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

Student's Name: D.G.

Date of Birth: [redacted]

ODR No. 15648-14-15-KE

CLOSED HEARING

Parties to the Hearing:	Representatives:	
Parent[s]	Yvonne M. Husic, Esq. 2215 Forest Hills Drive Suite 35 Harrisburg, PA 17112	Judith Gran, Esq. Freeman Carolla Reisman Gran 19 Chestnut Street Haddonfield, N. J. 08033
Central Dauphin School District 600 Rutherford Road Harrisburg, PA 17109	Christopher J. Conrad, Esq. Marshall, Dennehey, Warner, Coleman & Goggin 100 Corporate Center Drive, Suite 201 Camp Hill, PA 17011	

Date of Hearing: December 15, 2014

Record Closed: December 15, 2014

Date of Decision: December 21, 2014

Hearing Officer: William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student in this matter (Student)[1] is an eligible third grade student living within the respondent District. (NT 9; S 1.) At the beginning of the school year, Student was placed in Student's neighborhood school and included in a regular education classroom. (S 2, 3.) Student is identified as a child with the disabilities Emotional Disturbance and Speech or Language Impairment pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 9; S 4.)

On November 12, 2014, the District found Student to be in violation of the District's Student Code of Conduct due to an outburst in which Student kicked, struck and bit District personnel while acting out. On November 13, 2014, the District notified Parent of its decision to remove Student to an interim alternative educational setting without a manifestation determination. The District based its decision upon the IDEA "special circumstances" rule (NT 6), permitting change of placement for a child who has inflicted "serious bodily injury" upon another person at school. 20 U.S.C. §1415(k)(1)(G). On December 1, 2014, Parent filed a complaint notice under the IDEA appealing the District's decision to change Student's placement unilaterally.

Pursuant to the IDEA, a hearing commenced on Parent's appeal on December 15, 2014, and the hearing was completed on the same day. I conclude that the District did not have authority under the IDEA to change Student's placement unilaterally and I will order the District to return Student to Student's previous placement. In addition, I order the District to convene an IEP meeting upon Student's return.

ISSUES

[1] Student, Parents and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

1. Was the District's decision to change Student's placement appropriate under the IDEA's "special circumstances" rule?

2. Should the hearing officer order the District to return Student to Student's last operative placement?

3. Should the hearing officer order the District to conduct a manifestation determination, train its staff or take other action with regard to Student?

FINDINGS OF FACT

1. Student has been diagnosed with a mood disorder, not otherwise specified, as well as with bipolar disorder. In addition, Student has been diagnosed with oppositional defiant disorder and attention deficit disorder (with features of inattention, hyperactivity and impulsivity). Student has a history of partial hospitalization. (S 3.)

2. When Student was in second grade, Student displayed frequently reported behaviors of concern, involving outbursts of aggressive behavior that occurred inconsistently, with a duration of one to three hours, approximately 2 to 3 times per week. Behaviors included kicking furniture, kicking other persons and kicking belongings; crawling under furniture; barricading behind and under furniture; attempting to trip, bite or push peers; and scribbling on furniture and property. (S 3.)

3. Educationally, the IEP team placed Student in itinerant learning support. Student received specially designed instruction for below grade oral reading and fluency, as well as supports and accommodations for attention difficulties. In addition, Student has been receiving speech and language therapy to address needs with regard to grammar and articulation. (S 3.)

4. On November 12, 2014, Student engaged in a serious tantrum, as a result of which District personnel removed Student to the elementary school office. Student became oppositional and defiant and began attempting to hit Student's head, attempting to elope, crawling on the floor and lying down in the lobby of the school. District personnel induced Student to go into the school office. There, Student attempted to elope, attempted to upset or destroy property, destroyed a plastic mail slot, hit and kicked adults and screamed threats to the adults in the room. (S 5.)

5. The principal of the elementary school attempted, along with other District personnel, to restrain and calm Student. In the course of this incident, Student bit the principal, kicked the principal in the stomach and legs, and caused the principal to receive scrapes on her feet. The Student bit the principal through the principal's suit jacket sleeve. (NT 44; S 5.)

6. As a result of the bite, scrape and blows, the principal subjectively experienced serious pain that lasted for a few days. In particular, the area on the upper arm around the bite was sore and reddened. The skin was not broken. (NT 47, 58-64.)

7. The principal sought medical evaluation immediately after the altercation. (NT 48; S 5.)
8. The examining physician diagnosed the area of the bite as a contusion of the upper arm. The physician also diagnosed an abrasion or friction burn of the hip, thigh, leg and ankle. The physician did not prescribe any medication for pain, but did provide an antibiotic ointment for the abrasions. There was no bandage. There was no scarring. The physician released the principal from care and recommended return to regular duty on the next day. (NT 54-64, 77-79, 82; S 6.)
9. The principal returned to work on November 12, the same day. (NT 83.)
10. The District's director of special education decided on November 13, 2014, to remove Student to an alternate interim educational setting without a manifestation determination. The director selected a placement for this purpose. There was no IEP team meeting. (NT 73-74, 92-99, 105-106, 108-109, 113-114, 116-of of; S 15.)
11. On November 13, 2014, the IEP team did not review the existing IEP or behavior support plan. (NT 103.)
12. The District offered to conduct a functional behavioral assessment, but the Parent had not returned the written consent form by November 13, 2014. (NT 99-100.)
13. Student remains at home, as the Parent has appealed the District's decision to remove Student from the neighborhood school. (NT 112.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[2] that the other party failed

[2] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based

to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the District's decision to change Student's placement was inappropriate under the IDEA. If the Parent fails to produce a preponderance of evidence in support of her claim, or if the evidence is in "equipoise", then the Parent cannot prevail under the IDEA.

PROCEDURAL PROTECTIONS FOR CHILDREN WITH DISABILITIES WHO VIOLATE DISTRICT CODES OF STUDENT CONDUCT

The IDEA, 20 U.S.C. § 1415 (k), and its implementing regulations, 34 C.F.R. §300.530-534, provide specific protections to eligible students who are facing a change of placement due to violation of a student code of conduct. If a child is eligible, the school district cannot impose a change of placement unless it first holds a meeting and determines that the child's conduct in violation of the code of conduct was not a "manifestation" of a disability. 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e). If the conduct is found to be a "manifestation" of the

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upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

child's disability, the child must be returned to the placement from which he or she was removed. 20 U.S.C. §1415(k)(1)(F)(iii); 34 C.F.R. §300.530(f)(2).

The IDEA provides for an exception to this rule in "special circumstances". 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g). Regardless of whether the conduct was a "manifestation" of disability, a school district is authorized to change the child's placement by removing the child to an "interim alternative educational setting" under three specific circumstances. 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g). One of these "special circumstances" is that the child has "inflicted serious bodily injury upon another person while at school"... . 20 U.S.C. §1415(k)(1)(G)(iii); 34 C.F.R. §300.530(g)(3).

The IDEA defines "serious bodily injury" by reference to a section of the United States criminal code. 18 U.S.C. §1365(3). That section of the code defines "serious bodily injury" to mean a 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 the function of a bodily member, organ, or mental faculty

STUDENT'S CONDUCT DID NOT INFLICT SERIOUS BODILY HARM ON ANYONE AT THE SCHOOL

The issue before me is a very narrow one, as defined by the law. There is no question that the District decided to remove Student regardless of whether Student's behavior on November 12 was a "manifestation" of Student's disability. The narrow legal question is whether or not the "special circumstances" provisions of the IDEA, discussed above, authorize such a change of placement to an alternate interim educational setting. The District relies on only one of the four criteria under which the law would permit such a change of placement: that Student inflicted

“serious bodily injury” upon any person on November 12. The District asserts only that the principal experienced “serious bodily injury”, asserting only that the principal experienced extreme physical pain as a result of injuries sustained during the altercation on November 12.

The District does not assert that any of its personnel experienced a substantial risk of death, protracted and obvious disfigurement or protracted loss or impairment of a bodily member or mental faculty. Thus, I am called upon only to determine whether or not the principal's pain, which the principal characterized in her testimony as "serious", constituted that degree of pain which the IDEA (through its adoption of the Federal criminal code’s definition of “serious bodily injury) classifies as "extreme".

I conclude that the principal's pain was not "extreme" within the meaning of the criminal code definition. The principal characterized it as "serious". Principal did not characterize it, directly and spontaneously, as "extreme". In the principal's own report of the incident, written shortly after the events of November 12, the principal did not mention pain at all. None of the witness reports mentioned pain. The medical report of the principal's visit immediately subsequent to the injuries does not mention pain. No pain medication was prescribed. The principal testified that Tylenol was recommended on the contingency that pain should continue – a circumstance that does not imply a degree of pain that is extreme. Thus, there is no evidence that the principal was experiencing a degree of pain worth either expressing at the time of the injury or reporting to a physician for purposes of treatment. I conclude that this evidence establishes, by a preponderance, that the principal’s pain was not extreme by any reasonable definition of the word.

In reaching this conclusion, I rely upon a construction of the statute by reference to a subsequent subsection of the criminal code definition of bodily injury. The code distinguishes between “serious bodily injury” and “bodily injury”. The latter includes:

> (A) a cut, abrasion, bruise, burn or disfigurement;
> (B) physical pain;
> (C) illness;
> (D) impairment of the function of a bodily member, organ, or mental faculty; or
> (E) any other injury to the body, no matter how temporary.

18 U.S.C. §1365(4). Thus, the law establishes two classes of "bodily injury", and reserves the term "serious bodily injury" for the most extreme forms of injury.

Significantly the class of not-extreme injuries includes the injuries that the principal in this matter asserted: an abrasion, a bruise or a burn, with some pain. Therefore, I conclude that the injuries and pain that the principal described were at best "bodily injury" under the criminal code definition, and did not rise to the level of "serious bodily injury" that the IDEA allows as a lawful reason to remove a child from placement for 45 days under the "special circumstances" exception.

OTHER EQUITABLE RELEIF

Parents urge me to couple my expedited placement decision with an equitable order that the District train its staff in the requirements of the IDEA. I decline to do so. There was no evidence that suggests preponderantly that the District's staff need to be trained pursuant to a hearing officer's order.

Nevertheless, the District failed to conduct a manifestation determination, contrary to the plain language of the IDEA, which requires such a determination even in cases in which a district opts to remove the Student due to infliction of serious bodily injury. 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e) (requiring manifestation determination "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"). Moreover, the District failed to

convene an IEP team for purposes of determining the interim alternative educational setting. 20 U.S.C. §1415(k)(2); 34 C.F.R. §300.531.

Although the manifestation issue is moot in light of this decision, and as there was no manifestation determination within ten school days of November 12 as required by the IDEA, 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e), in these circumstances I deem it equitably appropriate to require that the District convene an IEP team meeting within ten calendar days of the Student's return to school, in order to review the IEP and positive behavior support plan, as well as their implementation, and to make any changes deemed necessary to address Student's behavior of repeated behavioral outbursts of the duration and intensity that occurred on November 12.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I found the Parent and all witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor.

CONCLUSION

I conclude that the principal did not experience what the law defines to be "extreme pain" and therefore did not experience "serious bodily injury" as defined for purposes of the IDEA

"special circumstances" exception permitting school personnel to remove a child with a disability to an interim alternate instructional setting for 45 days, irrespective of whether or not the behavior was a manifestation of the child's disability. Therefore, I will order the District to return the Student to Student's previously operative upon placement. In addition, I order the District to convene an IEP meeting as described below.

ORDER

NOW, this twenty-first day of December, 2014, in accordance with the findings of fact and conclusions of law set forth in my decision of even date herewith, I hereby **ORDER** as follows:

1. The District shall return Student to Student's previously operative placement on the first day of school in January 2015; and

2. The District shall convene an IEP meeting regarding Student within ten calendar days of Student's return to the previously operative placement; at such meeting, the IEP team shall review the Student's current IEP and Positive Behavior Support Plan, as well as their implementation, and determine whether or not any changes need to be made to the IEP, the Plan or their implementation, in order to address Student's recurrent episodes of inappropriate behavior similar to that displayed on November 12, 2014.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

December 21, 2014