

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:

25771-21-22

Child's Name:

E.P.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Leigh Loman, Esquire
Ellen Connally, Esquire
301 Grant Street, Suite 270
Pittsburgh, PA 15219

Local Education Agency:

South Allegheny School District
2743 Washington Boulevard
McKeesport, PA 15133

Counsel for LEA:

Christina L. Lane, Esquire
424 South 27th Street, Suite 210
Pittsburgh, PA 15203

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/13/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, E.P. (Student),¹ is an early elementary school-aged kindergarten student who resides in and attends school in the South Allegheny School District (District). Student has not been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² However, after a disciplinary removal from school, the Parent filed a Due Process Complaint pursuant to the IDEA and Section 504 of the Rehabilitation Act of 1973,³ asserting that Student was nonetheless entitled to the discipline-related protections in those statutes.

The matter proceeded to an expedited due process hearing,⁴ with bifurcation of non-expedited issues that will proceed under the standard timelines. The Parent sought to establish that Student met criteria for a “thought to be eligible” student under the IDEA and that the discipline was improper. The District maintained that Student did not qualify as “thought to be eligible” and that no remedy was due.

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted pending an evaluation.

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 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

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 (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. There are some duplicate exhibits that were admitted to ensure a complete record, but citations herein may not be to all versions of the same document.

ISSUES

1. Whether Student was “thought to be eligible” under the IDEA at the time of the disciplinary removal in September 2021; and
2. If Student was “thought to be eligible,” what remedies are appropriate?

FINDINGS OF FACT

1. Student is a kindergarten student residing in the District. At the time of the due process hearing, Student was attending a cyber-school program through the District. (N.T. 7-8.)
2. Student began kindergarten in a District elementary school building at the start of the 2021-22 school year. It was the same building that housed the pre-kindergarten program Student had attended through the local Intermediate Unit (IU). (N.T. 29, 43, 213-14, 236.)
3. When Student was in preschool, the IU reported that Student engaged in problematic behaviors such as physical aggression toward property, and sometimes sought support from District staff. (N.T. 46-47, 224-25.)
4. Because of the COVID-19 pandemic, the District did not conduct its usual screening of new kindergarten students to determine readiness. (N.T. 45-46.)
5. The District has a multi-tiered system of support (MTSS) for academics and behavior for all students. Generally MTSS

supports and interventions are used before a special education evaluation. (N.T. 41-42, 67, 101-02, 140, 145-46.)

6. The District also has a Student Assistance Program (SAP) that may be used to arrange for therapeutic services. (N.T. 84, 99-100, 102, 105-06.)
7. The District has formal policies on discipline and on suspension/expulsion. Expulsion is defined as, "exclusion from school by the Board for a period exceeding ten (10) consecutive school days." (S-8 at 2.) Permanent expulsion may occur for "any student whose misconduct or disobedience warrants this sanction" (*id.*) following a formal hearing. (S-7; S-8.)
8. The District's Code of Student Conduct has four disciplinary levels for elementary school students. Level I is incidental violations, Level II is minor violations, Level III is major violations, and Level IV is illegal violations. The District also has a matrix for determining the discipline to be imposed for various offenses ranging from a warning to expulsion, in addition to referral to police where appropriate. (S-6.)
9. The District has a safety protocol wherein police are called when a student attempts to or does leave the campus, which abuts a major roadway. The police then call the child's parents. (N.T. 17-19, 21-22, 52, 54, 92.)
10. Beginning on the first day of Student's kindergarten year, the District created and maintained an electronic document (behavior log) containing ongoing notes of Student's problematic behaviors that served as a vehicle for communication among teachers and other staff, including the Director of Elementary Education. The

District considered Student's behaviors to be indicative of difficulty making the transition to school-age programming, which is not uncommon, particularly in light of the disruptions during the COVID-19 pandemic the prior school year. (N.T. 13, 15, 31, 49-52, 75, 85, 129, 188, 204; HO-1; P-2; S-4.)

11. Student's behavior log recounts a number of behavioral incidents on August 19, 2021 (the first day of school), involving noncompliance with directives, work refusal, physical aggression toward property, physical aggression toward staff, running around the classroom and other areas, and elopement from the classroom and the school building. Student also repeatedly expressed wanting to go home. A number of staff were needed to intervene with Student's behaviors. (HO-1; S-4 at 1-3.)
12. Before the end of August, 2021, Student's kindergarten teacher created a behavior chart for Student that utilized positive reinforcement for appropriate behaviors, something not typically done for kindergarten students. Student was also provided opportunities for frequent breaks and had preferential seating in the classroom. (N.T. 120-22, 125-26, 132-33, 191; S-4 at 5, 8, 10-11, 13, 15, 17.)
13. Student's behavior log recounts similar incidents of various degrees on August 23, 24, 25, 26, 27, 30, and 31, 2021, and September 1, 7, 9, and 10, 2021, some of which also included physical aggression toward peers. A number of significant behaviors were reported on September 13, 2021, including elopement from and within the school building, physical aggression towards two administrators, physical aggression against property, and noncompliance with directives. On only

three school days, little or no problematic behavior was reported in the log, and on a fourth day, the concern noted was limited to work refusal. (P-2; S-4; HO-1.)

14. Also on September 13, 2021, when Student was particularly distraught, a social service agency was called in. (N.T. 23-25; S-4 at 18-19.)
15. Student tended to exhibit more problematic behavior at school when a sibling was present. (N.T. 65, 91-92, 140, 200.)
16. Student was suspended from school on September 13, 2021 for three school days beginning on September 14, 2021. That suspension was extended for two additional school days after an informal hearing was rescheduled, and for additional school days following the informal hearing. The suspension was further extended pending a determination on an expulsion. (P-10; S-5 at 1.)
17. At the rescheduled informal hearing, which the Parent attended, the District presented the Parent with two options: expulsion, or placement in an alternative education setting outside of the District. The participants at the meeting did not discuss Student remaining at the elementary school, because District professionals did not believe Student's behaviors could be handled in its school buildings. (N.T. 35-36, 179-80, 217-18, 220; P-8; S-9; S-10; S-11.)
18. The Parent visited and toured the alternative education setting and spoke with members of its staff, and concluded that it was not an appropriate placement for Student. (N.T. 220-21; P-9 at 1.)

19. An expulsion hearing was held on October 4, 2021 before the District Board of School Directors, after notice was provided to the Parent. Following the hearing, which the Parent did not attend, Student was expelled. (N.T. 183-84; S-14.)⁵
20. No one at the District considered a special education evaluation of Student prior to the expulsion. (N.T. 36-37, 99-100, 134-35, 151-52;
21. The District sought permission to evaluate Student and the Parent provided consent on December 21, 2021. (N.T. 247.)

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. 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 Parent who filed for 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.

Special education hearing officers assume the role of fact-finders, and 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*

⁵ The Parent was provided notice of the right to appeal to the local Court of Common Pleas. (S-14.)

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 generally credible as to the facts as they recalled them. The weight accorded the evidence, however, was not equally placed. More specifically, where witnesses needed to rely on documentary evidence during testimony, the testimony as to the content of those documents was generally deemed to be much less probative than the exhibits themselves, which were admitted without objection.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

IDEA Disciplinary Principles

For purposes of this decision, the Parent's Due Process Complaint challenges the District's imposition of discipline over the course of the 2021-22 school year based on the District's asserted knowledge that Student had a disability before the discipline was imposed. Pursuant to the IDEA and its applicable regulations, a parent making such an allegation had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing. 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c), 300.534(a). When such an appeal is filed, the child remains in the current alternative education setting unless the parties agree otherwise. 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.

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); *see also* 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).

A child who has not been identified as eligible for special education qualifies for the same protections as a child with a disability if the LEA had “knowledge (as determined in accordance with this paragraph)” of a disability before the behavior that led to the discipline. 20 U.S.C. § 1415(k)(5)(A). This is commonly termed “thought to be eligible.” The basis of knowledge, as delineated by the IDEA, exists when:

- i. the parent of the child has expressed concern in writing [to the LEA] 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 [under the IDEA]; or
- iii. the teacher of the child, or other personnel of the [LEA], has expressed specific concerns about a pattern of

behavior demonstrated by the child to the director of special education or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B); *see also* 34 C.F.R. § 300.534(b).

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)(1)(E); *see also* 34 C.F.R. § 300.530(e). The team must consider “all relevant information in the student’s file...including any relevant information provided by the parents[.]” 20 U.S.C. § 1415(k)(1)(E); *see also* 34 C.F.R. § 300.530(e). This same procedure applies to a child whom the LEA had knowledge may have a disability even without a prior identification. 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534(a). 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 the team must also 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. §§ 300.101(a), 300.530(c) and (d). A parent who disagrees with a manifestation determination may appeal that decision. 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a).

Application to the Discipline Imposed

The Parent asserts that the District had knowledge prior to the behaviors that led to the disciplinary removal that Student qualified for the protections in the IDEA. The only one of the enumerated bases for knowledge in this case that potentially exists is the third, namely an LEA professional expressing concerns to a supervisor about a “pattern of the behavior demonstrated by the child” pursuant to 20 U.S.C. § 1415(k)(5)(B) and 34 C.F.R. § 300.534(b).⁶ What constitutes a pattern of behavior is not defined in the IDEA or its implementing regulations, nor is there specification on what qualifies as a “concern.” Thus, the plain language requires an examination of what may have been conveyed and whether such expression demonstrates the requisite knowledge. To guide analysis of this narrow question, it is noteworthy that Congress clearly set forth its intentions regarding these particular provisions in the IDEA to provide protections when “the child has engaged in a pattern of behavior that should have alerted school personnel that the child may need special education and related services.” S.B. 108-185 at 46 (2003). This comment strongly supports a conclusion that no particular form or content of the expression of concern is necessary to establish the requisite knowledge. The U.S. Department of Education similarly rejected any interpretation that the concerns expressed by an LEA must specifically relate to its child find or referral obligation. 71 Fed. Reg. No. 156, 46727 (August 14, 2006.) As such, this hearing officer

⁶ The term “pattern of behavior” may have some similarities to, but is different from, the “pattern of removal” described in 34 C.F.R. § 300.536(a)(2).

concludes that, for purposes of the “thought to be eligible” provision in question, the expressions of concern by LEA professionals need not explicitly assert the possibility of a disability or need for a special education evaluation.

A fair reading of the behavior log for Student preponderantly establishes that a number of District professionals had genuine and serious concerns about Student’s ongoing pattern of behavior at school, beginning with the very first day of Student’s kindergarten year. The behaviors themselves varied to some extent in character and scope, but all related to some combination of Student’s disruption of class, physical aggression, elopement, noncompliance with directives, and work refusal. The entries in the behavior log may not have risen to a level of suspecting a disability, but they were unquestionably concerns about Student’s ongoing behavior pattern made by various staff including District supervisors. This conclusion satisfies the third possible basis for imputing knowledge of a disability to the District for purposes of the IDEA disciplinary protections.

As set forth above, a child who is “thought to be eligible” is entitled to the discipline protections in the IDEA. The ordinary remedy for failing to conduct a manifestation determination review is to require that one be convened. However, particularly in light of Student’s young age and very brief tenure in a District school building, a manifestation determination review in this case cannot precede the pending special education evaluation. This is also evident since the behavior that led to the discipline must be examined in light of the child’s identified disability, which Student does not currently have; and no such review can be meaningfully conducted without sufficient information about Student’s cognitive, academic, and

social/emotional/behavioral functioning, whether or not disability is identified. In the meantime, the current placement must remain in place.⁷

Student's pending evaluation must be completed within sixty calendar days of the date the Parent provided her consent,⁸ or within approximately five weeks from the date of this decision and order.⁹ Whether or not Student is determined to be eligible, a manifestation determination review must follow. The Parent will, of course, have the opportunity to raise challenges to future determinations regarding Student, whether in this administrative forum or elsewhere. In the interim, this hearing officer has jurisdiction over the related case involving Student, including any appropriate remedies that may be awarded. *See, e.g., Jackson v. Northwest Local School District*, 2010 U.S. Dist. LEXIS 90572, 2010 WL 3452333, 55 IDELR 71 (S.D. Ohio 2010), *adopted by Jackson v. Northwest Local School District*, 2010 U.S. Dist. LEXIS 90478, 2010 WL 3474970, 55 IDELR 104 (S.D. Ohio 2010).

Having determined that the District had the requisite knowledge prior to the disciplinary removal, the following order will specify the procedures to be followed to ensure that the District complies with its obligations following completion of the pending evaluation.

CONCLUSION OF LAW

⁷ As noted, Student has been expelled by the District Board of Education, and an appeal of that determination is properly raised before a different forum.

⁸ 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(1); 22 Pa. Code § 14.123.

⁹ Although this hearing officer considered ordering an expedited evaluation as described in 34 C.F.R. § 300.534(d), any order for same would necessarily change the timeline only minimally.

The District was required to conduct a manifestation determination review prior to Student's change in placement.

ORDER

AND NOW, this 13th day of January, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District had a basis of knowledge that Student was a child with a disability prior to the disciplinary removal in September 2021, and Student was entitled to the protections afforded children with disabilities under the IDEA and Section 504.
2. Upon completion of the initial evaluation of Student that is currently in process, the District shall promptly provide the Evaluation Report to the Parent.
3. Within five school days of completion of the Evaluation Report, the District shall convene a meeting with the Parent to review the report.
4. Whether or not Student is determined to be eligible for special education through the pending evaluation, the team shall also conduct a manifestation determination review at the same meeting. The District and Parent shall together determine the members of the team involved in that process.
5. If Student is determined to be eligible for special education, the team shall also, within five school days of that meeting, convene

another meeting to develop an IEP for Student with a behavior plan.

6. The District shall provide the Parent with notice of her procedural safeguard rights following completion of the Evaluation Report and the manifestation determination review, and the first IEP meeting if applicable, together with a Notice of Recommended Educational Placement/Prior Written Notice for each action.
7. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 25771-21-22