

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:

26341-21-22

Child's Name:

E.T.

Date of Birth:

[Redacted]

Parents:

[Redacted]

Counsel for Parents

Pro Se

Local Education Agency:

Radnor Township School District
135 S. Wayne Ave.
Wayne, PA 19087-4117

Counsel for LEA

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

May 3, 2022

The student in this matter (Student)¹ is a [an early-teenaged] middle school student in the (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) under the categories of Other Health Impairment (OHI) and a Specific Learning Disability.² The District filed a due process Complaint seeking to change the student's placement to an interim alternative educational setting on grounds that the Student is substantially likely to injure self or others if maintained in the current placement. The due process complaint also sought a ruling that the placement recommendation by the IEP school team to an alternative high school was appropriate. The *pro se* Parent (Parent) disagreed with the District's conclusion that the Student's placement change to an interim alternative educational setting was necessary.³

The Parent originally filed a due process Complaint raising related claims, and that request was withdrawn. When the District filed this Complaint, the Parent requested a continuance, which was granted. The day of the due process hearing, the Parent requested a second continuance, which was placed on the hearing record. That request was denied on grounds that decision due date in this matter could not be extended.⁴ For the following reasons, the relief requested by the District is granted.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

² 20 U.S.C. §§ 1400 – 1482. The implementing federal regulations are found at 34 C.F.R. §§ 300.1 – 300.818, and the state regulations are found at 22 Pa. Code §§ 14.101 – 14.163

³ During the due process hearing the Parent was accompanied by an advocate.

⁴ *Letter to Snyder*, 67 IDELR 96 (OSEP 2015). Hearing officer may not extend the timeline for issuing a decision, even if the parties to the hearing want to opt out. The expedited nature of the hearing is mandatory, not an option.

ISSUES

- 1) Should the Hearing Officer Order a change of placement to an appropriate interim alternative education setting for not more than forty-five school days on grounds that maintaining the Student in the current placement is substantially likely to result in injury to the child or others?
- 2) Is the placement recommendation made by the IEP school team to an alternative high school appropriate?

FINDINGS OF FACT

2021-2022 School Year

1. The Student is currently [an early-teenaged student] at the District Middle School. (S-12)
2. The Student is eligible for special education as a child with OHI and Specific Learning Disability.
3. During this school year, the District implemented the Student's IEP and provided direct instruction in an emotional support class along with an array of emotional support services. (S-12; N.T. 89-90)
4. As of the Complaint filing date, the Student has been absent 25 days (15 unexcused), tardy for 11 days, and 14 days of suspension (3 days in school and 11 days out of school). On January 14, 2022, the District

and the Parent met to discuss a Student Attendance Improvement Plan (SAIP).

5. During the 2021-2022 school year, the Student engaged in the following incidents:

- (1) 9/17/2021 - Behavior - Bus Misconduct-District transportation. (S-2 p. 3, S-7 p. 28)
- (2) 10/1/2021 - Disruptive Behavior - On school prop/grounds. The Student disrupted the classroom and used inappropriate language in the classroom. (S-2 p. 3)
- (3) 10/25/2021 - 1st Class Cut - On school property/grounds. (S-2 p. 4)
- (4) 10/27/2021 - Behavior – Defiance (S-2 p.3)
- (5) 11/30/2021 - 2nd Cut Class - On school property/grounds. (S-2 p. 4.)
- (6) 12/10/2021 - Terroristic Threats- On school property/grounds. [redacted] (S-2 p. 4-5; N.T. 38, 50)
- (7) 12/8/2021 - Fighting- On school property/grounds. Ex. S-2 p. 5. [redacted] (N.T. 42)
- (8) 12/10/2021 - 1st Class Cut- On school property/grounds. (S-2 p. 4)
- (9) 12/10/2021 – During a risk assessment, the Student, [engaged in threats of violence toward school staff.] (N.T. 49-51)
- (10) 12/20/21 – The Student [eloped and engaged in severely disruptive behavior.] (S-7 p. 13-15)

- (11) 12/21/21 – [Student engaged in severely disruptive behavior.] (S-7 p. 16)
- (12) 1/11/22 – Verbal argument with teacher. (S-6 p. 106)
- (13) 1/13/22 – [Physically aggressive toward peer.]. (S-6 p. 104)
- (14) 1/17/22 – [Student engaged in severely disruptive behavior.]. (S-6 p. 101)
- (15) 1/19/22 – [Student engaged in severely disruptive behavior.]. (S-6 p. 98)
- (16) 1/25/22 – [Student eloped and engaged in severely disruptive behavior.]. (S-6 p. 93; N.T. 34)
- (17) 1/28/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 89; N.T. 34)
- (18) 1/31/22 – [Student used inappropriate language and engaged in severely disruptive behavior.] (S-6 p. 87; N.T. 35)
- (19) 2/7/22 – [Student used inappropriate language toward peer.] (S-6 p. 82; N.T. 35)
- (20) 2/9/22 – [Student used inappropriate language toward staff.] (S-6 p. 78)
- (21) 2/10/21 – [Student used inappropriate language and engaged in severely disruptive behavior.]. (S-6 p. 77)
- (22) 2/11/22 – [Student used inappropriate language toward staff.] (S-6 p. 75)

- (23) 2/11/22 – Bullying special needs student at dismissal and on bus. (S-7 p. 10; N.T. 56)
- (24) 2/16/2022 - Fighting- On School property/Grounds. Ex. S-2 p. 5. [redacted] (N.T. 42)
- (25) 2/23/22 – [Student used inappropriate language toward peers].” (S-6 p. 67)
- (26) 3/1/2022 - Behavior Defiance - Classroom/On School Grounds. Ex. S-2 p. 5. [redacted]. (S-6 p. 57; S-7 p. 5-6)
- (27) 3/3/22 – [Student engaged in severely disruptive behavior.] Extremely disruptive, disrespectful during and before mask break. (S-6 p. 52).
- (28) 3/8/22 – [Student engaged in severely disruptive behavior.]. (S-6 p. 46; N.T. 35)
- (29) 3/9/22 – [Student engaged in severely disruptive behavior.]. (S-6 p. 44)
- (30) 3/10/22 – [Student taunted peer in hallway.] S-6 p. 43)
- (31) 3/11/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 41)
- (32) 3/14/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 39)
- (33) 3/16/2022 - Behavior Insubordination - Classroom/On School Grounds. Lunch detention. Ex. S-2 p. 6. [redacted] (S-6 p. 40; S-7 p. 2-3)

- (34) 3/16/22 – Threatened [redacted] (S-6 p. 35)
- (35) 3/18/22 – [Physical altercation with peer.]. (S-6 p. 37)
- (36) 3/22/22 – [Student eloped.] (S-6 p. 18)
- (37) 3/25/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 28)
- (38) 3/28/2022 - Harassment/Intimidation – Hallways/On School grounds. [redacted] (S-6, S-7: N.T. 42)
- (39) 3/28/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 16)
- (40) 3/29/22 – [Student eloped and engaged in severely disruptive behavior.] (S-6, p. 2)
- (41) 3/30/22 -[redacted]. (S-6 p. 9, p. 16; N.T. 36)
- (42) 3/31/22 - [Student engaged in severely disruptive behavior.]. (S-6 p. 16)
- (43) 4/1/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 4; N.T. 36-37)

(44) 4/1/22 – [Student engaged in severely disruptive behavior.] (S-6 p. 15)

6. To address the Student's behaviors, the District implemented supports which the IEP team revised as needed. The behavioral supports offered to the Student included: a schedule revision and enrollment in an emotional support class four days out of an eight-day cycle; modification to SDIs to allow access to the emotional support throughout the school day; access to other identified safe adults that included the [middle school] counselor and building leader who would check-in.
7. In September 2021, a Board Certified Behavior Analyst (BCBA) conducted a functional behavior assessment (FBA). A positive behavior support plan (PBSP) was implemented, and a point sheet was added. The focus areas of the PBSP and point sheet were to reduce class disruptions, verbal aggression, and time out of class. (S-12 p. 23)
8. On September 29, 2021, an IEP meeting was held to discuss the Student's positive behavior support plan (PBSP) (S-12 p. 9)
9. On November 10, 2021, the team revised the Student's IEP and added more emotional and behavioral supports that included opportunities to meet with a preferred adult throughout the day, check-in at the end of the day, and access to mental health services. (S-12)
10. On 12/15/2021, the Student's IEP was revised to incorporate additional emotional and behavioral supports. (S-12)

11. The District provided the Student with counseling with a clinical therapist during the school day with access as needed. (S-12 p. 24)
12. On February 22, 2022, the District held a manifestation determination meeting to address Student's days of cumulative suspensions. The team concluded that Student's IEP was followed, but the behaviors had a direct and substantial relationship to the Student's disability. In response, a BCBA revised the Student's PBSP and numerous revisions were made that included a RBT to assist the Student for the entire school day. The Parent did not challenge or introduce any evidence to contradict these determinations. (N.T. 74-75)
13. Although the Student's PBSP was revised and more supports were provided, the Student' behavior continued to pose a safety threat to the Student and others. (S-12)
14. On March 24, 2022, the District provided the Parent with a Notice of Recommended Educational Placement (NOREP), with procedural safeguards that recommended the Student attend a full-time emotional support program at a County alternative high school. (S-4)
15. The IEP team recommended that Student attend the County Alternative School (TCA), which accepted the Student into the program. (S-4, S-9)
16. TCA is not an alternative education for disruptive youth (AEDY) program. (S-4; N.T. 93-95)
17. TCA provides an accredited, full-day special education program that offers vocational exploration, a structured behavior management

system, and mental health supports in collaboration with the local medical center. (N.T. 93-95)

18. On April 5, 2022, the Parent returned the NOREP and indicated disagreement with the District recommendation for an alternative placement. That same day, the Parent filed a due process complaint which was withdrawn. (S-4, p. 3)
19. On April 7, 2022, the District filed a due process complaint and requested an expedited hearing. (S-1)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Witness Credibility

Hearing officers, as factfinders, are 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). The District offered the testimony of two witnesses. The Parent did not testify and did not present any witnesses. The limited testimony was reviewed and weighed in light of the witnesses' participation in the hearing. Considering the testimony in light of the documentary evidence, I find that the witnesses were credible and reliable. The witnesses' testimony was consistent with the documentary evidence.

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006), the Court first noted that the term "burden of proof" is commonly held to encompass both the burden of persuasion (i.e., which party loses if the evidence is closely balanced) and the burden of production (i.e., the party responsible for going forward at different points in the proceeding). In *Schaffer*, only the burden of persuasion was at issue. The Court held that "the burden of persuasion in a hearing challenging the validity of an IEP is placed on the party on which the burden usually falls -- the party seeking relief -- whether that is the parent of the child with a disability or the LEA.

Discipline Procedures

In Pennsylvania, a manifestation determination meeting must be convened where the discipline amounts to an exclusion in excess of ten consecutive school days or exclusions in excess of fifteen cumulative school days. See 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. See 34 C.F.R. §300.530(e)(f). 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)

A student's placement may not be changed if the behavior is viewed as a manifestation of a student's disability; however, when the school district believes that maintaining the current placement of the student is substantially likely to result in injury to the student or 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. See 34 C.F.R. §§300.532(a)(b)(2)(ii). 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 of resulting in injury to the student or to others, a hearing officer has 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).

The District's Claims

In its Complaint, the District asserts that the Student's removal to an interim placement is warranted because of increased physical and verbal aggression directed toward peers and school staff. These behaviors included assault, threats of death and harm, harassment, ethnic intimidation, and bullying. There is no bright-line rule for determining whether a particular student's behavior can be determined as dangerous to self or others. However, in promulgating rules under the IDEA, the Department of Education explained that "[h]earing officers have the authority under 34 C.F.R. § 300.532 to exercise their judgment after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others." 71 Fed. Reg. 46540, 45722 (August 14, 2006).

Although the IDEA and its implementing regulations do not include factors for determining whether maintaining a child's current placement is "substantially likely to result in injury," a review of several administrative and judicial decisions illustrates the type of conduct that decision-makers have found to meet this standard. Those decisions clearly indicated that proof of physical violence toward staff members or classmates is deemed sufficient to find that maintaining a student's current placement is likely to result in injury. *Lawrence Township Board of Education v. D.F. ex rel. D.F.*, EDS 12056-06, final decision (January 9, 2007); *San Leandro Unified School District*, 114 LRP 550 (CA SEA December 16, 2013); *Rialto Unified School District*, 114 LRP 1023 (SEA CA November 19, 2013); *Smithton R-VI School District*, 110 LRP 22863 (MO SEA April 8, 2010).

In this matter, the District has provided ample and recent evidence of Student's volatility that have included physical assault, as well as dangerous and disturbing behaviors that include threats [of violence towards staff and family members], as well as racial and ethnic intimidation. Based upon the detailed findings of fact and evidence adduced during the hearing, this Student's provocative and disturbing behavior, although determined to be a manifestation of Student's disability, is deemed substantially likely to result in injury to the child or others.

The District's efforts to maintain the Student in the current educational placement are well documented. The District appropriately responded to the various behavioral incidents and resulting suspensions with multiple team meetings and IEP revisions. After a manifestation determination meeting, more individualized supports and services were introduced to ensure Student's access to the current educational environment. Those efforts were unsuccessful. The Student's unpredictable and aggressive behavior

continued to risk the health and safety of the Student and others. At this time, an interim placement is necessary.

The interim placement proposed for the Student is an accredited, full-day special education program that offers vocational exploration, a structured behavior management system, and mental health supports in collaboration with the local medical center. It is an appropriate interim placement. For this expedited proceeding, this hearing officer concludes that the District has met its burden of proof, and the following is ordered.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

The District's request for an Order for a change of placement to the County Alternative High School (TCA) for not more than 45 school days on grounds that maintaining placement at the District middle school is substantially likely to result in injury to the Student or to others is GRANTED:

1. Within one (1) school day following entry of this Order, the District shall arrange transportation to TCA for the Student;
2. TCA shall enroll the Student and maintain the placement for not more than 45 days unless the parties agree otherwise as set forth below;

3. The District's placement recommendation provided to Parent on the NOREP for TCA dated March 24, 2022, is appropriate.

Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree in writing.

FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Joy Waters Fleming, Esquire

Joy Waters Fleming, Esquire
Special Education Hearing Officer

May 3, 2022