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.

DECISION

ODR No. 13605-1213 KE

Child's Name: A.B.

Date of Birth: [redacted]

Date of Hearing: 4/3/13

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Parent Attorney
Parent	Mark Voigt, Esquire Plymouth Meeting Executive Campus 600 W. Germantown Pike, suite 400 Plymouth Meeting, PA 19462
School District	School District Attorney
Pennsbury 134 Yardley Avenue P.O. Box 338 Fallsington, PA 19058-0338	Timothy Gilsbach, Esquire Fox, Rothschild, L.L.P. 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001
Date Record Closed:	April 3, 2013
Date of Decision:	April 4, 2013 (Updated April 10, 2013)
Hearing Officer:	Anne L. Carroll, Esq.

PENNSYLVANIA

Special Education Hearing Officer

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In re: File No. 13605–1213 KE

Due Process Hearing for A.B.

FINAL ORDER

In accordance with the findings of fact and conclusions of law placed on the record after a full due process hearing in this matter on April 3, 2013 and as stated below, IT IS HEREBY **ORDERED** that in accordance with the authority of the hearing officer conferred by 20 U.S.C. §1415(k)(3)(B)(i), (ii)(I) and 34 C.F.R. §300.532(b)(2)(i), the School District shall immediately return Student to the educational placement from which Student was removed by the NOREP issued on March 5, 2013.

Dated: April 4, 2013

Anne L. Carroll

Anne L. Carroll, Esq., Hearing Officer

FINDINGS OF FACT/CONCLUSIONS OF LAW

This foregoing order is based upon the Findings of Fact and Conclusions of Law set forth below, as well as set forth on the record at the close of the due process hearing. (N.T. pp. 354—356)

Findings of Fact

1. Student [redacted], born [redacted] is an IDEA eligible resident of the School District, who was enrolled in and attending a District elementary school until March 5, 2013. At that time, Student was removed by school personnel to an interim alternative educational setting for 45 days due to a weapons offense. (Stipulation of the parties, N.T. pp 20—22 P-8, NOREP dated 3/5/13)

2. The evaluation report on which Student's eligibility for special education is based concluded that Student qualified for services in the categories of ED (emotional disturbance, due to "some clinical aspects of depression") and OHI (other health impairment, due to ADHD). (Stipulation, N.T. pp. 21, 22; P-2 pp. 10, 22)

3. [Redacted.]

4. [Redacted.]

5. [Redacted.]

6. On the evening of February 14, the District superintendent and the District director of administrative services received an e-mail from the parent of another child in Student's class, notifying them [of a particular circumstance]. (N.T. pp. 227, 229, 239, 262)

7. The director of administrative services met with the school principal the following morning to conduct an investigation. They spoke with the mother of the child who [reported the incident], notified the local police and summoned Parent and Student to the principal's office, since the school personnel had determined that only Student had [been involved]. (N.T. pp. 103, 184, 228, 232, 251, 252, 254, 255, 261, 262, 273, 290)

8. [Redacted.]

9. The District initially suspended Student for three days as a result of the incident. On February 25, the District conducted a manifestation determination review, resulting in the conclusion that the behavior underlying the incident was a manifestation of Student's disability. The suspension was extended for an additional 7 days. (N.T. pp. 109—111, 115, 120, 162, 163; P-5, P-11 pp. 1, 3)

10. On March 5, the District extended the suspension for another four days, bringing the total number of days Student was suspended for the incident to 14. (N.T. p. 121; P-11 p. 5)

11. Pursuant to a subpoena, the police officer who investigated the [attended] the due process hearing on April 3, 2013. [An item] was photographed and marked Exh. HO-1. (N.T. pp. 47—50)

12. The actual item [redacted and] personally examined by the hearing officer. The District submitted a black and white photograph, taken by the police department, that accurately depicts the item [redacted]. (N.T. pp. 52, 53, 75, 76, 238; S-2)

13. [Redacted.]

Conclusions of Law

1. Pursuant to 34 C.F.R. §530(g)(1),

> 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;

2. The IDEA regulations further provide that,

> Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

34 C.F.R. §530(h)(i)(4).

3. The term "dangerous weapon" means a weapon, device, instrument, material or substance, 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 21/2 inches in length.

18 U.S.C. §930(g)(2)

4. In the IDEA regulations, the term "serious bodily injury" has the same as the definition found in 18 U.S.C. §1365(h)(3):

> The term "serious bodily injury" means bodily injury which involves—
>
> (A) a substantial risk of death;
> (B) extreme physical pain;
> (C) protracted and obvious disfigurement; or
> (D) protracted loss or impairment of a bodily member, organ or mental faculty

5. The device in question in this case, as described above (FF 13) and as depicted on S-2, is not a "dangerous weapon" as defined in Title 18, and, therefore, is not a "weapon" that can support a change of educational placement by the District without regard to whether the behavior in question was a manifestation of Student's disability.

First, the testimony in this case left no doubt that the device the District considered to be the weapon was [redacted].

Second, even if the [item] could be considered the "weapon"[, the item] is not, as a matter of law, "readily capable of causing death or serious bodily injury." It may be possible for [such an item] to cause the mayhem described by the police officer, but a small pocket knife blade could have the same effect. The standard, however is not whether a device "could" cause serious bodily injury but whether it is "readily capable" of doing so. [Redacted.]

The only potential risk of serious bodily injury posed by the device in this case would come from [redacted]. Based on the configuration of the device, that is entirely implausible. [Redacted.] Again, although by some stretch of the imagination, it is, perhaps, conceivable, that someone could accidentally [suffer a consequence], the standard is whether the device is "readily capable" of causing serious bodily injury. The unusual circumstances that would have to occur [make the item] not "readily capable of causing serious bodily injury."

6. Since the School District removed Student to an interim alternative educational setting based solely on the provision of the IDEA statute and regulations permitting such change of placement for carrying a weapon to school or possessing a weapon on school property and the device that the District considered the "weapon" does not meet to the statutory definition of that term as incorporated into the IDEA statute and regulations in that it is not readily capable of causing death or serious bodily injury, the School District violated the IDEA statute and regulations, specifically, 34 C.F.R. §300.530(g)(1) in effecting the removal.

7. The order above, returning Student to the prior placement is entered pursuant to 34 C.F.R. §532(b)(2)(i)

Dated: April 4, 2013
Updated April 10, 2013

Anne L. Carroll

Anne L. Carroll, Esq., Hearing Officer