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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: [REDACTED]

Date of Birth: xx/xx/xx

Date of Hearing: December 4, 2008

CLOSED HEARING

ODR No. 9430/08-09 LS

Parties to the Hearing:

Representative:

Parents:
[REDACTED]

Pro Se

School District:
Betsy Gustafson
Director of Special Education
Pocono Mountain School District
P.O. Box 200
Swiftwater, PA 18370

School District Attorney:
Rebecca A. Young, Esq.
King, Spry, Herman, Freund & Faul
1 West Broad Street, Suite 700
Bethlehem, PA 18018

Date Record Closed:
Date of Decision:

December 9, 2008
December 12, 2008

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[REDACTED] (Student)¹ was attending the Pocono Mountain School District's (School District) public school when Student followed a peer into the lavatory, engaged in a fight, and broke the peer's nose. The School District suspended Student for 10 days, determined that Student's behavior was not a manifestation of Student's disability, and unilaterally removed Student to a 45 day interim alternative educational setting (IAES). Student appealed both the manifestation determination and the IAES removal. For the reasons described below, I affirm the School District's manifestation determination and I reverse the IAES removal.

ISSUE

Whether Student's October 2, 2008 conduct was caused by, or had a direct and substantial relationship to, Student's disability?

Whether the School District's unilateral IAES removal complies with law?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a teenage high school student currently residing within the School District. Between 1999 and 2008, while living in a [STATE REDACTED] school district (District #1), Student received special education services as a student with a specific learning disability. (P2, p.1,2,9)²

¹ All future references to [REDACTED] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² References to "HO," "SD" and "P" are to the Hearing Officer, School District, and Parent exhibits, respectively. References to "N.T." are to the transcript of the December 4, 2008 hearing conducted in this matter.

2. Around May 2007, while still living in District #1, Student was placed on “home instruction” for the remainder of the 2007-2008 school year in response to “a situation with ‘bullying.’” (N.T. 13; P2, p.1) A neuropsychiatric evaluation by psychiatrist Dr. J determined that Student legitimately felt threatened, unsafe and as a result quite anxious in the current (District #1) school setting. (N.T. 14; P2,p.2) Diagnostic impressions were noted to be Adjustment Disorder with anxious mood primarily with secondary or underlying resultant depression and possible mild to moderate attention deficit hyperactivity disorder (ADHD). (P2,p.2)
3. Student attended a different [STATE REDACTED] high school for the 2007-2008 school year until, at some time during that school year, Student moved to Pennsylvania and into the [REDACTED] School District (District #2). (N.T. 14; P2,p.1)
4. On March 27, 2008, District #2 conducted an evaluation report (ER). (P2) The ER concluded that Student was a child with a specific learning disability and recommended continued learning support services, checks for understanding of directions/ assignments, consideration of a less restrictive English class for the 2008-2009 school year, and continued focus on basic skills in math. (P2,p.11) The District #2 IEP states that Student exhibits behaviors “that are disruptive, that interfere with his/her learning or that are inappropriate,” specifically, Student speaks very disrespectfully to authority in front of peers. (SD2,p.10) The IEP check-off box titled “Behaviors that impede his/her learning or that of others” is not checked, however, although similar, nearby boxes indicating “Transition

- services” and “Other” are checked. (SD2,p.16) No anxiety-related services were listed in the District #2 IEP. (N.T. 99-100)
5. Around April 7, 2008, Student moved into the School District and began attending the School District’s public high school. (N.T. 13; SD1) Student’s parents and the School District agreed to adopt the District #2 ER and IEP. (P1; SD2; N.T. 56, 61)
 6. Upon enrollment into the School District, Student’s parent signed a six-question high school health form, answering “No” to the question whether parent had any concerns about Student’s behavior and/or emotional well-being of which the school should be aware. (SD2; N.T. 112)
 7. On September 26, 2008, Student received a three day out-of-school suspension for threatening other students. (N.T. 16; P3) Student was in another student’s way when the other student asked Student to move. Student responded by taking the other student’s books, throwing them on the ground, pushing the other student, and then threatening other students who intervened. (N.T. 18; P3,p.2)
 8. On October 2, 2008, when Student returned to school from the 3 day suspension, Student felt anxious and believed that other students were intending to hurt Student in retaliation for Student’s behavior on September 26. (N.T. 19, 20; 146) As a proactive response to the perceived retaliation threat, Student followed a particular student, whom Student considered to be the most immediate threat, into the lavatory. (N.T. 24, 27-28, 31) Student kicked and punched the other student several times, breaking the other student’s nose. (N.T. 29, 156-157; SD3; SD4)

9. The School District suspended Student for 10 days, from October 3 through October 17, 2008, for violation of the School District's Violent Behavior Policy. (SD4) The School District also scheduled a manifestation determination review and gave notice that it intended to recommend a 45 day Interim Alternative Educational Setting (IAES) and may recommend Student's expulsion. (SD4; SD5)
10. Student has never been disciplined for fighting in school before. (N.T. 34)
11. On October 7, 2008, Student's parent sought advice from the state Department of Education's Bureau of Special Education. (P4) The record does not indicate what, if anything, resulted from this request.
12. On October 16, 2008, the School District issued an Addendum to its April 14, 2008 reevaluation report stating that it is exercising its right to implement a 45 day IAES. (S13)
13. On October 17 2008, the School District issued a Notice of Recommended Educational Placement/ Prior Written Notice (NOREP/PWN) stating that it would unilaterally place Student in an IAES at Youth Service Alternatives (YSA) from October 21, 2008 through January 6, 2009. (P5; SD14,p.1-2,7-8; SD15; N.T. 89) The NOREP/PWN states that, during the 45 day IAES, the School District would like to pursue a reevaluation of Student, including a psycho-educational evaluation and a functional behavioral assessment (FBA). (SD14, p.8)
14. On October 27, 2008, the parties conducted a manifestation determination. All School District personnel concluded that Student's behavior on October 2, 2008 was not related to Student's disability, while Student's parents disagreed.

(SD21,p.2; SD22) Student's parents drew the team's attention to Student's anxiety and fear of being victimized, as reported by Dr. J and referenced in Student's ER. (P2,p.2; N.T. 37 141) Student's teacher stated that she did not observe any behaviors or expressions of anxiety on October 2. (N.T. 147) The School District psychologist noted that, since entering the School District, Student had not manifested any unstable, antagonistic or angry behaviors suggesting adjustment disorder, ADHD, anxiety or feelings of being threatened, and Student's former school district IEPs did not have any behavior plans attached. (N.T. 143-144, 150) Student's parents complained that, although Student's "IEP notes that [Student] has behaviors that impede [Student's] learning, however, no BIP [behavior intervention plan] was implemented." (SD21, p.2) The School District psychologist did note that parents' information suggested a need for further evaluation of Student. (N.T. 153)

15. On October 27, 2008, Student's parent sent a complaint regarding the School District's manifestation determination and IAES decision to the state Department of Education's Division of Compliance Monitoring and Planning and requested an "expedited meeting." (N.T. 48; SD25, p.7-21)
16. Also on October 27, 2008, Student enrolled in a local charter school. (SD9; SD10)
17. On November 13, 2008, this matter was assigned to me to conduct an expedited due process hearing. I scheduled a four-hour expedited due process hearing for the evening of December 4, 2008.
18. On November 14, 2008, the School District's counsel entered her appearance and moved to dismiss and/or compel service of the due process complaint and/or

restart procedural time frames in this case. On November 25, 2008, I faxed to both parties the complaint-related documents faxed to me by Student's parent, and I denied the School District's motion to dismiss as well as the School District's motion to continue the December 4 hearing. (SD25,p.6)

19. On December 4, 2008, I conducted a four-hour expedited due process hearing. Student's parents listed numerous complaints regarding School District behaviors and decisions. They wanted the disciplinary action to be reconsidered and adjusted because they believe Student's October 2 behavior was not only a manifestation of Student's disability, but also the result of School District behavior in not adequately preventing the October 2 fight. (N.T. 40-41) Student's parents further wanted the School District to be held accountable for not attempting to protect and calm Student on October 2 in light of his anxiety and fear of retaliation, as well as for not addressing Student's anxiety in Student's IEP. (N.T. 40-41) Student's Parents do not argue that the School District failed to implement Student's IEP; rather, they argue that Student's IEP was flawed because it did not address all of Student's needs as listed in Student's ERs. (N.T. 132)
20. At the 4 hour expedited due process hearing, I limited the issues to parents' challenge of the manifestation determination under the direct and substantial relationship test, and parents' challenge of the IAES determination. I determined that all other issues must be raised in a separate, non-expedited, request for due process hearing. (N.T. 51) Neither party was able to present all of the evidence that it wanted to present in the compressed 4 hour expedited due process hearing.

The School District did not have time to present the teacher who observed no threatening or anxious behaviors in Student on October 2, 2008 (N.T. 166), a witness who would have testified that the Office for Dispute Resolution told School District personnel that mediation was unavailable for a manifestation determination review (N.T. 168), or the principal who received parent's call on October 2 warning of possible trouble and who then told the hall monitor and Student's teachers to stay alert, and who also told the other particular student involved not to interact with Student at all on that day (N.T. 167) Student's parents did not get the opportunity to present evidence of the School District's scrambled paperwork and allegedly false claims as to when various documents were delivered to parents. (N.T. 168)

21. Hearing Officer exhibit 1 is admitted into the record. (N.T. 8) Parent exhibits P1, P2, and P5 are admitted into the record, while P3 and P4 are not. (N.T. 66, 69-70, 170) School District exhibits SD1 through SD25 are admitted into the record. Parental objections to the admission of SD6, SD9, SD16, and SD20 are overruled. (N.T. 171-174)

DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Education Improvement Act (IDEIA) provides that, within 10 school days of a school district decision to change a disabled student's placement because of a violation of a code of student conduct, the student's IEP team must determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability or was the direct result of the school

district's failure to implement the IEP.³ 20 USC §1415(k)(1)(E); 34 CFR §300.530(e) In this case, Student's parents do not argue that the Student's behavior was the direct result of the School District's failure to implement Student's IEP. Student's parents explained at the hearing that, when they use the term "failure to implement the IEP," they mean that Student's IEP was flawed because it did not program for Student's anxiety-related educational needs. (N.T. 132)

If the behavior is determined not to be a manifestation of the child's disability, then the child may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 1415(k)(1)(C); 34 CFR §300.530(c) If the behavior is determined to be a manifestation of the child's disability then, with limited exceptions, the IEP team must either modify any existing behavioral intervention plan or conduct a functional behavioral assessment and develop a behavioral intervention plan.

1415(k)(1)(F); 34 CFR 300.530(f) One of the limited exceptions is that, even if the child's behavior was a manifestation of disability, the School District may nevertheless unilaterally remove the child to an IAES for not more than 45 school days if the child has inflicted serious bodily injury upon another person while at school. 1415(k)(1)(G)(iii); 34 CFR §300.530(g)

"Serious bodily injury," for these purposes, is narrowly defined as: "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 USC §1365(h)(3) "Serious bodily injury" for these purposes, is not: "a cut, abrasion, bruise,

³ Congress decided in 2004 that the appropriateness of the IEP would no longer be considered during a manifestation determination. See M.R. v Philadelphia School District, Special Education Opinion No. 1918 (2008), citing 71 Fed. Register 46,719-46,720 (Aug. 14, 2006)

burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.” 18 USC §1365(h)(4)

Parents challenging either a manifestation determination or a unilateral removal for infliction of serious bodily injury are entitled to an expedited due process hearing. 1415(k)(3)(A), (k)(4)(B); 34 CFR §300.532(c); 22 Pa. Code §14.162(q)(4) The burden of proof is upon the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Educ., 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) In this case, Student bears the burden of proof because Student challenges the School District’s manifestation determination and its unilateral IAES removal.

In this case, the parties disagree over whether Student’s October 2, 2008 behavior was a manifestation of Student’s disability. No one argues that Student’s behavior was a manifestation of Student’s specific learning disability, which is the only disability explicitly identified and programmed for in Student’s IEP. (SD2) The argument, rather, is whether Student has another, anxiety-related and/or ADHD-related disability, and whether Student’s October 2, 2008 behavior was a manifestation of that disability. Student’s teacher stated that she did not observe any behaviors or expressions of anxiety on October 2. (N.T. 147) The School District psychologist noted that, since entering the School District, Student had not manifested any unstable, antagonistic or angry behaviors suggesting adjustment disorder, ADHD, anxiety or feelings of being threatened, and Student’s former school district IEP did not have any behavior plans attached. (N.T. 143-144, 150) Student’s parents admit that Student has never been disciplined for fighting in

school before. (N.T. 34) Student's parents drew attention, however, to Student's anxiety and fear of being victimized, as reported by Dr. J and referenced in P2, p.2. (N.T. 37 141) I find that the record does not establish that Student has an anxiety-related and/or ADHD-related disability. Psychiatrist Dr. J's determination that Student legitimately felt threatened, unsafe and was quite anxious (N.T. 14; P2,p.2), was in the context of a particular bullying incident in District #1 (N.T. 13; P2, p.1) and apparently served as the basis for "home instruction" for the remainder of that 2007-2008 school year. (N.T. 13; P2, p.1) Although Dr. J expressed "Diagnostic impressions" of Adjustment Disorder with anxious mood primarily with secondary or underlying resultant depression and possible mild to moderate ADHD (P2,p.2), they appear limited to that particular bullying/home instruction context. I base this conclusion upon the fact that, after the "home instruction" ended, Student attended three different public schools (District #1 briefly, then District #2, and finally School District) with no change in Student's disability identification or programming. Further, Student's parent expressed no concerns about Student's behavior and/or emotional well-being upon enrollment into the School District. (SD2; N.T. 112) It appears, then, that Dr. J's impressions of Adjustment Disorder, anxious mood, depression and possible ADHD were time-and-place-specific.

Although Student's parents allege that Student's "IEP notes that [Student] has behaviors that impede [Student's] learning" (SD21,p.2), this is not true. The IEP check-off box titled "Behaviors that impede his/her learning or that of others" is not checked. (SD2,p.16) Further, although the IEP does state that Student exhibits behaviors "that are disruptive, that interfere with his/her learning or that are inappropriate" (SD2,p.10), these are disrespectful behaviors to authority in front of peers, not peer-based or fear-based

anxiety or impulsivity. (SD2,p.10) Significantly, no peer-related behaviors and no anxiety-related services are listed in Student's IEP. (N.T. 99-100)

It is possible that, upon further evaluation, Student will be found to have an anxiety, or fear-based, or impulsivity-related disability. The School District psychologist did note that parents' information at the manifestation determination suggested a need for further evaluation of Student. (N.T. 153) In fact, the School District gave notice in its 45 day IAES NOREP/PWN that it would like to pursue a reevaluation of Student, including a psycho-educational evaluation and FBA. (SD14, p.8) It does appear that further evaluation of Student is warranted.

As I noted earlier, however, Congress has decided that the appropriateness of the IEP is no longer to be considered during a manifestation determination. Thus, even if Student is reevaluated and Student's IEP is revised to include additional disability, this relates to the appropriateness of the current IEP and is not relevant in a manifestation determination challenge. The single issue in this expedited appeal is whether Student's behavior was caused by, or had a direct and substantial relationship to, the student's disability. I have concluded that it was not. Accordingly, the School District's manifestation determination is affirmed.

Regarding the IAES, I conclude differently. The School District unilaterally placed Student in an IAES because Student violated the School District's Violent Behavior Policy. (SD4) I assume that Student's behavior in following a peer into the lavatory and then breaking the peer's nose (N.T. 24, 27-29, 31, 156-157; SD3; SD4) constitutes a violation of the School District's Violent Behavior Policy. That does not

mean, however, that such behavior automatically qualifies as the infliction of serious bodily injury under the IDEIA.

“Serious bodily injury” for IAES purposes, is not: “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.” 18 USC §1365(h)(4) Rather, the infliction of “serious bodily injury” for unilateral IAES placement purposes must involve “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 USC §1365(h)(3) Although Student’s behavior was injurious, frightening and intimidating, a broken nose does not fit within the IDEIA’s narrow definition of the infliction of “serious bodily injury.”⁴ Thus, I conclude that the School District’s unilateral removal of Student to an IAES was inappropriate and violates applicable federal regulations. In accordance with 34 CFR§300.532(b)(2)(i), I will order that, if Student reenrolls,⁵ the School District shall return Student to the placement from which Student was removed.

CONCLUSION

Special education law permits school districts to apply relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as those procedures would be applied to children without disabilities –if the behavior that

⁴ For what it’s worth, I note that a unilateral IAES is an extraordinary governmental power that deprives disabled children of the pendency protections usually associated with most other disputed changes in placement. Apparently Congress intended this power to be used only in the most egregious circumstances.

⁵ Student is currently enrolled in a local charter school. (SD9; SD10)

gave rise to a violation of a code of student conduct was not a manifestation of the student's disability. In this case, because I conclude that Student's behavior was not caused by, or had a direct and substantial relationship to, Student's disability, I affirm the School District's manifestation determination.

Special education law also permits school districts to unilaterally place children with disabilities into an IAES without regard to whether the behavior was a manifestation of the child's disability if the child has inflicted serious bodily injury upon another person at school. In this case, I conclude that Student's behavior does not meet the narrow legal definition of "serious bodily injury." Therefore, I reverse the School District's unilateral IAES placement.

ORDER

- Student's October 2, 2008 behavior was not caused by, nor did it have a direct and substantial relationship to, Student's disability. Accordingly, the School District's manifestation determination is affirmed.
- Student's October 2, 2008 behavior does not fit within the IDEIA's narrow definition of the infliction of "serious bodily injury." Accordingly, the School District's unilateral removal of Student to an IAES is reversed.
- If Student reenrolls, the School District shall return Student to the placement from which Student was removed.

Daniel J. Myers

HEARING OFFICER

December 12, 2008