

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.B.

Date of Birth: [redacted]

ODR No. 17688-15-16-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Collegium Charter School
535 James Hance Court
Exton, PA 19341

Nicole Snyder, Esquire
Latsha, Davis & McKenna P.C.
350 Eagleview Boulevard, Suite 100
Exton, PA 19341

Date of Hearing:

May 19, 2016

Record Closed:

May 19, 2016

Date of Decision:

May 23, 2016

Hearing Officer:

William F. Culleton, Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is an eligible enrollee of the charter school named in this matter (Charter). Student is identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), as a child with the disabilities of Emotional Disturbance, Other Health Impairment and Specific Learning Disability. The Charter filed the present due process complaint notice pursuant to the IDEA, requesting an expedited hearing and order authorizing it to change Student's educational placement from supplemental emotional support located in its own middle school building to full time emotional support in a different school operated by the local Intermediate Unit (IU School).

The Charter requested an order authorizing temporary transfer to an alternative educational setting for 45 days pursuant to 20 U.S.C. §1415(k)(3)(A)(current placement believed substantially likely to result in injury to child or others). It also requested an order declaring that it is authorized to make the temporary placement permanent, due to the consent of Student's Mother, over the opposition of Student's Father.² It also requested an order prior to hearing declaring that the proposed new placement is actually the pendent placement, thus authorizing immediate placement in the IU School, on grounds that the Student's Mother had signed a Notice of Recommended Educational Placement (NOREP), making the new placement pendent, 20 U.S.C. §1415(j) and conferring "stay put" status on the new placement, although Student had not started at the new placement when the complaint notice was filed.

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

² The Charter's complaint notice also asked for an order regarding a requested Independent Educational Evaluation, but at hearing the parties settled this issue and the Charter withdrew it.

Student's Mother agrees with the proposed placement, but Student's Father disagrees and presses the hearing officer to deny the Charter's requested relief. Student's Father agrees that the Student's present educational placement is inappropriate, but he asserts that the proposed new placement is inappropriate also, and that other placements or changes in the IEP at the present location should be undertaken instead of transfer to the IU School.

In view of the request to declare the IU School the pendent placement, I scheduled the hearing well in advance of even an expedited time line, and conducted the hearing in one day. The record is closed and I hereby order the Charter to change Student's educational placement to a 45-day alternative educational placement.³ I bifurcate the matter, closing the expedited matter resolved by this decision and final order. The Office for Dispute Resolution will assign a new case number for resolution of the issue of permanent placement change. The latter is not an expedited issue, and will be scheduled in accord with normal IDEA time lines.

ISSUES

1. Is maintaining Student's current placement substantially likely to result in injury to Student or others?
2. Is placement in full-time emotional support at the IU School for up to 45 days, as proposed by the Charter, an appropriate interim alternative educational placement?
3. Should the Hearing Officer order the District to proceed with its proposed temporary change in placement?

³ Parents share joint custody under a series of orders of the Court of Common Pleas of [Redacted] County, the most recent of which appears to be a consent decree dated September 24, 2015. Read together, these orders mandate that Student "shall remain in" the Charter. Student's Father argues that this clause in an order entered by the Court in 2014 and incorporated by reference in a consent order of September 24, 2015, may contradict any transfer of Student to another location for education, even in an emergent situation such as the present one. I do not so construe the custody order. I note that Student will remain enrolled in the Charter during the entire temporary 45 days in the alternative placement, consistent with the terms of the order. Thus, Student remains in the Charter and under its jurisdiction. The Charter seeks to change the building in which Student will be educated, as well as the level of supports and structure to be provided by the Charter through a contract between the Charter and the IU. The Court's order does not address this level of detail in educational decision-making. Father is of course free to seek the Court's contrary judgment and superseding mandate.

FINDINGS OF FACT

1. Student is identified under the IDEA as a child with the disabilities of Emotional Disturbance, Other Health Impairment and Specific Learning Disability. (NT 22-23; J 13.)
2. Student attends school at the Charter, in its middle school building, and Student is in eighth grade. (J 116.)
3. About 278 students attend the Charter's elementary school. Regular education classes have between 20 and 25 students. (NT 71, 173.)
4. The Charter's elementary school building is located in an office park comprised of multiple buildings arranged in a multiple acreage campus characterized by landscaped spaces and winding roads for automobile access to its buildings. (NT 173-174.)
5. The office park in which the elementary school building is located is bordered by suburban drives and commercial thoroughfares for automobiles. (NT 69, 133, 172.)
6. Student has a history of significant behavior problems in school, including aggressive behaviors toward others, property destruction and throwing objects, sometimes in the direction of peers. Student also has a history of withdrawal from the educational process, defiance and refusal to follow instructions. Recently, Student has demonstrated emotional instability and has posed a risk of explosive behavior. (NT 77-79, 119-120, 124-126, 14-143, 145, 193-195; J 29, 85, 110, 116.)
7. The 2015-2016 school year, Student was able to regulate Student's behavior, and was able to participate in education to some extent. Although Student had demonstrated behaviors interfering with learning prior to the beginning of the present school year, Student's behavior improved during the period between the beginning of the school year and March 2016. (NT 141.)
8. In March 2016, Student's behavior began to deteriorate substantially. Student demonstrated greater withdrawal from the educational process, and Student began to walk out of classrooms without permission. (NT 119-121, 141-142; J 4, 76 to 85.)
9. This elopement behavior escalated in March 2016, when Student left the elementary school building without permission. Student traversed the Office Park campus and began to walk along the side of a busy commercial thoroughfare. At some points, Student's path was no more than 5 feet from the side of the road. (NT 68-69, 170-171, 184-186; J 80.)
10. Student eloped from school for a second time, again traveling to the side of the busy commercial thoroughfare. Educational staff again caught up with Student and tried to convince Student to return to school. Student did not respond to these directions or requests. Police officers were called and attempted to stop Student from walking along the

side of the road. Student attempted to elude the officers while within feet of the road. Eventually, police officers physically arrested Student and placed Student in a police vehicle, returning Student to the school building. (NT 68-69, 170-173; J 84.)

11. The Charter called an IEP team meeting in order to discuss Student's escalation in inappropriate behaviors and elopements. After the meeting, as Student's Father was placing documents into a bag, Student approached Student's Father and punched Father in the face. This was delivered without warning, from the side, and with a closed fist. (NT 157-160; J 97 to 101, 102, 107 to 109.)
12. Student made one other gesture threatening a physical altercation with Father on school property. Student has threatened to hit and kill Student's Father. (NT 67-71, 126-127, 181; J 117.)
13. Student is almost entirely disengaged from learning at the present time. During the period from March 2016 until the date of the hearing, Student repeatedly indicated that Student intended to do anything necessary in order to be expelled from the Charter's elementary school. (NT 71, 79, 108-109, 116-118, 157, 204-205.)
14. During the period from March 2016 until the date of the hearing, Student threatened to set off a fire alarm in the school, in order to enable Student to elope from the school. (NT 70.)
15. Student is about [redacted] tall and weighs approximately [redacted] pounds. Physical intervention in order to prevent Student from eloping from the school or even from a classroom would create a substantial risk of injury to Student or to staff attempting such intervention. This is true notwithstanding that staff are trained in physical intervention techniques as part of their crisis intervention training. Even sanctioned appropriate holds create a substantial risk of injury to Student or others. (NT 101-104, 106-107, 161-163, 167-168.)
16. The Charter has implemented a positive behavior support plan informed by a Functional Behavioral Assessment. (NT 119-121, 201-202; J 116.)
17. The Charter has made changes to Student's IEP and behavior plans in order to respond to Student's escalating negative behaviors, including provision of an educational aide to support Student on a one-to-one basis daily. (NT 101-104, 1115-116, 57-158.)
18. The Charter cannot provide any changes to Student's placement or IEP that would appropriately address Student's behaviors in order to reduce the risk of injury to Student or others to an appropriate level. (NT 101-104, 119, 123-124, 156-163, 173, 175, 204-205, 218-220.)
19. The Charter has explored several options for alternative placement, and the IU School is the most appropriate option for Student at this time. (NT 206-214.)

20. The IU School is in a safer location, farther away from dangerous roads in the event of an elopement. It provides a behavior management system with smaller class sizes and full time emotional support provided through clinical staff, including a consulting psychiatrist. (NT 120-123, 133, 203-205, 209, 218-220.)
21. Student has expressed a willingness to attend the IU School, an appropriate consideration in determining appropriate placement. (NT 122, 129-130.)

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), an IDEA case, the United States Supreme Court held that the burden of persuasion is on the party that requests relief. Thus, the moving party must produce a preponderance of evidence⁴ that the other party failed 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.

⁴ 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 upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

In this matter, the Charter requested due process and the burden of proof is allocated to the Charter. The Charter bears the burden of persuasion that its claims are true. If the Charter fails to produce a preponderance of evidence in support of its claims, or if the evidence is in “equipose”, then the Charter cannot prevail.

AUTHORITY TO ORDER A 45 DAY TEMPORARY PLACEMENT

The IDEA provides protections for children with disabilities who violate school codes of student conduct. 20 U.S.C. §1415(k)⁵. The ordinary consequences of such behavior are limited when those consequences constitute a change of placement. The IDEA provides that such changes of placement must be subjected to an analysis as to whether or not the child's behavior in question was a "manifestation" of the child's disability. 20 U.S.C. §1415(k)(1)(E).

Nevertheless, the IDA recognizes exceptions for behaviors that are deemed so dangerous as to create a substantial risk of injury to the child or to others; in these circumstances, a local educational agency such as the Charter is permitted to file complaint notice and request a due process hearing before an impartial hearing officer. 20 U.S.C. §1415(k)(3)(A). The hearing officer is required by law to hear the request and to make a determination regarding the request. 20 U.S.C. §1415(k)(3)(B)(i). That determination is limited to either returning a child to a previous placement or ordering a change in placement of the child to an "appropriate interim alternative educational setting for not more than 45 school days" 20 U.S.C. §1415(k)(3)(B)(ii)(II). Such hearings must be conducted on an expedited basis. 20 U.S.C. §1415(k)(4)(B); see also, 22 Pa. Code §14.162(q)(4).

⁵ See also, 34 C.F.R. §300.530 – 536, implementing the statute.

This is the narrow issue that the Charter has presented for me to decide. As I explained to Parents, this issue does not require me to decide what is the psychological or historical cause of Student's behavior. In particular, the law does not require me to decide – nor does it authorize me to decide – whether or not either Student's Mother or Student's Father or both of Student's parents bear full or partial responsibility for Student's present behaviors. Although both parents attempted to introduce their own testimony or other evidence aimed at suggesting the culpability of their former spouse, I made it clear that such evidence was not material or relevant to the issues before me, and that I would not consider any such evidence in any way in making a decision in this matter. I have not considered such evidence at all in rendering this decision.

There is little dispute as to the nature of Student's behavior during the last few months. There is no dispute that Student has eloped from the school building, traveled through the office park and walked along a busy highway, more than once. There is no dispute that Student attempted to evade a law enforcement officer under circumstances that could have placed either Student or the officer in the travel lanes of a busy highway. Educational staff testified without contradiction that these behaviors alone are dangerous to Student and others. Student's one-to-one aide, assigned to watch Student during the school day, testified that even physical intervention to prevent eloping from the building would raise a substantial risk of injury to Student or others.

The evidence is preponderant that Student punched Student's Father in the face with a closed fist. There is no dispute that Student has made repeated statements that Student was willing to do anything necessary to get the Charter to expel Student, including setting off a fire alarm. There is no dispute that the Student presently is completely disengaged from education while in the present placement.

There is also preponderant evidence in the record that Student's emotional state is presently unstable, and can become explosive. Student's therapist so indicated in a report sent to Charter officials. The Charter's school psychologist endorsed this view.

I conclude that Student's most recent behavior proves beyond a preponderance of the evidence that retaining Student in the present placement at the Charter's elementary school building would continue to create a substantial risk of injury to Student or other persons, including both educational staff and Student's peers. I also conclude that the Charter is unable to make changes to Student's placement, location or IEP (including Student's positive behavior support plan or IEP) that would ameliorate the present substantial risk to an appropriate level. Therefore, I conclude that a change of placement is appropriate. Indeed, I conclude that Student must be placed in a more safe and structured setting as soon as possible.

APPROPRIATENESS OF PROPOSED TEMPORARY PLACEMENT

Having found that leaving Student in the present placement would permit a substantial risk of injury to Student or others, I am required by the IDEA to make a determination as to whether or not the Charter's proposed temporary placement is "appropriate". 20 U.S.C. §1415(k)(3)(B)(ii)(II). I conclude that the proposed temporary placement is appropriate. The placement offers an academic program with therapeutic support, in a physical setting of increased structure and smaller class sizes. Thus, it constitutes an elevation of the level of Student's placement from "supplemental" to "full-time". Classes are smaller and therapeutic staff are available to intervene in crisis and to support Student in regaining behavioral self-regulation. Staffing includes a consulting psychiatrist, who would be available for therapeutic purposes including administration and regulation of any appropriate medications. Thus, the IU School

would address Student's needs in the areas of academic achievement, behavioral control and regaining emotional stability.

The Student's Father made it clear that he desires a good academic environment for Student. Student's father also made it clear that he believes the Student needs a more intensive level of therapeutic intervention with regard to Student's emotional needs. These are exactly the needs that the proposed placement would address, according to the preponderance of the evidence presented at the hearing.

The Student's Father emphasized his concern that Student's behavior was a product of anxiety and frustration that originated in Student's considerable record of absences during the present school year. It is unclear to me how this evidence contradicts the Charter's recommendation for change of placement. I consider that there may be an inference in this argument that the Charter could do a better job of enforcing Student's attendance at its school. Yet there is no evidence that Student, even if more effectively required to attend school regularly, would change Student's risky behaviors as a result. Rather, the record supports an inference that Student's behaviors have a function of escape from work demands and attention seeking, according to the latest functional behavioral assessment. No matter how the Student's anxiety affects these risky behaviors, there are other factors at work. Thus, Father's argument with regard to the operation of Student's poor attendance does not negate the preponderant evidence that Student would be substantially likely to engage in these risky behaviors, even if Student were attending more regularly.

Student's Father also argues that the proposed placement would not provide Student with opportunities for extracurricular activities or extended school year services. He fears the Student would be adversely affected by missing graduation from eighth grade if sent to the proposed placement. While all of these considerations are important, and I do not discount any of them, they

do not render the proposed placement inappropriate, in view of the overwhelming evidence that Student needs a more structured, higher level of intervention in a smaller setting that would be much better able to keep Student safe and would enable both educators and clinicians to more effectively address Student's emotional instability and resulting behavioral dyscontrol. These latter needs are simply more urgent and more fundamental than the very valid and important concerns that Student's Father expressed with regard to the limitations of the proposed placement.

CONCLUSION

For the reasons set forth above, I conclude that allowing Student to remain in the present placement would constitute a substantial risk of injury to Student or others. I conclude that the proposed placement is appropriate for a temporary alternative placement. Therefore I will order the Charter to place Student in the proposed placement as soon as possible for 45 school days.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Charter place Student in the IU School as soon as possible on a temporary, basis for no longer than 45 school days.

William F. Culleton, Jr. Esq.

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

DATED: May 23, 2016