

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

ODR File Number:

26270-21-22

CLOSED HEARING

Child's Name:

J.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

04/28/2022

Introduction and Procedural History

This expedited special education due process hearing concerns the educational rights of a student (the Student).¹ The Student was recently identified as a child with disabilities as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

On March 24, 2022, the Student's parents (the Parents) initiated this matter by filing an expedited due process hearing request with the Office for Dispute Resolution (ODR). In their complaint, the Parents allege that the Student exhibited behaviors that are a function of the Student's disability. The behaviors violated the District's code of conduct, and the District initiated expulsion proceedings. The Parents sought an order prohibiting the District from expelling the Student. The Parents raised other claims and sought other relief as well.

On March 25, 2022, the District filed an answer and a motion for this matter to be heard on the IDEA's standard statutory hearing timeline, not the expedited timeline.

ODR initially assigned the matter to a different hearing officer and then transferred the matter to me. I assumed jurisdiction on March 28, 2022.

On March 29, 2022, the Parents responded to the District's motion.

Later on March 29, 2022, I issued a pre-hearing order, resolving the District's motion by granting it in part and denying it in part. The pre-hearing order speaks for itself but, for context, I found that the Parents' demand for an order prohibiting the District from expelling the Student was an expedited issue. I found that the other issues were not expedited, no matter how urgent.

In the pre-hearing order and in an email transmitting the pre-hearing order I stated my understanding that facts concerning the expedited issue were not in dispute, and that the expedited issue could be resolved as a matter of law. I instructed the parties to file joint stipulations (in the alternative, I instructed the parties to file statements as to what facts are in dispute).

On April 5, 2022, the parties filed joint stipulations concerning the expedited issue.

¹ Except for the cover page, identifying information is omitted to the extent possible.

On April 11, 2022, I convened a pre-hearing conference call to clarify the parties' positions and confirm facts that were not directly addressed in the stipulations. After the call, I sent an email to the parties to confirm my understanding of the facts discussed during the call. The parties replied, confirming that the facts in my email are not in dispute.

As discussed below, I find in favor of the Parents. The District may not expel the Student.

Bifurcation

This matter is hereby bifurcated. The expedited issue is resolved through this decision and order, which is a final decision and order, and is appealable. Information concerning appeals will be included with the transmission of this decision to the parties.

The remaining issues raised in the Parents' due process complaint will be heard separately on the IDEA's normal statutory timeline. ODR has assigned a separate file number for the non-expedited portion of this matter: 26336-21-22

Issue

The single issue in this matter is: may the District expel the Student?

Stipulations and Facts

The parties' joint stipulations of fact are included below. I have made no changes except for redacting the student's name and initials. In addition to the stipulations, the parties confirmed that other facts are not in dispute. Those facts, and other information from the pleadings, are also included in this section. I have also included information about the parties' positions to provide context. None of the facts in this section are disputed except as noted.

1. At all times, through the present and ongoing, the District was and is the Student's Local Education agency (LEA) as defined by the IDEA.
2. The Student was enrolled in the District's high school during November 19 through 22, 2021 (Friday through Monday). During this time, the Student engaged in conduct – including online conduct generated

outside of school – that the District determined was a violation of its code of conduct.²

3. The Student was not identified as a child with a disability as defined by the IDEA at the time of the behavioral incident.
4. The Parents allege that the District initiated disciplinary proceedings against the Student following the behavioral incident. This included a recommendation from District personnel to the District's Board to expel the Student. It is not clear if the District agrees with the Parents' characterization.
5. There is no dispute that the District issued a "Notice of Recommendation for Expulsion and Notice of Expulsion Hearing" (the Expulsion Notice) on February 18, 2022. Discussed below, the status of the Expulsion Notice is in dispute.
6. Following the behavioral incident, the District placed the Student in a District-funded, private, remote education program.
7. Following the behavioral incident, the District either funded or conducted an evaluation to determine whether the Student is a child with a disability as defined by the IDEA. The evaluation was completed with the issuance of an Evaluation Report dated March 9, 2022.
8. There is no dispute that the District re-issued the Expulsion Notice on March 14, 2022. Again, discussed below, the status of the Expulsion Notice is in dispute.
9. The parties stipulate that at a "meeting on March 17, 2022, the District's Multi-Disciplinary Team reviewed and agreed with the initial evaluation dated March 9, 2022 (which was emailed to Parents on March 11, 2022) that [the Student] is a child with a disability pursuant to the Individuals with Disabilities Education Act[.]"
10. The parties further stipulate that at "the meeting on March 17, 2022, the IEP team determined that the November 19-22, 2021 conduct, which the District alleges violated the District's Code of Conduct, was a manifestation of [the Student's] disability[.]"

² The Parents aver that this conduct occurred primarily outside of school. It is not clear if the Parents agree that the Student's behavior violated the District's code of conduct. The Parents agree, however, that the District determined that the Student's behaviors violated its code of conduct.

11. The parties further stipulate that “None of the exceptions at 20 U.S.C. § 1415(k)(1)(G) apply in this case.”³
12. After some time in the remote education program, the Parents enrolled the Student in a private school. The Parents selected the private school and are funding the Student’s tuition.⁴

The Student’s Enrollment Status

The parties do not agree about the Student’s enrollment status. The Parents take the position that the Student is enrolled in the District because the Student never dis-enrolled from the District. The District takes the position that the unilateral parental placement in a private school terminated the Student’s enrollment. The distinction is irrelevant.

Enrollment is rarely an issue in special education cases. When enrollment is an issue, it relates to a school’s LEA status. For example, if a student enrolls in another school district, charter school, or cyber charter school, the new school becomes the Student’s LEA. That situation does not apply in this case. Rather, strictly from an LEA status point of view, the circumstances of this case are no different from cases in which parents enroll their children in a private school and then seek tuition reimbursement. Further, the District agrees that it is the Student’s LEA. The Parents, therefore, may bring this hearing against the District and the District is a proper party. *See, e.g.* 20 U.S.C. § 1415.

The Status of Expulsion Proceedings

The parties do not agree about the status of the Expulsion Notice or expulsion proceedings. The District avers that the Expulsion Notice is in abeyance and, therefore, it “has not noticed any expulsion proceedings currently.” The Parents aver that the Student has been under threat of expulsion since February 18, 2022.

I need not resolve the status of the Expulsion Notice to resolve this matter, and therefore I decline to do so. Such resolution is not necessary because the parties confirmed the following (from my post-call email):

³ I accept this stipulation as a statement that facts that could trigger the exceptions did not occur.

⁴ The District characterizes this as a unilateral parental placement. The Parents describe this as “self-help” in the absence of an appropriate in-District placement and as a response to the District’s threat of expulsion.

Finally, despite any prior notices, the District avers that expulsion proceedings are not currently scheduled or pending, but that there are circumstances under which the District would convene an expulsion hearing. Specifically, circumstances under which the Student would return to the District's high school may prompt the District to convene an expulsion hearing. Examples include, without limitation, the Parents' rejection of the initial provision of special education combined with what the District describes as the Student's re-enrollment. The Parents argue that those circumstances are less than theoretical, as they are demanding appropriate special education as part of their due process complaint.

Whether or not an expulsion notice is currently pending is irrelevant. The District has confirmed that certain actions may trigger expulsion proceedings relating back to an incident that is a manifestation of the Student's disability. As such, the District takes the position that it may still expel the Student for behaviors that are a manifestation of the Student's disability. The only question presented in this part of the hearing, therefore, is not moot.

The IDEA's Disciplinary Protections

The IDEA includes disciplinary protections for children with disabilities. First among these is a manifestation determination. A manifestation determination is decision made by a multidisciplinary team – including the parents – as to whether a child's behavior is a manifestation of the child's disability before the LEA can effectuate a disciplinary change in placement. See 20 U.S.C. § 1415(k)(1)(E)(i).

The IDEA establishes factors that the multidisciplinary team must resolve to determine whether the child's behavior is a manifestation of the child's disability. See 20 U.S.C. §§ 1415(k)(1)(E)(i)(I), (II); 1415(k)(1)(E)(ii).⁵ If the multidisciplinary team determines that the child's behaviors are a manifestation of the child's disability, the LEA must take certain actions. See 20 U.S.C. § 1415(k)(1)(F). Specifically, the LEA must:

- (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to

⁵ The particular factors are not relevant because the multidisciplinary team determined that the Student's behaviors are a manifestation of the Student's disability and the District concedes this point.

such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

- (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
- (iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

IDEA regulations extend these protections to students who have not been identified as children with disabilities at the time of the disciplinary infraction if the LEA has a basis of knowledge that the student is a child with a disability. As discussed in the pre-hearing order, those regulations are not applicable in this case because the District evaluated the Student and convened a manifestation determination meeting.

The IDEA also includes exceptions whereby an LEA may unilaterally change a student's placement even if the student's behaviors are a manifestation of the student's disabilities. See 20 U.S.C. § 1415(k)(1)(G). The parties stipulate that those exceptions do not apply in this case.

Discussion

The IDEA prohibits the District from expelling the Student. The multidisciplinary team determined that the Student's behaviors are a manifestation of the Student's disability. An expulsion is a disciplinary change in placement. The IDEA unambiguously forbids the District from unilaterally imposing a disciplinary change in placement resulting from behaviors that are a manifestation of the Student's disability.

I recognize the distinction between convening an expulsion hearing and expelling the Student. An expulsion hearing is a separate proceeding in which the District's Board (or someone appointed by the Board) would hear evidence and then decide whether to accept the expulsion recommendation. My authority to prohibit the District from convening an expulsion hearing is questionable. However, I cannot understand the logic of convening an expulsion hearing when the IDEA prohibits the District from expelling the Student. The District may not use a state law process to seek a result prohibited by federal law, and so I cannot permit the District to proceed to an expulsion hearing.

Even if I lack authority to prohibit the District from convening an expulsion hearing, I have authority to prohibit the District from expelling the Student. The District may not unilaterally impose a disciplinary change in placement for conduct that is a manifestation of the Student's disability unless an exception applies. In this case, the District agrees that the Student's conduct is a manifestation of the Student's disability and that the exceptions do not apply. If the District convenes an expulsion hearing and the Board issues an expulsion order, the District may not effectuate that order.

The District's offer to hold expulsion proceedings in abeyance, provided that the Student makes no effort to return to the District's high school does not change this determination. First, the Parents seek the Student's return to the District's high school through their due process complaint. The condition under which the District will proceed to an expulsion hearing will likely be met if the Parents prevail in the bifurcated portion of this hearing. Second, the timing of the expulsion proceeding is irrelevant. No matter when an expulsion hearing convenes, the District may not unilaterally implement a disciplinary change in placement resulting from the Student's behaviors on November 19-22, 2021.

I also disagree with the Parents' argument that the IDEA's disciplinary protections require the District to return the Student to its high school. The IDEA requires the District to "return the child to the placement from which the child was removed." Nothing establishes that the District removed the Student. Rather, the Student began taking remote classes at the District's expense and then enrolled in a private school at the Parents' expense. Regardless of the parties' characterizations, the Student's current placement is not a removal by any definition. The order below prohibits the District from expelling the Student but does not require the District to place the Student in its high school.

Nothing herein concerns the District's rights pursuant to 34 C.F.R. § 300.352(a) and (b)(2)(ii). Similarly, nothing herein alters the Parents' right to educate the Student privately at their own expense, seek tuition reimbursement, or demand an appropriate placement within the District.

The order below enables the Parents to seek a special education placement for the Student within and from the District without fear of triggering expulsion. I make no determination about what an appropriate special education program for the Student must include or where such a program may be implemented. Those issues will be addressed in the bifurcated portion of this hearing.

Conclusions

To the extent that I have authority to bar the District from convening an expulsion hearing for the Student, I do so bar the District. I cannot permit the District convene a hearing to obtain a result that the IDEA prohibits.

Should the District convene an expulsion hearing, the District may not expel the Student for the incident between November 19 and 22, 2021. Such an expulsion would be a unilateral disciplinary change in placement. The IDEA prohibits this because the Student's behaviors were a manifestation of the Student's disability and none of the exceptions apply.

All other issues in the Parents' complaint are bifurcated and will be heard in accordance with the IDEA's statutory hearing timeline.

An appropriate order follows.

ORDER

Now, April 28, 2022, it is hereby **ORDERED** as follows:

1. The District may not convene an expulsion proceeding in relation to the Student's alleged volitions of the District's code of conduct between November 19 and 22, 2021.
2. If the District convenes an expulsion hearing in violation of this order, and if the District's board adopts the District's expulsion recommendation or otherwise expels the Student, the District shall not enforce or effectuate that order.
3. This matter is bifurcated. All other issues raised in the Parents' due process complaint shall be heard in accordance with the IDEA's hearing timeline.

/s/ Brian Jason Ford
HEARING OFFICER