remote learning model, although students may come into school for brief periods of time to get support in person. The program includes a

counselor, school psychologist and many, many teachers, as well as instructional videos and other resources for students to proceed at their own pace. (NT 127 – 128)

16. The school district did not conduct a manifestation determination review for the student in this case. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as my own independent legal research, the hearing officer makes the following conclusions of law:

1. When a local education agency decides to change the educational placement of a child with a disability because of the violation of a code of student conduct, it must within 10 school days convene a manifestation determination review meeting with the local education agency, the parent and relevant members of the student's IEP team. The manifestation determination review team is to 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: (i) if the conduct in question was caused by or had direct to substantial relationship to the child's disability; or (ii) if the conduct in question was a direct result of a local education agency's failure to implement the IEP. IDEA § 615(k)(1)(E); 34 C.F.R. § 300.530.

2. Certain students who have not yet been determined to be eligible for special education may be entitled to the disciplinary protections of IDEA if the district has knowledge that the student has a disability prior to the behavior that precipitated the disciplinary action. A public agency is deemed to have knowledge that a child had disability if (1) the parent

expressed a concern in writing that the student is in need of special education; (2) the parent requested an evaluation of the child for special education or (3) a teacher or other personnel expressed specific concerns about a pattern of behavior directly to a director of special education or other supervisory personnel. 34 C.F.R. § 300.534(a)(b).

3. If a manifestation determination review team determines that either of the two prongs of the test are answered in the affirmative, the school district may not change the student's educational placement. If the answer to both questions is no, the student may be disciplined in the same manner and for the same duration as children without disabilities. 34 C.F.R. § 300.530(c).

4. When a parent challenges the manifestation determination review with a due process complaint, there must be an expedited hearing within 20 school days after the filing of the complaint and a decision within 10 school days after the hearing. 34 C.F.R. § 300.532(c); Letter to Gerl, 51 IDELR 166 (OSEP 2008). When a local education agency violates the IDEA discipline rules, a hearing officer has broad authority and wide discretion to order appropriate equitable remedies, including changes to the placement of the student and elimination or reduction of a disciplinary penalty. 34 C.F.R. § 300.532(b); see, District of Columbia v. Doe ex rel. Doe, 611 F. 3d 888, 54 IDELR 275 (D.C. Cir. 2010).

5. In the instant case, the school district violated IDEA by not conducted a manifestation determination review before changing the student's placement for disciplinary purposes because the student qualifies for IDEA discipline protections as a not yet eligible student.

6. The stay put placement for a student whose parent has filed a due process complaint appealing a disciplinary decision is the interim alternative educational setting. 34 C.F.R. § § 300.533; See, Analysis of

Comments to Proposed Regulations, 71 Fed. Reg. No. 156 at page 46726 (OSEP August 14, 2006).

7. In the instant case, the appropriate stay put placement for the student pending the school district's conducting a manifestation determination review is the interim alternative educational setting, which is the current placement for the student.

DISCUSSION

IDEA provides special protections regarding student discipline because prior to the passage of the predecessor of IDEA, school districts often misused disciplinary measures in order to exclude children with disabilities from public school classrooms altogether. Honig v. Doe, 484 U.S. 305, 324, 559 IDELR 231 (1988).

The key protection provided by the law is the requirement that a student with a disability cannot be punished by means of a change of educational placement for conduct that is a manifestation of his/her disability. IDEA § 615(k); 34 CFR § 300.530(f); 22 Pa. Code § 14.143. Thus, when a change of placement of a student with a disability is contemplated because the student violated a student code of conduct, a school district must convene a manifestation determination meeting. IDEA § 615(k)(4); 34 CFR § 300.530(e).

1. Whether the parent has proven that the student is entitled to a manifestation determination review meeting as a student “not determined eligible for special education?”

In the instant case, the parent has proven that the student should have received a manifestation determination review because the parent had previously requested a special education evaluation of the student in 2017, coupled with the fact that the parent, on August 31, 2021, requested help finding therapy or counseling for the student. These two facts taken together are sufficient to impute knowledge to the school district, for purposes of the IDEA discipline protections, that the student was entitled to such protections as a student not yet eligible for special education. Although the student was apparently found not eligible for special education in 2017, the previous request for an evaluation, coupled with the current request for therapy is sufficient to impute knowledge of a potential disability to the school district, especially in light of the extreme importance of the IDEA disciplinary protections for children with a disability.

The parent contends that the parent expressly asked the student’s counselor for a special education evaluation on approximately September 1, 2020, during a telephone conversation. The parent’s testimony regarding this alleged request for a special education evaluation is less credible than the denial by school counselor, who testified that the parent did not request such an evaluation, because of the demeanor of the witnesses, as well as the following: the parent’s contemporaneous notes, which were later typed and submitted as an exhibit in this case, include no mention or reference to this important telephone call. No documentary evidence supports the

mother's testimony. It is concluded that the parent did not specifically request a special education evaluation in 2021.

However, the 2017 request for a special education evaluation, along with the August 30 e-mail requesting help finding a therapist for the student, is sufficient to trigger the IDEA disciplinary protections, as the school district should be imputed to have knowledge that the student potentially has a disability.

Accordingly, a manifestation determination review meeting should have been conducted before the student was subjected to a disciplinary change of placement, such as the expulsion in the instant case. This does not mean that the student should be treated as eligible for special education for other purposes, but only that the student should be regarded as having a disability for purposes of the proposed disciplinary change of placement. The school district failed to convene a manifestation determination review meeting concerning the conduct of the student for which the student is subject to expulsion.

It should be noted that in the supplemental brief submitted by the counsel for the parent there are references to a number of items that are not in the evidentiary record for this case. For example, there is a reference to a news story, references to various social media accounts, argument concerning the fight or flight response and references to a "fight culture" at the student's school. There is no testimony or exhibit in the record supporting these assertions. Because there is no evidence in the record to support these various factual contentions, they are not properly before the hearing officer, and they were not considered with respect to this decision.

It is concluded that the parent has proven that the student was entitled to the IDEA protections as a student not yet eligible.

2. Whether the parent has proven that the student is entitled to stay put protection?

The parent contends that the student should be returned to the student's general education placement, The school district argues that the interim placement is the appropriate stay put placement.

Although IDEA generally requires that a student remain in the student's "then current placement" pending a due process hearing, See 34 C.F.R. § 300.518, the 2004 amendments to IDEA change the stay put requirement for discipline cases. For discipline cases, the stay put placement during appeals of decisions by the school district concerning a disciplinary change of placement is the interim alternative educational setting. 34 C.F.R. § 300.533. See, Analysis of Comments to Proposed Regulations, 71 Fed. Reg. No. 156 at page 46726 (OSEP August 14, 2006).

In the instant case, the un rebutted testimony of the assistant superintendent was that the student's interim placement was the asynchronous learning environment that the assistant superintendent described in testimony. Accordingly, the interim alternative educational setting identified by the testimony of the assistant superintendent was the appropriate stay put placement up until the hearing officer decision. The asynchronous learning environment should remain the stay put placement after the hearing officer's decision while the school district is conducting the

manifestation determination review in this case because of safety considerations, especially the extreme nature of the violent assault by the student and the student's sibling upon a third student while the third student was lying on the ground. In view of the specific facts of this case, it would not be appropriate here to change the student's placement from the interim asynchronous learning environment pending the manifestation determination review.

The mother's testimony, in the hearing for the student's sibling, that the student and the sibling were merely defending themselves is not credible or persuasive. Although student No.1 began the fight by hitting the student, the fight continued with the student and the student's sibling ending up on top of student No.1 and repeatedly punching Student No.1 while Student No.1 was lying on the ground. The video evidence of the later part of the incident clearly contradicts the mother's testimony. It is concluded based upon the evidence in the record that the student and the student's sibling engaged in a violent assault upon student No.1. The extreme nature of the assault requires that the student remain in the asynchronous learning environment pending completion of the manifestation determination review.

The parent's supplemental brief argues that the student can only be expelled for 45 days. This statement has no basis in the law. If the manifestation determination which has been ordered for the student reveals that the student's conduct in committing the violent assault was a manifestation of the student's disability, then the school district may not change the student's placement because of that conduct. If the manifestation determination results in the conclusion that the behavior in question was not a manifestation of the student's disability, however, the school district may discipline the student in the same manner and for the

same duration as it would a student without a disability. 34 C.F.R. § 300.530(c) and (e).

It appears that the parent has confused the provisions for removal of a student to an interim alternative educational setting for up to 45 school days when certain special circumstances are present (weapons, drugs or serious bodily injury) with the manifestation determination rules. In instances involving the enumerated special circumstances, a school district may remove a student from the student's educational placement for up to 45 school days without regard to whether the behavior was a manifestation of the student's disability. The school district has not invoked the special circumstances exception for weapons, drugs or serious bodily injury in the instant case. Accordingly, the rule pertaining to 45 school day placements does not apply here. The parent's argument is rejected.

The parent has not proven that the stay put rules require that the student be returned to a regular education placement.

ORDER

Based upon the foregoing, it is HEREBY ORDERED:

1. Within 10 school days of the entry of this Order, the school district shall convene a properly constituted manifestation determination review team to conduct a manifestation determination review in order to determine whether the conduct for which the school district seeks to expel the student is a manifestation of the student's disability;

2. Until such time as the manifestation determination review ordered herein is completed, the student shall remain in the student's interim alternative educational setting, the asynchronous learning environment. See 34 C.F.R. § 300.532(b)(2)(ii); and

3. All other relief requested by the due process complaint is denied.

IT IS SO ORDERED.

ENTERED: October 18, 2021

James Gerl

James Gerl, CHO
Hearing Officer