

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: 22120-18-19

Child's Name: J. L.

Date of Birth: [redacted]

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 5/29/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student in the School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a Due Process Complaint against the District asserting that it violated the disciplinary protections in the IDEA through a pattern of removals from school that amounted to a change in placement.³ The District contended that no such pattern existed and that the discipline imposed was proper under the law.

The case proceeded to an efficient, single-session hearing conducted on an expedited basis, at which the parties presented evidence in support of their respective positions.⁴ Following review of the record and the applicable law, and for all the reasons set forth below, the claim of the Parents cannot be sustained and must be denied.

ISSUES

1. Whether Student's disciplinary removals over the course of the 2018-19 school year amount to a pattern such that there has been a change of placement;

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ Additional issues will be heard and decided under a separate file number.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (D-) followed by the exhibit number, and Hearing Officer Exhibits (HO-1) followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

2. If the discipline does constitute a pattern of removals and a change of placement, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is mid-teenaged and is a resident of the District. Student is eligible for special education under the IDEA under the disability classifications of Emotional Disturbance and Other Health Impairment. (N.T. 20-21; D-13; D-19.)
2. Student has been diagnosed with Bipolar Disorder, Oppositional Defiant Disorder, and Attention Deficit Hyperactivity Disorder, as well as possible other mental health disorders. (D-13 at 3.)
3. Student has historically engaged in problematic behavior that continued through the date of the hearing. That behavior includes use of curse words to express frustration. (N.T. 86, 107.)
4. The District has a Code of Student Conduct for the middle school that specifies conduct that constitute violations as well as a range of sanctions. District administrators have discretion in determining the sanction for a particular offense in conformance with a specific violation. (N.T. 24, 38-39; D-7 at 37-40.)
5. Student was evaluated in the spring of 2018 with a Reevaluation Report (RR) issued in April of that year (seventh grade). The RR noted Student's previous IDEA exceptionality classifications as well as the various mental health diagnoses. (D-13 at 3.)
6. Teacher input into the 2018 RR reflected Student's inconsistent motivation, work ethic, and work completion, as well as a tendency to become frustrated and engage in disruptive behaviors. (D-13 at 4.)
7. Cognitive testing for the 2018 RR yielded an average range Full Scale IQ (102) with some variability reflecting relative strengths and weaknesses across composites and subtests. Student's scores on achievement testing in reading and mathematics were all in the average range. (D-13 at 8-12.)
8. Assessment of social/emotional/behavioral functioning for the 2018 RR (Behavior Assessment System for Children – Third Edition) were variable among raters (Parent, two teachers, and Student). The Parent indicated only one area of concern, Aggression, in the at-risk range. One or both teachers endorsed concerns in the clinically significant range for Hyperactivity, Aggression, Conduct Problems, Depression, Attention Problems, and Atypicality; and at-risk concerns with Anxiety and Withdrawal. Student's Self Report reflected only an at-risk concern with Attitude to Teachers. (D-13 at 12-14.)

9. A Functional Behavioral Assessment (FBA) was conducted as part of the 2018 RR. Targeted behaviors that were identified were disruption (behavior disruptive to others), verbal refusal (starting a refusal to comply with a directive), nonverbal refusal (failing to comply with a directive), verbal aggression (using inappropriate language and yelling), and physical aggression (hitting, kicking, pushing, or punching others). The hypotheses for these behaviors were determined to be to gain attention, gain access to a preferred activity, or escape a demand; a positive behavior support plan was recommended. (D-13 at 14-20.)
10. The 2018 RR determined that Student was eligible for special education and related services under the classifications of Emotional Disturbance and Other Health Impairment. (D-13 at 20.)
11. An Individualized Education Program (IEP) was developed in May 2018. Needs identified in that IEP were for improving motivation, decreasing disruptive behaviors, and increasing time on-task. This IEP focused on behaviors as well as post-secondary transitional/ academic skill deficits as part of a Positive Behavior Support Plan (PBSP). The behavior goals addressed compliance with teacher directives, maintaining attention to task and avoiding work refusal, and decreasing verbal and physical aggression. A number of program modifications/items of specially designed instruction were included in the IEP, which provided for itinerant emotional support. (P-3; D-14.)
12. On October 15, 2018, Student was disciplined for engaging in [redacted] behavior with another student on the school bus. A three-day out of school suspension was imposed. The high school principal also met with Student about this incident. (N.T. 37-38; D-1; D-6.)
13. Student's IEP team met and revised the document to provide for support following Student's return to school after the October 2018 incident. (D-14 at 8-9.)
14. On November 21, 2018, Student was disciplined for [redacted incidents]. An initial three-day out of school suspension was imposed, followed by an additional four-day out of school suspension after an informal hearing. (N.T. 28, 41-43, 101-02; D-2; D-6.)
15. The Parents met with the high school principal after the November 21, 2018 incident. In addition, the IEP team met to discuss that incident and agreed to conduct another FBA. Student was also provided with specific guidelines upon returning to school to include the availability of guidance or emotional support as needed. (N.T. 43-44; D-14 at 8.)
16. A new RR was issued in February 2019. This reevaluation recounted Student's behavioral history including that over the 2018-19 school year and updated other input. Two teachers completed the Behavior Evaluation Scale – Fourth Edition, revealing significant to extreme concerns with overall behavioral functioning. (D-19.)
17. The February 2019 RR also included a new FBA identifying the following targeted behaviors: non-compliance (previously refusal), verbal aggression, physical aggression, off-task behavior, disruptive behavior, and sleeping (described as mild). The perceived functions of the behaviors were to gain attention or access to an item/activity, avoiding

directives, and avoiding tasks. Recommendations including revisions to the PBSP were also provided. (D-19.)

18. The February 2019 RR maintained the eligibility classifications as Emotional Disturbance and Other Health Impairment. (D-19 at 36.)
19. On February 14, 2019, Student was disciplined for [redacted]. A two-day out of school suspension was imposed. (D-3; D-6.)
20. Student's IEP team met following the February 14, 2019 incident and referred Student to the Student Assistance Program. (D-14 at 8.)
21. On February 26, 2019, Student was disciplined for using profane and offensive language against staff. A one-day out of school suspension was imposed. (D-4; D-6.)
22. On March 12, 2019, Student was disciplined for [redacted]. A one-day out of school suspension was imposed. (D-5; D-6.)
23. Over the course of the 2018-19 school year, Student was also disciplined for various infractions that did not result in an out of school suspension. Those sanctions ranged from a warning or time-out (such as for yelling and being disrespectful), to lunch or after school-detention (such as for skipping class or using curse words toward others), to counseling (such as for talking in class during instruction). (N.T. 32; D-2; D-6.)
24. The District did not convene a meeting of Student's IEP team during the 2018-19 school year to conduct a manifestation determination review. (N.T. 69, 78, 92, 122, 124, 129.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those

rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible and, despite differing perspectives, the testimony was essentially quite consistent where it overlapped for purposes of the issues presented.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties’ closing statements.

IDEA DISCIPLINARY PRINCIPLES

For purposes of this file number, the Parents’ Due Process Complaint challenges the District’s imposition of discipline over the course of the 2018-19 school year that they contend amounted to a change of placement. Pursuant to the IDEA and its applicable regulations, the Parents had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing.⁵ 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c).

⁵ HO-1 referenced at the hearing (N.T. 132-33) is hereby admitted.

A local education agency (LEA), including a school district, is permitted to remove a child with a disability from his or her current educational setting for violation of the code of student conduct for a period of no more than ten consecutive school days within the same school year, provided that the same discipline would be imposed on non-disabled students. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). An LEA is also permitted to impose additional disciplinary removals for separate incidents of misconduct for fewer than ten consecutive school days, provided that such removals do not constitute a “change of placement.” 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §300.530(b). A “change of placement” based on disciplinary removals is defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a “pattern”. 34 C.F.R. § 300.536(a). The LEA must determine, on a case by case basis, whether a series of disciplinary removals constitutes a pattern and, therefore, a change of placement. 34 C.F.R. § 300.536(b). A pattern may arise if three factors exist: (1) the series of removals totals more than ten school days in the school year; (2) the child’s behavior is “substantially similar” to previous incidents that led to removals; and (3) additional factors such as the length of each removal, total amount of time of removal, and proximity in time support a conclusion that there is a pattern. 34 C.F.R. § 300.536(a)(2). The relevant Pennsylvania regulations explicitly provide that disciplinary exclusion of a child with a disability that exceeds fifteen days in the same school year is deemed a pattern and, thus, a change in placement. 22 Pa. Code § 14.143(a). “Any unique circumstances” of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

Once a decision is made to change the placement of a child with a disability for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct “was caused by, or had a direct and substantial relationship to, the child’s disability; or ... was the direct result of” the LEA’s failure to implement the child’s IEP. 20 U.S.C. § 1415(k)(E)(i); see also 34 C.F.R. § 300.530(e). The manifestation determination must be made within ten school days of any decision to change the eligible child’s placement, and must be made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA).” 34 C.F.R. § 300.530(e); see also 20 U.S.C. § 1415(k)(1)(E). If the team determines that the behavior was a manifestation of the child’s disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). If the team determines that the behavior was not a manifestation of the child’s disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.530(c) and (d).

APPLICATION TO THE DISCIPLINE IMPOSED

The record establishes a total of fourteen non-consecutive days of out of school suspension. That number does not amount to a change in placement within the meaning of the federal and state disciplinary provisions unless the series of removals presents a “pattern.” It merits mention, nonetheless, that the Office of Special Education Programs has recently reiterated its longstanding position that LEAs should consider whether a student’s educational

program needs to be revisited even before the child has accumulated ten days of disciplinary removal, particularly if there is a recurring denial of access to instruction:

Some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs... and that "there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as 'free days.'"

Dear Colleague Letter, 68 IDELR 76 (OSEP 2016).

The primary issue, thus, is whether the District was required to convene a manifestation determination review meeting prior to the filing of the Due Process Complaint. The Parents have suggested that the District's response to Student's infractions suggests a pattern of ongoing removal of Student from school. As noted above, the federal regulations define the factors that are to be considered in determining if such a pattern exists: (1) whether the series of removals exceeds ten school days in that year; (2) whether the child's behavior is "substantially similar" to previous conduct leading to removals; and (3) whether additional circumstances such as the length of each removal, total amount of time of removal, and proximity in time suggest a pattern. This decision requires consideration of only that narrow issue.

The first factor is clearly met, with Student having been assigned out of school suspension for a total of fourteen days over the 2017-18 school year, just under the threshold under the Pennsylvania regulations. The second factor is not so easily determined. The offenses for which out of school suspension was imposed were: [five types of behaviors redacted]. The Parents contend that these behaviors are consistent with Student's mental health diagnoses, have been addressed by the District over the course of a number of school years, and that three of those incidents encompass [redacted]. The District, on the other hand, argues that the behaviors

in question are different and cannot be considered substantially similar for purposes of the IDEA disciplinary protections.

On balance, this hearing officer cannot conclude that the behavior is “substantially similar” to previous conduct within the meaning of the applicable law. When the current IDEA regulations were promulgated, the Department of Education noted that its “longstanding position” on this question is, “whether the behaviors, taken cumulatively, are substantially similar” in nature; and, that such a determination is necessarily subjective but must be made on a case by case basis. 71 Fed. Reg. 46729-30 (2006). This guidance is instructive. The behavior involved in the five particular incidents, considered cumulatively, are more disparate than alike, and simply cannot be deemed to be “substantially similar” in nature. Moreover, the behaviors for which any discipline has been imposed on Student have also varied widely. While it is arguably true that all of these behaviors might be described as defiant of school rules, the same could be said of most if not all disciplinary sanctions that would fall within a school’s code of student conduct.

With respect to the third factor, the length of the out of school suspensions has varied from one to seven days and span a five-month period. Though there have been more frequent removals from school in February and March compared to the beginning of the school year, the circumstances as a whole do not suggest a pattern. Thus, third element has also not been established.

Student’s behavior has been and currently is a need to be addressed by Student’s special education program. The District has responded to various incidents by imposing a variety of sanctions, some of which did not amount to removal from school; by convening the IEP team; by providing additional support; and by conducting a reevaluation in February 2019 that included a

new FBA. For purposes of this expedited proceeding, this hearing officer cannot conclude that the District violated the IDEA in imposing discipline on Student during the 2018-19 school year through the date of the hearing, and accordingly no remedy is due.

ORDER

AND NOW, this 29th day of May, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parents' claim is DENIED. It is **FURTHER ORDERED** that any claims raised in this expedited proceeding not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 22120-1819AS