This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 29191-23-24

CLOSED HEARING

Child's Name:
J.R.

Date of Birth:
[redacted]

Parent:
[redacted]

Counsel for Parent:
Jessica Limbacher, Esquire
Nicole Reimann, Esquire
7 Bala Avenue, Suite 202
Bala Cynwyd, PA 19004

Local Education Agency:
Chichester School District
401 Cherry Tree Road
Aston, PA 19014

Counsel for the LEA:
Gabrielle C. Sereni, Esquire
32 Regency Plaza
Glen Mills, PA 19342

Hearing Officer:
Brian Jason Ford

Date of Decision:
03/05/2024

Introduction and Procedural History

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). On February 9, 2024, the Student's parent (the Parent) filed a due process complaint (the Complaint). The Parent raises claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*.

The Student attended the District's high school. There, the Student engaged in disciplinary infractions. Those infractions resulted in suspension and, ultimately, the District expelled the Student. The District had not identified the Student as a child with a disability at the time of the infraction resulting in expulsion.

After the District expelled the Student, the Student attended an alternative high school run by the Intermediate Unit in which the District is located (the IU). While attending the alternative high school, the IU evaluated the Student and found that the Student was a child with a disability as defined by the IDEA.

While attending the alternative high school, the Student continued to engage in a series of disciplinary infractions. The Parent removed the Student from the alternative high school and placed the Student in the District's cyber education program (an online program operated by the District, not a public cyber charter school).

The Parent alleges that the Student was a "thought to be eligible" student at the time of the infraction resulting in the expulsion, and that the expulsion was a disciplinary change in placement in violation of the Student's IDEA rights. The Parent demands an order reversing the expulsion and returning the Student to the District's high school with an appropriate Individualized Education Plan (IEP). The Parent raised other claims and demands as well, but the disciplinary placement appeal arises under 20 U.S.C. § 1415(k) and is expedited.

To hear the disciplinary appeal on the IDEA's expedited timeline, I bifurcated the matter. Expedited claims moved forward under this ODR file number. Non-expedited claims remain pending at ODR No. 29263-23-24.

On February 14, 2024, the District filed a motion to dismiss. On February 18, 2024, the Parent filed a response in opposition to the District's motion. On February 21, 2024, I issued a pre-hearing order granting the District's motion in part by dismissing the Parent's demand for an order reversing the

expulsion itself. I did not dismiss the Parent's appeal of the disciplinary change in placement.[1]

On February 23, 2024, the expedited hearing convened. On March 1, 2024, I received post-hearing briefs (written closing statements) from the parties.

On the record before me, the Student was not a "thought to be eligible" student at the time of the incident resulting in the disciplinary change in placement. The Parent's appeal of the disciplinary change in placement is denied on that narrow basis. Both parties should take note, however, that a Child Find claim and other issues concerning the Student's placement remain open questions to be resolved in the non-expedited portion of this hearing.

Findings of Fact

I reviewed the record in its entirety. While the record of this expedited hearing is comparatively small, a significant portion of it relates to a Child Find violation, which is part of the Parent's broader FAPE claim. *See discussion below*. I make findings of fact only as necessary to resolve the narrow issue before me, and so the Child Find and FAPE evidence is addressed only as necessary to provide a cogent chronology of events. I find as follows:

The 2021-22 School Year

1. The Student was not identified as a child with a disability at any point prior to September 13, 2023. *Passim, see* P-34.

2. On March 23, 2022, the Student participated in a fight in school. The Assistant Principal reported the fight to the District's Superintendent, Assistant Superintendent, Director of Student Services, and the building-level administrative team (the Principal, two Assistant Principals, the Dean, and the Athletic Director). P-2, P-6, P-9, P-10, NT at 44-45.

3. The initial discipline for the fight was a 10-day suspension. *See id*.

[1] The Pre-Hearing Order speaks for itself. For context, I found that I do not have authority to reverse the Board's expulsion vote, but that I do have authority to provide relief – including a change in placement – under the IDEA. The conflict between those laws is not lost on me. My analysis was guided by *OSEP Letter to Zirkel*, 05/13/2019, in which the federal Office of Special Education Programs provided guidance that the remedies listed in the IDEA at 20 U.S.C. § 1415(k) are not the exclusive remedies in expedited disciplinary appeals. https://sites.ed.gov/idea/files/osep-letter-to-zirkel-05-13-2019.pdf.

4. On April 1, 2022, the District convened a pre-expulsion meeting with the Parent. Various District administrators, including the Superintendent, attended the meeting. During the meeting, the parties executed an "Agreement in Lieu of Expulsion." Pursuant to that agreement, the family accepted placement in the District's cyber education program and the District agreed that it would not expel the Student for the fight March 23, 2022. *See* P-12.

5. The Student attended the District's cyber program for the remainder of the 2021-22 school year. *Passim*.

The 2022-23 School Year

6. The Student returned to the District's high school for the 2022-23 school year. *Passim*.

7. In October 2022, the Student was suspended for an incident of noncompliance. The Student was failing an English class around that time as well. P-2, P-17, P-49.

8. On November 3, 2022, the Student's history teacher (the Teacher) sent an email to the District's social worker (the Social Worker). The subject line of the email was the Student's initials. The body of the email, not including the signature block, in its entirety was (P-49 at 25):

> I got one for your radar, [Student], Gr. [redacted]. If you need insight on [Student] you can ask [another teacher] or I.

9. The record of this hearing does not include evidence of subsequent communications between the Teacher, the Social Worker, the other teacher referenced in the email, or any combination of the three. *Passim.*

10. Although not refenced in the November 3, 2022, email, the Teacher contacted the Social Worker because the Student was missing several assignments and made concerning remarks as part of a Veteran's Day project. NT at 116-118.

11. On November 17, 2022, the Student was involved in a fight in school. A teacher was injured during the fight. The incident also involved the transmission of [redacted] of a third student. S-16. The District initially

imposed a three-day out-of-school suspension. The District then increased the suspension to 10 days. *See, e.g.* P-14.

12. On December 6, 2022, the District convened an expulsion hearing. During the hearing, the Superintendent recommended expulsion until the end of the 2023-24 school year. S-16.

13. On February 21, 2023, the District's Board accepted the Superintendent's recommendation and expelled the Student.[2]

14. The District did not give the Student any of the IDEA's disciplinary protections as part of the expulsion (e.g. the District did not convene a manifestation determination meeting). *Passim. See discussion below.*

15. After the expulsion, the Student attended an alternative high school run by the IU (the Alternative School).[3]

The 2023-24 School Year

16. On September 13, 2023, the IU competed its evaluation and issued an evaluation report (the ER). Through the ER, the IU concluded that the Student was eligible for special education as a child with an Other Health Impairment (OHI) but not as a child with an Emotional Disturbance (ED). P-34.

17. There is no dispute that, sometime after the ER was completed, the Student left the Alternative School and enrolled the District's cyber school program. *Passim*.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of

[2] The Board's expulsion adjudication was filed along with the District's motion to dismiss. That document was not made part of the record during the hearing, but there was no objection to the filing with the District's motion. More importantly, there is no dispute that the District expelled the Student (the expulsion forms the basis of the Parents' claims).
[3] The record does not reveal precisely when the Student began to attend the Alternative School. However, the Evaluation Report at P-34 includes an observation of the Student at the Alternative School on May 23, 2023.

judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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).

I find that all witnesses testified credibly. All responded candidly to questions from both sides and their answers were consistent with contemporaneous documentation. Moreover, while the parties view the facts differently, there is no genuine dispute about what happened and when. None of the facts found above are contingent upon a credibility determination.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

IDEA Disciplinary Protections

The IDEA includes disciplinary protections for children with disabilities. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530-536. Pennsylvania regulations implement and enhance those protections. 22 Pa. Code § 14.143.

Generally, the IDEA permits LEAs to remove children from school or otherwise change their placement, regardless of disability, for 10 consecutive or 15 cumulative school days (there are various exceptions to that general rule). *See* 34 C.F.R. § 300.530(b); 22 Pa. Code § 14.143(a). Anything more is considered a change in placement. Children with disabilities are entitled to

significant protections before an LEA can unilaterally impose a change in placement for discipline or any other reason.

The primary disciplinary protection for children with disabilities is a Manifestation Determination. *See* 34 C.F.R. § 300.530(e). The Manifestation Determination is a meeting in which a team of school personnel and the parents review relevant information to determine if the student's conduct "was caused by, or had a direct and substantial relationship to, the child's disability" or if "the conduct in question was the direct result of the LEA's failure to implement the IEP." *See id*. If the conduct was a manifestation of the child's disability, the LEA must "return the child to the placement from which the child was removed" unless the parties agree otherwise and must take various actions to address the behavior. *See* 34 C.F.R. § 300.530(f). As with changes in placement, there are various exceptions to this general rule. *See, e.g.* 34 C.F.R. § 300.530(g).

The IDEA's disciplinary protections extend to "children not determined eligible for special education and related services" if certain conditions are met. 34 C.F.R. § 300.534. For a student who is not identified as a child with a disability to assert the IDEA's disciplinary protections, the school must have a "basis of knowledge" that the "child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. § 300.534(a).

Three factors may establish an LEA's basis of knowledge. If the Parent proves any of those three factors, the LEA "must be deemed to have knowledge that a child is a child with a disability" and the IDEA's disciplinary protections apply. 34 C.F.R. § 300.534(b). Those three factors, enumerated at 34 C.F.R. § 300.534(b)(1)-(3), are:

> (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
>
> (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
>
> (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the

> director of special education of the agency or to other supervisory personnel of the agency.

Substantively identical language is found in the IDEA at 20 U.S.C. § 1415(k)(5)(B)(i)-(iii):

> (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
>
> (ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or
>
> (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

If an LEA has a "basis of knowledge," all the IDEA's disciplinary protections apply even if the student had not yet been found eligible for special education. Colloquially, such children are often referred to as "thought to be eligible" students.

Discussion

Pennsylvania has an ongoing obligation to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This is referred to as the Child Find obligation. The Child Find obligation is satisfied at the local level by LEAs. The District has a "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009).

During the hearing, both parties spent time presenting evidence that would either support or refute a Child Find claim. While Child Find is an issue in the broader, non-expedited hearing, that issue is not before me in this part of the hearing. My consideration does not expand to the holistic mosaic of

factors or "red flags" that could place the District on notice that an evaluation was warranted.[4] Rather, my consideration is limited to the three concrete, statutorily delineated circumstances under which a "basis of knowledge" is imputed to the District.[5] I will address each factor in order.

First, on the record of this case, the Parent did not express concern in writing to the District's supervisory or administrative personnel, or to a teacher, that the Student needs special education and related services.[6] The factor at 20 U.S.C. § 1415(k)(5)(B)(i) does not establish a basis of knowledge for the District.

Second, the Parent did not request an evaluation pursuant to 20 U.S.C. § 1414(a)(1)(B). The referenced IDEA section permits the Parent to "initiate a request for an initial evaluation to determine if the child is a child with a disability." *Id*. Pennsylvania regulations implementing and enhancing parental rights to request an evaluation are found at 22 Pa Code § 14.123(c). Under those regulations, parents may request evaluations in writing or orally (a school's next steps vary depending on how the parent makes the request). On the record of this case, there was no written evaluation request. The record establishes that there was no oral request either. The factor at 20 U.S.C. § 1415(k)(5)(B)(ii) does not establish a basis of knowledge for the District.

Third, the record does not support a finding that any District employee expressed specific concerns about a pattern of behavior demonstrated by the Student, directly to the District's director of special education or to other supervisory personnel. This factor is muddy in this case for two reasons: the history of District administrators' involvement and the Teacher's email to the Social Worker.

Regarding the history of District's administrators' involvement, there can be no dispute that a school superintendent is "supervisory personnel" by any definition. The District's Superintendent and other administrators were aware of the Student's behavior in March 2022, when they offered agreement in

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[4] The Parent explicitly raised a Child Find claim in the complaint. That claim is pending at ODR 29263-23-24.

[5] Unlike remedies available in disciplinary appeals under 20 U.S.C. § 1415(k), I am unaware of any case or OSEP policy guidance expanding the scope of what establishes an LEA's "basis of knowledge" beyond the three enumerated in the statute.

[6] *See, e.g.* NT 148-152. The Parent also testified that the District administered ADHD medication to the Student in school during the Student's early school years. Nothing in that testimony constitutes preponderant evidence that the Parent expressed concerns in writing that the Student may require special education.

lieu of expulsion.[7] The Superintendent was aware of the Student's behavior again in November 2022, during the expulsion proceedings. Both represent a reporting of stand-alone behavioral incidents. In both instances, the District imposed discipline relative to the infraction, not relative to the Student's disciplinary history. *See, e.g.* S-16. Neither incident, nor both together, constitute an expression of specific concerns about a pattern of behavior demonstrated by the Student to the District's supervisory personnel.

Regarding the Teacher's email to the Social Worker, any fair reading yields a conclusion that the email is an expression of concern. However, the email does not relate to a pattern of behaviors. Rather, the Teacher's email put the Student on the Social Worker's "radar." The email itself, taken literally, says nothing about the Student's behavior. Going beyond the four corners of the email, the Teacher was concerned about the Student's missing assignment and remarks during a Veteran's Day project – neither of those are a pattern of behaviors. Further, even if the email can be read to indicate a pattern of behaviors (to be clear, I find that it does not), the record of this case does not establish that the Social Worker is "supervisory personnel." The email, therefore, does not include the necessary elements that would trigger the third "basis of knowledge" factor.

Neither the history of District's administrators' involvement, nor the Teacher's email to the Social Worker establish the basis of knowledge factor at 20 U.S.C. § 1415(k)(5)(B)(iii).

I note, again, that the specific, explicit factors that may constitute the District's "basis of knowledge" are narrow. I make no determination at this time as to whether the same evidence would substantiate a Child Find violation. I find only that the District had no "basis of knowledge," as defined by 20 U.S.C. § 1415(k)(5)(B), at the time of the infraction resulting in the disciplinary change of placement.

Having found no basis of knowledge, I must conclude that the District was free to discipline the Student in the same way that it may discipline children who do not have disabilities. *See* 20 U.S.C. § 1415(k)(5)(D)(i). The Parent's expedited disciplinary appeal fails on this basis.

While the Parent's appeal fails, the record of the expedited hearing establishes one of the IDEA's disciplinary limitations that will become a factor in the hearing pending at ODR 29263-23-24. The District was permitted to change the Student's placement because it had no basis of knowledge. Then,

[7] Some evidence suggests that the District had a new Superintendent starting in the 2022-23 school year. That personnel change makes no difference.

during the disciplinary placement, the Student was "determined to be a child with a disability." 20 U.S.C. § 1415(k)(5)(D)(ii). The District is, therefore, required to "provide special education and related services … except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities." *Id.* Issues concerning the appropriateness of the post-eligibility special education offered by the District are pending at ODR 29263-23-24, along with the Parent's demand for compensatory education.

Summary and Legal Conclusions

The Parent requested an expedited due process haring to appeal a disciplinary change in the Student's placement. The Parent alleged that the District had a basis of knowledge that the Student was a child with a disability at the time of the infraction and, therefore, was entitled to the IDEA's disciplinary protections. The disciplinary appeal was bifurcated from other issues. The other issues remain pending.

The Parent demanded the Student's reinstatement at the District's high school under an appropriate IEP. Through a pre-hearing order, I determined that the Parent's demand was available in an IDEA disciplinary appeal. The expedited hearing then convened. Both parties presented evidence and filed post-hearing briefs.

The Student was protected by the IDEA's disciplinary protections only if the District had a "basis of knowledge" that the Student was a child with a disability as defined by the IDEA. Unlike Child Find, the IDEA provides three explicit, narrow factors that can establish the District's basis of knowledge. It was the Parent's burden to establish any of those three factors. Two of those factors are all but non-issue in this case: The Parent did not express concern in writing that the Student needs special education, and the Parent did not request a special education evaluation.

The third factor is complicated in this case. The District had a basis of knowledge if any of its employees expressed specific concerns about a pattern of behavior demonstrated by the Student, directly to the District's director of special education or to other supervisory personnel. Supervisory personnel were involved in two behavioral incidents in two school years, and the Teacher sent an email to put the Student on the Social Worker's "radar." Discussed above, I find that neither constitutes an expression of specific concerns about a pattern of behavior. The third "basis of knowledge" factor does not apply.

Having found that none of the three "basis of knowledge" factors are met, the Parent's disciplinary appeal fails. At the same time, the record establishes one of the IDEA's disciplinary limitations at 20 U.S.C. § 1415(k)(5)(D)(ii).

I make no determination at this time as to whether any of the evidence presented in this case establish a Child Find violation or any of the other alleged violations pending at ODR No. 29263-23-24.

ORDER

Now, March 5, 2024, it is hereby **ORDERED** as follows:

1. The Parent's expedited disciplinary change in placement appeal pursuant to 20 U.S.C. § 1415(k) is **DENIED** and **DISMISSED.**

2. All other claims raised in the Parent's due process complaint of February 9, 2024, remain pending at ODR 29263-23-24 except for claims dismissed in the pre-hearing order of February 21, 2024

/s/ Brian Jason Ford
HEARING OFFICER