

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: L.V.

Date of Birth: [redacted]

Date of Hearing:

December 3, 2012

CLOSED HEARING

ODR Case # 13244-1213KE

Parties to the Hearing:

Parents

Moon Township Area School District
8353 University Boulevard
Moon Township, PA 15108

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jonathan Steele, Esquire
Charles Steele, Esquire
428 Forbes Avenue / Suite 900
Pittsburgh, PA 15219

Russell Lucas, Esquire
Michael Brungo, Esquire
3301 McCrady Road
Pittsburgh, PA 15235

December 3, 2012

December 12, 2012

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereinafter “student”)¹ is [pre-teenaged] student who attends the Moon Township Area School District (“District”). The student has not been identified as a student with a disability under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”) and Pennsylvania special education regulations (“Chapter 14”) but, pending the outcome of an ongoing comprehensive evaluation process, is thought to be eligible.² The dispute centers on whether the District exceeded its statutory authority to remove the student for 45 school days for a behavior incident that led to a statutorily-defined “serious bodily injury”.

The District contends that it acted appropriately under its statutory authority to remove the student unilaterally to a private placement when the student, in the midst of a classroom behavior incident, [engaged in a behavior] resulting in a serious bodily injury. The student’s parents counter that the [redacted] wound does not rise to the level of a serious bodily injury. As such, parents argue that the District exceeded its statutory authority to remove the student unilaterally and that the student should be returned to the District.

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

For the reasons set forth below, I find in favor of the parents and student.

ISSUES

Did the District exceed its authority
in unilaterally removing the student from the District
as the result of a behavior incident that led to a serious bodily injury?

FINDINGS OF FACT

1. The student attended District schools briefly in the fall of 1st grade and was then dis-enrolled to attend private school for the remainder of 1st grade and 2nd grade. The student returned to the District for the current school year, the student's 3rd grade year. (Notes of Testimony ["NT"] at 39, 50).
2. Prior to November 2, 2012, the student exhibited frequent problematic behaviors in the classroom, specifically anger, verbal outbursts, and anxiety, all of which were addressed by the student's classroom teacher with redirection and calming techniques. On occasion, the student was removed from the classroom and taken to the principal's office as a result of these behaviors. Prior to November 2, 2012, the student had raised fists against other students but had never struck another student. The student also once threw [an object] at another student. (NT at 80-84, 168-171, 192-193).
3. On Friday, November 2, 2012, near the end of the school day, the student had finished the day's schoolwork and, with the permission of the classroom teacher, was attempting to access an educational website at a classroom computer. (NT at 171).
4. The student became frustrated when the website could not be accessed. The student began to yell [redacted] and raised a fist at the classmate. (NT at 171, 191-192).
5. The classroom teacher removed the student from the classroom. While escorting the student to the principal's office, the student hit the classroom teacher [redacted]. The classroom teacher was

shocked because the student had never hit before. (NT at 171-172, 194-196).

6. Because the school day was nearing its end, neither the principal nor the guidance counselor (professionals the classroom teacher had relied on in the past when the student exhibited problematic behaviors) were available. The classroom teacher returned to the classroom with the student. The student was yelling throughout the journey to and from the school office. (NT at 172-173, 196).
7. Once back in the classroom, the student continued to tantrum. The student's classmates were still in the classroom. (NT at 87-88, 172-173, 196-197).
8. Hearing the student yelling, a second teacher from a neighboring classroom entered the student's classroom to assist the classroom teacher. (NT at 79, 116, 162-163).
9. The student continued to yell. The two teachers attempted to calm and/or redirect the student. The student returned to the computer area and attempted to throw [objects] at the teachers. (NT at 79-80, 86, 89-92, 197, 202).
10. The student lunged at another student and [engaged in other problematic behavior including hitting the classroom teacher]. (School District Exhibit ["S"]-2; NT at 92-94, 96-97, 173-178, 202-204).
11. At that point, the classroom teacher began to clear the other students from the room. (NT at 173-177, 203-204).
12. [Redacted.]
13. [Redacted.]
14. The student [continued to engage in aggressive behavior which resulted in aggression toward and injury to the teacher]. (Parent Exhibit ["P"]-2; S-1, S-2; NT at 103-110, 126-128).
15. [Redacted]. Both teachers continued to clear other students from the classroom. The student eventually calmed. (NT at 112-115).
16. As was his normal practice on Friday afternoons, the student's father arrived at the school to pick up the student from school. The school office informed him that he should proceed to

the classroom. There, he spoke about the incident with both teachers. The student's father left with the student. (NT at 62-66).

17. Directly after the incident, the teacher [left the school for an appointment]. Thereafter, the teacher spoke with the District's director of special education and returned to the District to complete worker's compensation paperwork related to the incident. Thereafter, the teacher went to a local medi-help center for treatment [redacted]. (S-2; NT at 118-120, 147-148).
18. [After the teacher] was examined at the medi-help center[, the] teacher declined a prescription for pain medication but accepted a prescription for a course of antibiotics. The doctor recommended a tetanus shot [and testing]. The teacher declined to pursue [the recommended testing]. (P-2; S-1, S-2; NT at 122-124, 130, 137-138, 142-143, 147).
19. As a result of the [redacted] wound on the right arm and the tetanus shot in the left arm, the teacher experienced pain in both arms in the days after the incident. She needed assistance with certain household and work tasks (mainly involving lifting of objects). The teacher experienced side effects of dizziness and chills from the antibiotics and tetanus shot. Additionally, the teacher had difficulty sleeping in the days after the incident due to the need to keep her arms elevated and iced. She did not take time off work as a result of the [redacted] wound, or the side effects, or the sleeplessness. (NT at 124-126, 137, 143-145).
20. The [wound] area began to bruise the day after the incident, on Saturday, November 3rd. (P-2; S-1; NT at 120).
21. By the date of the hearing on December 3, 2012, the wound had healed, and the teacher had two small pink discolorations at the site of the [arm] wound. (NT at 126-128).
22. On November 2, 2012, shortly after the incident and nearly contemporaneously with the arrival of the student's father, the classroom teacher spoke with the student's mother by telephone. (NT at 40-41, 47-48).
23. Later that evening, the principal spoke with the student's mother by telephone. The principal indicated that she would be speaking with District administration and that a 3-day suspension was likely as a result of the incident. The principal indicated she would speak with the family on Monday, November 5th. (NT at 41-42).

24. On Monday, November 5, 2012, the student did not return to school. The principal spoke with the student's mother by telephone, indicating that the student would be suspended for three days: that day, Monday November 5th, Wednesday November 7th, and Thursday November 8th. (Tuesday, November 6th was Election Day, and District schools were closed.) (P-1; NT at 41-42).
25. On Tuesday, November 6, 2012, even though the District was not in session, the student's mother met with the principal and classroom teacher regarding the 3-day suspension. At that time, the student's mother also granted permission to evaluate the student for eligibility for special education. The student's mother left that meeting understanding that the student would return from the 3-day suspension on Friday, November 9th. (P-1; NT at 42-44, 46).
26. On Wednesday, November 7, 2012, the principal spoke with the student's mother by telephone. The principal indicated that she was calling with the District's director of special education present and that the District would be pursuing a 45-day unilateral placement of the student. (NT at 44-45).
27. The student has not attended the unilateral placement. (NT at 60).
28. On or before January 5, 2013, the District's initial evaluation report will be issued. (Hearing Officer Exhibit ["HO"]-1).
29. On January 22, 2013, the student's 45-school day unilateral placement would end. (HO-1).

DISCUSSION AND CONCLUSIONS OF LAW

Where a student with a disability, or thought to have a disability, "has inflicted serious bodily injury upon another person while at school", school authorities are authorized to remove the student to an interim alternative educational placement for a period not to exceed 45-school

days.³ While a manifestation determination process is required to be undertaken, the removal may be undertaken unilaterally by the school district and without regard to whether the behavior is a manifestation of the student's disability, or suspected disability.⁴

The provisions of IDEIA adopt the definition of "serious bodily injury" from another federal statutory framework, namely federal criminal law regarding consumer product tampering. "Serious bodily injury" is defined as "bodily injury which involves— a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."⁵ While not adopted as part of the provisions of IDEIA, the same statutory provision defines a "bodily injury" as "a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary."⁶

Here, there is no doubt that the [incident] injured the teacher. But, under these facts, the [redacted] wound does not rise to the level of a "serious bodily injury" under the IDEIA. The claim by the District is that the [redacted] wound qualifies as a statutorily-defined serious bodily injury because it caused extreme physical pain. Under the definition, the

³ 34 C.F.R. §300.530(g)(3), §300.534. The provisions of 34 C.F.R. §§300.530-300.536 have been adopted as provisions of Chapter 14. *See* 22 PA Code §14.102(a)(2)(xxxii).

⁴ 34 C.F.R. §300.530(g), §300.534.

⁵ 18 U.S.C.A. §1365(h)(3).

⁶ 18 U.S.C.A. §1365(h)(4).

nature of the physical pain must be extreme indeed in light of the other qualifying bodily injuries in the definition—namely, substantial risk of death, protracted or obvious disfigurement, and/or protracted loss or impairment of a bodily member, organ, or mental faculty. While not minimizing in any way the pain that was endured by the teacher, she engaged in reasoned conversations after the incident where the wound was not the sole or overriding focus, did not need to seek emergency care, ran an errand with her son, returned to the District to consult with administrators and complete paperwork, and only then sought out urgent care at a local medi-help center. A fair reading of “extreme physical pain” in light of the other characterizations of a statutorily-defined serious bodily injury under the IDEIA (risk of death, disfigurement, protracted loss or impairment) leads to a conclusion that the incident did not result in a “serious bodily injury”.

Bolstering this conclusion is a fair reading of the statutory definition of mere “bodily injury” at 18 U.S.C.A. §1365(h)(4). First, this statutory definition was not adopted by the provisions of IDEIA which supports a conclusion that under IDEIA only a much more severe result—“serious bodily injury”—would support unilateral school district removals under 34 C.F.R. §300.530(g). Second, the [redacted] wound suffered by the teacher is clearly more accurately described by the provisions of 18 U.S.C.A. §1365(h)(4): physical pain, and slight

disfigurement, caused by cuts/bruising that resulted in a temporary impairment of the use of the teacher's right arm.

This decision should not be read to support a conclusion that a [similar] wound can never amount to a statutorily-defined "serious bodily injury" under the IDEIA. A [similar] wound could certainly result in a substantial risk of death, or extreme physical pain, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Likewise, this decision should not be read as minimizing the physical pain that the teacher endured from the student's [behavior]. Colloquially, there is no argument that it was a serious bodily injury. Statutorily though, under the terms of the IDEIA, it was not a "serious bodily injury".

Accordingly, the District exceeded its authority in unilaterally placing the student in a private placement as of November 7, 2012.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, in unilaterally removing the student to a private placement as of November 7, 2012, the [Redacted] School District exceeded its statutory authority under 34 C.F.R. §300.530(g).

Accordingly, and under the authority of 34 C.F.R. §300.530(b)(2)(i), the parties shall coordinate the student's return to the District without undue delay.

Any claim not specifically addressed in this decision and order is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

December 12, 2012