

*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: 22046-18-19**

**Child's Name:** M. W.

**Date of Birth:** [redacted]

**Parents:**  
[redacted]

*Counsel for Parent*  
Lori McKinley, Esquire  
238 West Miner Street  
West Chester, PA 19382

**Local Education Agency:**  
Unionville-Chadds Ford School District  
740 Unionville Road  
Kennett Square, PA 19348

*Counsel for the LEA*  
Anne Hendricks, Esquire  
Levin Legal Group, P.C.  
1800 Byberry Road, Suite 1301  
Huntingdon Valley, PA 19006

**Hearing Officer:** Michael J. McElligott, Esquire

**Date of Decision:** 05/28/2019

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (“student”)<sup>1</sup> is a high school-aged student who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>2</sup>. The student has been identified with an emotional disturbance and a health impairment. The student resides and attends schools in the Unionville-Chadds Ford School District (“District”).

As set forth below, over the course of the 2018-2019 school year, the student experienced personal incidents in the student’s private life, and some school-based incidents, that led the District to file the due process complaint which led to these proceedings, requesting an expedited hearing pursuant to 34 C.F.R. §§300.532(a), (b)(2)(ii), seeking a hearing officer-ordered interim placement because it believes that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.<sup>3</sup>

For the reasons set forth below, I find in favor of the parents. On the evidence developed on this record, maintaining the student’s current placement

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

<sup>2</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. See also 22 PA Code §§14.101-14.162.

<sup>3</sup> Chronologically, the parents had filed an earlier complaint alleging multiple claims, including a claim that the student was not being allowed to return to District schools. In its answer to that complaint, the District asserted that it was requesting a change in placement under the provisions of 34 C.F.R. §§300.532(a), (b)(2)(ii). Therefore, that expedited claim is being adjudicated at this file number. An affiliated complaint, including claims related to child-find, appropriate programming, and wrongful exclusion from District schools, is being adjudicated under a separate ODR file number.

does not present a substantial likelihood of harm to self or others in the school environment.

### **ISSUE**

Should the student's placement be changed because maintaining the current placement of the student is substantially likely to result in injury to the student or to others?

### **FINDINGS OF FACT**

1. The student has attended District schools for multiple school years. (Parents Exhibit ["P"]-4; Joint Exhibit ["J"]-4 at pages 1-3).
2. As of the fall of 2018, the student had not been identified as a student with a disability under the IDEIA. (J-4).
3. At the end of October 2018, in the student's [redacted] grade year, the student was involved in an attempt of self-harm at home. (J-12; Notes of Testimony ["NT"] at 16-158).
4. The student was hospitalized and received treatment as a result of this home-based incident. (J-14; NT at 16-158).
5. The parents advised the District that the student was being treated at a facility but did not share much information with District educators about the incident and did not provide consent for the District to consult with the facility providers. (J-14; NT at 16-158).
6. In early November 2018, the student returned to the District high school. The student was provided instructional support and received an instructional support team ("IST") action plan. (J-9; J-14).
7. The IST action plan included a goal in adaptive coping and self-advocacy skills when faced with anxiety or agitated emotional states. (J-9).
8. At that time, the District did not request permission to evaluate the student for potential qualification for special education programming.

9. Shortly after returning to the District, the District social worker became aware of an incident outside of the school environment which led to risk assessments for the student for potential self-harm. (J-6 at pages 7-14).
10. Approximately ten days after returning to the District, the student was found in possession of drugs and drug paraphernalia. (J-10, J-14; NT at 231-340).
11. The day before the November incident, the District had received information that the student would have this contraband. Upon arriving at school, District administrators intercepted the student and took the student to a District office. (J-10; NT at 231-340).
12. The drugs and paraphernalia were found upon a search of the student. (J-10; NT at 231-340).
13. During the District investigation, while the student was being housed in the District office, the student's cell phone was not removed from the student's possession. The student made threats of retribution against whoever had provided information to the District. The student also threatened self-harm. (J-10).
14. Specifically, while being held by District administration, the student used social media to post messages of [redacted] (J-10 at pages 9-13).
15. The student's mother, who had been summoned to the school, and a group of students both informed District administration that the student was utilizing social media while the student was being detained by District administrators, and the student's phone was then made inaccessible to the student. (J-10).
16. The student was suspended for ten school days for drug possession and terroristic threats, although that suspension was held in abeyance as the student sought treatment at a medical facility. (J-10).
17. Following the November incident, the District requested permission to evaluate the student for potential qualification for special education programming. The parents granted permission for the evaluation in early December 2018. (J-4 at pages 19-22).
18. The student received treatment at the facility through early December 2018. (P-1 at page 2).

19. The student returned to the District in early December 2018, at which time the 10-day out-of-school suspension was applied. Therefore, the student was suspended through late December 2018. (P-1 at page 2).
20. Given that drug possession was part of the infraction of the code of student conduct as part of the November incident, even as a student potentially-eligible for special education programming, the District arranged a 45-school day alternative education placement for the student. (P-5; J-12; NT at 158-230).<sup>4</sup>
21. The student was enrolled in the alternative education placement in early January 2019. (P-5).
22. In early February 2019, the District issued its evaluation report (“ER”), finding that the student was eligible under the IDEIA as a student with an emotional disturbance and the health impairment of attention deficit hyperactivity disorder (“ADHD”). (J-4).
23. The February 2019 ER contained information from a prior IST process in the 2016-2017 school year. The content (including teacher input) and results of that IST process focused entirely on academic and organization/attention/task-approach skills. (J-4 at pages 1-4).
24. The IST information from the 2016-2017 IST process contained in the February 2019 ER indicates that, at the time of that IST process, the parents provided a psychological evaluation from July 2015 that indicated that the student had been diagnosed with ADHD and oppositional defiant disorder. (J-4 at page 3; J-7 at pages 1-12).
25. There is nothing from the 2016-2017 IST process that indicates problematic behavior in the school environment or negative peer interaction, or concerns from any educator or from parents, about the student’s interaction with peers or adults. (J-4 at pages 1-4).<sup>5</sup>

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<sup>4</sup> See 34 C.F.R. §300.530(g).

<sup>5</sup> There is an indication that, in November 2016, the student was disciplined for “violation of computer use/harassment”, although there are no details in the ER or in the record generally about the details of this discipline. (J-4 at page 2). Also, later in the ER in reporting results from attention assessments, the District evaluator opines that “some consistency was noted in (the student) among (the student’s) [9<sup>th</sup> grade] male teachers probed [sic] regarding oppositional and defiant behaviors noted to some degree in (the student) in their curricular classes (...geometry...Western Civilization...biology)”. (J-4 at page 9, bracketed material added). Yet a review of the input of those specific, named teachers from the 2016-2017 IST process indicates nothing about opposition and defiance with those teachers. In fact, the teachers report as strengths, respectively, “likes to interact with others”, “receptive to feedback”, and “participates in all activities, cooperative, respectful”. (J-4 at page 2). If such oppositional/defiant data exists, it was not provided in the February 2019 ER, or anywhere else in this record.

26. The February 2019 ER included information about the student's IST process in early November 2019 and the disciplinary incident/suspension/alternate-education placement. (J-4 at pages 4-6).
27. The February 2019 ER contained input from three teachers, received in November 2018. Three teachers reported concerns with organization and task-completion, two teachers reported attention issues and sleeping in class, and one teacher reported a sad/moody affect and concerns of interaction with peers and adults. These teachers recommended developing coping and stress-management skills and development of independent organization/task-completion skills. (J-4 at page 6).
28. In addition to the psychological diagnoses from the July 2015 evaluation, the parents also reported as part of the February 2019 ER that the student has been diagnosed with bipolar disorder, anxiety, and depression. (J-4 at page 6).
29. Intellectual and achievement assessments in the February 2019 ER indicated that the student does not demonstrate any needs in academics. (J-4 at pages 7-9).
30. Assessments of executive functioning in the February 2019 ER indicated that the student exhibited some weaknesses, but no at-risk or clinically significant scores. The student's father indicated that the student demonstrated clinically significant deficits across all measured sub-scales and indices. (J-4 at pages 10-12).
31. Assessments of emotional/behavioral functioning in the February 2019 ER indicated that the student's self-report was at-risk for attitude to school, attitude to teachers, and locus of control and not clinically significant in any self-rating. The student's mother indicated at-risk and clinically-significant deficits across almost every sub-scale and composite scale, with specifically clinically-significant ratings in the following: externalizing-problems composite (including aggression and conduct problems sub-scales), the depression sub-scale, the behavioral symptoms index (including the withdrawal and attention-problems sub-scales), the activities of daily living sub-scale, the functional communication sub-scale, the anger-control sub-scale, the bullying sub-scale, the emotional self-control sub-scale, and the executive functioning sub-scale, and the negative-emotionality sub-scale. (J-4 at pages 13-14).
32. The February 2019 ER concluded that the student had "characteristics of an emotional disturbance related to...diagnoses involving depression and anxiety" and recommended identification of the

student under 22 PA Code Chapter 14 as a student in need of special education. The ER concluded that, as the result of the ADHD diagnosis, the student also qualified as a student in need of special education with the health impairment of ADHD. (J-4 at page 15).

33. The February 2019 ER indicates that the student's need for specially designed instruction included skill development in adaptive coping, stress management, emotional regulation, and decision-making. (J-4 at page 15).

34. The February 2019 ER does not contain any indication that, as of that time, the District evaluator felt that the student posed a threat to self or others, or felt the need to recommend any consideration by the student's individualized education program ("IEP") team for concerns about those matters, or interaction with peers/adults. (J-4).

35. The student's IEP team met in late February 2019 to draft the student's IEP. (J-5).<sup>6</sup>

36. Almost presciently, school-based members of the IEP team opined at the February 2019 IEP meeting, regarding an eventual return of the student to the District, that they had concerns about mis-use of the Commonwealth's school-threat reporting system, that "(the student) may be reported frequently if (the student) returns to (the District high school)". (J-5 at page 10).

37. The student participated in the District [redacted] team, a long-time interest and activity of the student. (J-15).

38. [Redacted]

39. In mid-March 2019, as the 45-day alternate placement came to its end, the student's IEP team met to coordinate the student's return to the District. The student would participate in online learning through the

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<sup>6</sup> The February 2019 ER contains detailed information about the student's educational history, about the student's affect in the school environment over time, and about how the District understood the student and the student's needs in the school environment. Therefore, granular fact-finding is necessary as to that process/document for the issue in this decision. For the February 2019 IEP, however, fact-finding in this decision is not as granular for two reasons: (1) The February 2019 IEP (and its subsequent March 2019 revision) reveals very little about the District's understandings of the student, in a chronological sense, prior to April 2019 and (2) that IEP will be the subject of necessarily more granular fact-finding in the affiliated matter being adjudicated under a separate ODR file number. Fact-finding as to the February 2019 IEP (and its subsequent March 2019 revision) is included here only as it touches on the issue in this decision.

end of March, and then transition to attendance at the District in early April, for the final marking period of the school year. (J-5 at pages 9-10).

40. At the March 2019 IEP meeting, a teacher from the alternate education placement shared that the student had been compliant with teachers and had not exhibited any problems or negativity in interacting with peers. (J-5 at page 10).
41. On March 25, 2019, the student met with the District school psychologist. The student reported that the transition through online learning was proceeding fine. They discussed the student's disappointment at not playing well in the first [redacted] game of the season, and the school psychologist related that the student did not exhibit any emotional difficulties. (J-15).
42. On April 1, 2019, the student returned to the District high school on a limited basis with a full integration into classes two days later (on April 3<sup>rd</sup>). On April 1, 2019, the student again met with the District school psychologist. The student was more relaxed and open than at their first meeting. The student shared that the transition continued to go well and that the student was glad to be back at school and to be transitioning to a regular class schedule. (J-5 at pages 9-10, J-15).
43. On April 3, 2019, the student began to attend the District high school on a full schedule under the terms of the February 2019 IEP. (J-5).

#### April 4, 2019

44. On April 4, 2019, the student was disappointed by the way the student had played [redacted] that day. That evening, the student posted the following message through social media [redacted]. (J-11 at page 1, J-13 at page 1).
45. Shortly thereafter, an individual contacted the Commonwealth's school-threat reporting system [redacted] (J-11 at page 1).
46. In an online dialogue with an individual at the Commonwealth system, the representative from the system asks "do you know what this is in regards to?". [Redacted] (J-11 at pages 1-2 [repeated at pages 3-4]).
47. On this record, the student never threatened gun violence at any time, either in the past, or on April 4<sup>th</sup>, or at any time thereafter. (NT at 231-340).



48. As a result of the report to the Commonwealth's school-threat reporting system, as a matter of protocol the community police were dispatched to the student's home. At some point thereafter, the police departed. (NT at 39-43).
49. As a result of the report to the Commonwealth's school-threat reporting system, as a matter of protocol the District was also notified. (J-13 at page 1).
50. It is not clear on this record whether the precise details of the April 4<sup>th</sup> report to the Commonwealth's school-threat reporting system were shared with the District, or whether it was simply notification that a report had been made.
51. That evening, a District administrator was advised of the situation, including a follow-up social media post by the student [asking] [redacted] (J-13, J-18).
52. That evening, the District administrator spoke with the student's mother by telephone. (J-13).
53. That evening, the District administrator convened a conference call where it was determined that the student had [redacted] [in the sport] earlier that day. (J-13).
54. That evening, the District requested the presence of community police at the school building the next day, April 5<sup>th</sup>. (J-13; NT at 231-340).

#### April 5, 2019

55. Upon arrival at the District high school the next day, April 5<sup>th</sup>, District social worker and District school psychologist performed a risk assessment of the student. (J-6 at pages 16-20, J-14, J-15; NT at 39-45).
56. During the risk assessment, the student shared that after the police had departed the previous evening, the student was aggressive toward the student's mother and had to be restrained by the student's father. When questioned about this, the student could not articulate any plan but voiced concrete notions of doing physical violence to the mother. (J-6 at pages 16-20, J-14, J-15; NT at 39-45).

57. Ultimately, as a result of the risk assessment, the District educators felt that the student did not present as a risk for self-harm but they were concerned for the safety of the student's mother. (J-14, J-15; NT at 39-45).
58. After the risk assessment, a District administrative team including met with the student's parents (the student's mother was present and the student's father joined by telephone). The District social worker sat with the student in an outer office. (NT at 45-47, 231-340).
59. The District's position was [redacted] (J-13; NT at 231-340).
60. After reaching this decision, the student was called back into the room and was informed that [redacted] (J-13; NT at 231-340).
61. The student reacted emotionally [redacted] insisted on participating and made expletive-laced comments such as 'f\*\*\* the administration' and 'f\*\*\* the principal'. (J-13; NT at 231-340).
62. The student abruptly left the meeting, using both hands to give those gathered in the room the finger. The student abruptly left the high school building. The student departed with the mother. (J-13; NT at 46-47).
63. Shortly after leaving the school, the student utilized social media to post [redacted] two messages [redacted]. (J-11 at pages 5-7 [repeated at pages 8-10], J-13 at page 2).
64. These posts to social media prompted an individual to contact the Commonwealth's school-threat reporting system, indicating [redacted] (J-11 at pages 5-7 [repeated at pages 8-10]).
65. The representative from the system asks "when was this posted?". There was no reply to the question by the reporting individual and the dialogue ends at that point. (J-11 at pages 5-7 [repeated at pages 8-10]).
66. In the afternoon, the District social worker and District school psychologist contacted the student's private counselor about the situation. (P-6; J-15 at page 2).
67. Also in the afternoon, various District administrators met to discuss the situation. It was decided that, hours after allowing the student to depart with the mother, the District felt that the mother might be unsafe and called community police. (J-13; NT at 231-340).

68. The District scheduled an IEP meeting for Monday, April 8<sup>th</sup>. (J-5, J-13).
69. [Redacted] (J-13 at page 2).
70. [Redacted] (J-8 at page 22; NT at 231-340, 340-375).

#### Weekend of April 6 – 7, 2019

71. [Redacted] (P-2; J-8).
72. [Redacted] (J-8 at pages 10-11; NT at 340-375).
73. [Redacted]. (P-2; J-8; NT at 340-375).
74. [Redacted]. (P-2; J-8).

#### April 8, 2019 & Thereafter

75. On Monday, April 8, 2019, the student's IEP team met to revise the student's IEP. (J-5).
76. On April 9, 2019, parents filed a special education due process complaint seeking an order maintaining the student's placement as the result of the stay-put doctrine. (J-1).
77. On April 10, 2019, the District filed its response to the parents' complaint, including a request for a change in the student's placement pursuant to 34 C.F.R. §§300.532(a), (b)(2)(ii). It is this filing which led to the special education due process hearing in this matter. (J-2).
78. On April 11, 2019, the District issued its recommendation on the student's educational placement, a full-time placement at an intermediate unit program for emotional support. On April 12, 2019, the parents rejected the recommended placement, citing their special education due process complaint. (J-5 at pages 43-45).
79. The record supports a conclusion that most of the anxiety and emotionality in the student's life arises outside of the school environment and is related to the student's relationship with the student's mother. (J-6, J-7, J-14, J-15).

## **DISCUSSION AND CONCLUSION OF LAW**

Where a student with a disability violates the student code of conduct, a school district may implement discipline against that student as it would with student who does not have a disability. Federal and Pennsylvania special education regulations, however, contain explicit limits and protections for a student with a disability in such circumstances. (34 C.F.R. §§300.530-536; 22 PA Code §§14.143, 14.162).

At any time, a manifestation determination meeting may be convened to consider whether a student's behaviors, or violations of the student code of conduct, are a manifestation of the student's disability. (34 C.F.R. §§300.530(a),(e),(f)). In Pennsylvania, however, at a minimum a manifestation determination meeting must be convened where the discipline amounts to an exclusion in excess of 10 consecutive school days, or exclusions in excess of 15 cumulative school days. (34 C.F.R. §§300.530(d)(4); 22 PA Code §§14.143).

Where a manifestation determination meeting results in a determination that a student's behavior was a manifestation of a disability, the student's placement cannot be changed except by agreement of the student's IEP team, or through a special education due process hearing. (34 C.F.R. §§300.530(e),(f)). Specifically in the context of this matter, where a student's placement may not be changed because the behavior is viewed as a manifestation of a student's disability but the school district believes that maintaining the current placement of the student is substantially likely to

result in injury to the student or to others, the school district may utilize a special education due process hearing to seek an interim 45-school day placement outside of the school district. (34 C.F.R. §§300.532(a),(b)(2)(ii)). This is the course chosen by the District in the instant matter.

Finally, while a special education hearing officer has a large degree of programmatic and remedial flexibility in working with the educational programming of students with disabilities, in this context, the IDEIA constrains that flexibility. Specifically, in considering a claim under 34 C.F.R. §§300.532(a), (b)(2)(ii) that maintaining a student's current placement presents a substantial likelihood to result in injury to the student or to others, a hearing officer has only the authority (i) to "return the child with a disability to the placement from which the child was removed" or (ii) to "order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days". (34 C.F.R. §§300.532(a), (b)(2)(ii)). There is no middle way, or authority of a hearing officer, to craft a different placement for the student.

On this record, the District has not met its evidentiary burden of proof that maintaining the student's current placement is substantially likely to result in injury to the student or others. Emotions and feelings of students, District staff, and District community members swamp this record. But viewed dispassionately as a matter of fact-finding, based on the consistent documentary evidence regarding the student's affect and behavior in the school environment, this hearing officer cannot reach the conclusion that maintaining

the student's placement at the District is substantially likely to result in injury to the student or others.

Reviewing the District records prior to November 2018 reveals that no one in the school environment—not one educator or District professional—at any time related any concern or problems with the student's affect or behavior. Indeed, except for the mention two years ago of “violation of computer use policy/harassment”, without any supporting detail, there is no indication on this record that prior to November 2018 the student was disciplined or suspended for any infraction of the student code of conduct.

Obviously, that changed in November 2018 after the student's self-harm incident and possession of drugs/drug paraphernalia and subsequent removal from school. On the day of the incident, even as the incident was being investigated and the student was being detained by District administrators, the student had access to the cell phone which Student used to send generalized threats to those who had ‘snitched’.

These threats are inexcusable and utilizing these threats, in addition to the drug infraction, as the basis for suspending the student was entirely warranted by District administration. But in hundreds of pages of exhibits and testimony, it is the only concrete example of the student threatening any harm to another in the school environment. And after that use of social media, there is nothing in the record to indicate that the student investigated who ‘snitched’, or threatened violence to any particular student, or followed up on the threat. Likewise, aside from the self-harm incident in late October 2018, the only time

the student presented any indication of self-harm was in the midst of that same tirade. Yet from that one November 2018 incident, an edifice was erected within the District that the student was a danger to others and presented a threat to self and others.

Granted, in April 2019, the student shared with the District that the student wished to visit violence upon the student's mother. And it is clear that the student's relationship with the mother appears to be problematic and the basis for emotionality/anger by the student. But, the November 2018 incident aside, the student did not exhibit any emotionality/anger in the school environment until the April 2019 incident where the student was informed that [redacted] privileges were being revoked.

Here again, the student's behavior toward District administration was inappropriate and warranted a consequence. But, and this is merely the opinion of this hearing officer, having been put out of school (albeit with the full support of the provisions of IDEIA) for four and half months, where participation in [redacted] was a great solace, and only just having returned to the District high school—something the student shared with the District school psychologist as an ardent desire—, the student's reaction was, frankly, understandable. It was not defensible, but it was understandable. And even given this emotionality/anger, the student did not threaten anyone with harm and, with self-awareness, indicated in a social media message directly after leaving the school, that Student was not going to engage in self-harm.

And one cannot describe the April 2019 situation as an “incident”. The report to the Commonwealth’s school-threat reporting system did not involve any concrete threat and, in fact, included false information (a past threat [of redacted violence] which is entirely unsubstantiated on this record). This is not to fault the District—as pointed out above, it is unclear whether the District knew anything of the details of the report or simply that a report had been made. But the District’s response fed into momentum in misguided understandings of the student, both within the District and within the community, in the days thereafter.

In sum, the totality of the evidence weighs decidedly in favor of a finding that maintaining the student’s placement in the District is not substantially likely to result in injury to the student or to others.

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## **ORDER**

On this record, in accord with the findings of fact and conclusions of law as set forth above, maintaining the student's placement does not present a situation where it is substantially likely to result in injury to the student or to others. The student shall be reinstated for attendance at District schools on Monday, June 3, 2019.

The IEP team shall convene within three days of this decision and order to determine whether, with only six school days remaining in the school year after the reinstatement date above, the student should transition back to the District in the remaining days of the school year.

In this regard, nothing in this order should be read to limit or interfere with the ability of the student's IEP team, by agreement of the parents and the District, to alter the explicit directives of this order.

The affiliated case at a different ODR file number, including an ultimate determination as to the student's special education programming and placement, continues to be adjudicated.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

May 28, 2019