

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:

25772-21-22

Child's Name:

E.P.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

01/13/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, E.P. (Student),¹ is a mid- elementary school-aged student who resides in and attends school in the South Allegheny School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² However, at the time of Student's disciplinary removal from school, the Parent had not yet formally approved the proposed program. Following the removal, 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 entitled to the protections in those statutes regarding discipline.

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 was entitled to the disciplinary protections under the IDEA and that the discipline was therefore improper. The District maintained that Student was not yet subject to those provisions, and that no remedy was due.

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.

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted and the District ordered to convene a manifestation determination review.

ISSUES

1. Whether Student was entitled to the disciplinary protections of the IDEA at the time of the removal; and
2. If Student was entitled to those protections, what relief is appropriate?

FINDINGS OF FACT

1. Student is a primary elementary school-aged child residing in the District. Student has been evaluated and determined to be eligible for special education. (N.T. 9-10.)
2. Student is currently attending the District cyber-school program. (N.T. 77.)
3. 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-17 at 2.) Permanent expulsion may occur for "any student whose misconduct or disobedience warrants this sanction" (*id.*) following a formal hearing. (S-16; S-17.)
4. Student was evaluated by the District for special education eligibility in the spring of 2021, and an Evaluation Report (ER) issued in late May.

That ER followed a previous evaluation in the fall of 2019 that did not find Student eligible for special education. (S-5.)

5. The District attempted, unsuccessfully, to obtain input from the Parent into the ER on multiple occasions prior to its completion. (N.T. 55; S-5 at 2.)
6. The May 2021 ER determined that Student was eligible for special education under the classification of Emotional Disturbance. This conclusion is based in significant part on the teacher's rating scales of Student's social/emotional/behavioral functioning that reflected areas of concern across those domains. (S-5.)
7. The District also conducted a Functional Behavioral Assessment (FBA) for the ER. The behaviors of concern were noncompliance with and refusal of task demands, with the hypothesized function of escape or avoidance. A number of skill deficits were also identified that related to the behaviors of concern. (S-5 at 11, 19-22.)
8. A meeting to develop an Individualized Education Program (IEP) convened on August 23, 2021. The District issued a Notice of Recommended Educational Placement (NOREP) for initiation of special education services through a program of supplemental emotional support. The Parent signed but did not approve or disapprove the NOREP at that time, citing inaccurate information in the ER. (N.T. 79; P-3; P-4; S-6; S-7.)
9. The Parent and the District school psychologist discussed the ER following the IEP meeting, and the Parent indicated that she wanted to provide her input. They also discussed her failure to mark which option on the NOREP she was choosing, and the school psychologist followed up again on the NOREP several times after that meeting. (N.T. 39, 41, 48-49, 52.)

10. Beginning on the first day of the 2021-22 school year, the District created and maintained an electronic document (behavior log) containing ongoing notes of Student's problematic behaviors from various staff including the Director of Elementary Education. That document and Student's discipline record recounts a number of behavioral incidents beginning on August 19, 2021 (the first day of school), involving noncompliance with directives, work refusal, disrupting the classroom, physical aggression toward property, verbal and physical aggression toward staff, running around the classroom and other areas, and elopement from the classroom and the school building. Incidents were reported on a majority of school days through September 13, 2021. A number of staff were needed to intervene with Student's behaviors. (HO-1; P-14; S-14; S-15.)
11. Student was suspended from school on September 13, 2021 for three school days beginning on September 14, 2021. The suspension was extended for two additional school days through September 21, 2021 after an informal hearing was rescheduled. (P-7; P-17; S-14 at 1.)
12. An informal hearing convened with the Parent on September 21, 2021, at which time the District offered two options: expulsion, or placement in an alternative education setting outside of the District. There was no discussion of Student remaining in the District elementary school. Student was suspended for an additional five school days at that time pending an expulsion hearing. (N.T. 70, 82; P-8; P-9; P-10; S-8; S-9; S-10; S-11; S-12.)
13. The District did not again present the as-yet-approved NOREP to the Parent at the informal hearing. (N.T. 21.)
14. Student's suspension from school was extended indefinitely on September 28, 2021, through an expulsion determination. (P-11.)

15. No manifestation review was conducted for Student. (N.T. 19.)
16. The Parent met with staff of the alternative education setting in an intake meeting. (N.T. 83-84, 90; S-13.)
17. Student was expelled for the remainder of the 2021-22 school year by an adjudication of the District School Board on October 20, 2021. The Parent did not attend the expulsion hearing. (N.T. 85; S-18.)⁵

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 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

⁵ The Parent was provided notice of the right to appeal to the local Court of Common Pleas. (S-18.)

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 as a child whom the District had identified as having a disability and in need of special education. 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). 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). 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). 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).

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 contends that the District was required to conduct a manifestation determination review prior to the disciplinary removal in September 2021 that amounted to a change in placement in light of Student's identification by the ER. The District counters that, because the Parent did not consent to the initial provision of special education services, Student was not yet a child with a disability entitled to the disciplinary protections under the IDEA or Section 504.

The District accurately observes that, without the Parent's consent to services, it could not provide special education for Student; nor could it seek to override her lack of consent. The law is clear that, while a District may (but is not required to) seek to override a parent's refusal of consent to evaluate a child, it may not do so in order to provide initial services. 20 U.S.C. § 1414(a)(1)(D)(i); 34 C.F.R. §§ 300.300(a), (b). However, the discipline protections in the IDEA apply to a "child with a disability." 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(a). The definition of a "child with a

disability” is two-pronged: having one of certain enumerated conditions and, by reason thereof, needing special education and related services. 20 U.S.C. § 1401(3). The relevant federal regulation further notes that the child must have been evaluated under the IDEA in order to identify the disability. 34 C.F.R. § 300.8. The definition plainly does not contain any element of parental consent to services for purposes of the disciplinary protections.⁶

There can be no question that Student is a child with a disability based on the District’s own evaluation. Accordingly, once the District decided that Student’s placement should be changed, it was required to conduct a manifestation determination review. Because the District failed to do so, it did not comply with its obligations to Student under the IDEA in imposing discipline that resulted in Student’s removal from school. Accordingly, the District will be directed to convene a team to conduct a proper manifestation determination, following which the Parent will be afforded the right to challenge that decision if she disagrees.⁷

Having reached this conclusion, it is unnecessary to address separately any protections available to Student under Section 504. The attached order will direct the District to conduct the required manifestation determination review.

⁶ Indeed, even a child whose parent requested an evaluation that had not yet been conducted would be entitled to disciplinary protections as a child not yet identified as having a disability. 20 U.S.C. § 1415(k)(5); 34 C.F.R. §§ 300.534(a), (b).

⁷ The IDEA and its implementing regulations vest the authority to conduct a manifestation determination review in the LEA and the team assembled to do so. A hearing officer may hear an appeal of such determination. See 71 Fed. Reg. No. 156 at 46723-24 (noting that the determination does not occur in a due process hearing but may be considered on appeal after the process has concluded).

CONCLUSION OF LAW

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. Student is a child with a disability entitled to the disciplinary protections of the IDEA and Section 504.
2. Within ten calendar days of the date of this decision, the District shall convene meeting to include the Parent to conduct a manifestation determination review. The District and Parent shall together determine the members of the team involved in that process.
3. If the team conducting the manifestation determination concludes that the behaviors that resulted in the removal were a manifestation of Student's disability, the team shall proceed to determine what steps are necessary to revise Student's behavior plan, and as a team discuss appropriate special education programming and placement for Student.
4. The District shall provide the Parent with procedural safeguard rights following completion of the manifestation determination

review and any Notice of Recommended Educational Placement/Prior Written Notice that follows.

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. 25772-21-22