

*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:**

25828-21-22

**Child's Name:**

C.W.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

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**Hearing Officer:**

Cheryl Cutrona, J.D.

**Date of Decision:**

January 18, 2022



## **PROCEDURAL HISTORY**

C.W. (hereafter "Student")<sup>1</sup> is a [middle school aged] student residing in the School District of Philadelphia (hereafter "District"). On November 19, 2021, the Parent was notified that the Student was being placed in an alternative educational placement. On December 3, 2021, the Parent filed an Expedited Discipline due process complaint alleging that the Student should be considered "thought to be exceptional" and claiming that the District should have held a manifestation determination hearing prior to expelling the Student for participating in a fight on November 1, 2021. The December 3, 2021 Complaint demanded that a manifestation determination be held prior to any change of placement; that the District issue a Permission to Evaluate (PTE); and that the Student be awarded compensatory education for the District's failure to properly program for and place the student.

Nine (9) school days later, on December 16, 2021, a manifestation determination review was held. It concluded that the Student's participation in the November 1, 2021 fight was not a manifestation of any disability. On December 16, 2021, the District also issued a PTE.

On January 3, 2022, the Parent filed an amended Complaint alleging that the change in placement was not appropriate because an evaluation was not completed. In the amended Complaint, the Parent sought an order returning the Student to the previous placement or a different non-disciplinary school pending the completion of an evaluation, and to award compensatory education for the District's failure to properly program for and place the Student and for any time the Student has been out of school due to a lack of transportation.

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<sup>1</sup> 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 the details on the cover page, will be redacted prior to the decision's 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).

The case proceeded to a closed, expedited due process hearing held on January 5, 2022. The session was convened remotely due to the COVID-19 pandemic. The expedited decision due date is January 20, 2022.

The Hearing Officer's authority is limited to the issues listed in the Complaint. The non-expedited Free Appropriate Public Education (FAPE) issue may be filed separately by the Parents.

## **ISSUES**

1. Was the determination that the Student's involvement in the November 1, 2021 fight was not a manifestation of a disability appropriate?
2. Was the School's placement of the Student in an alternative educational setting for a period of 45 days appropriate?
3. If the placement at the alternative disciplinary school was not appropriate, should the Student receive compensatory education for the time out of school?

## **FINDINGS OF FACT**

All evidence including the exhibits admitted to the record, the transcripts of the testimony and the parties' oral closing statements was considered. The only findings of fact cited in this Decision are those needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The Student, who resides within the District's boundaries, has attended [redacted] School (hereafter the "School") since the 2019-2020 school year when the Student entered [redacted] (NT 28)<sup>2</sup>. The

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<sup>2</sup> References to the record throughout this decision will be to the Notes of Testimony (NT-) followed by the page number in the hearing transcript, School District Exhibits (SD-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number.

Student attended general education classes and had never been evaluated to assess eligibility for special education services.

2. In April 21, 2021, the Parent emailed a teacher of the Student expressing her concerns that the Student was having difficulty with reading comprehension and retaining information (P-2, 1). The District did not take any action in response to the Parent's request at that time.
3. On November 1, 2021, the Student participated in a group altercation at school. An undated and unsigned "Request for Interim Safety Placement" (RISP) described the November 1, 2021 incident. One student (hereafter "victim") was "jumped" by multiple [redacted] students, including this Student. The RISP noted that five teachers and the Assistant Principal intervened to stop the altercation, and that two of those teachers went on Worker's Comp as a result of their injuries. The RISP also indicated that the Student and the victim in this altercation were involved in another fight on September 1, 2021, and that the Student continued to engage with the victim despite multiple directions to stay away. The RISP form indicated that it would be in the best interests of the Student's safety and welfare to receive an interim placement (P-5/SD-9, 1-2).
4. The Student received a three-day, out-of-school suspension from November 4-8, 2021 (SD-12, 1). The Student was subsequently placed in an alternative educational school (SD-15) for the same offense. None of the other students involved in the November 1, 2021 altercation were placed in alternative educational schools (NT 62-63).
5. On November 10, 2021, a Behavior/Performance Review (BPR) Team convened and reviewed the Student's academic and behavioral data. The BPR Team included the School Principal, the School Counselor, and one of the Student's [redacted] teachers. The BPR Team

concluded that the Student was thought not to have a disability and that the disciplinary action could proceed (SD-7, 1-2).

6. In addition to the November 1, 2021 altercation, the Student's disciplinary record includes nine other incidents: (1) On October 18, 2019, the Student was a victim of a simple assault; (2) January 28, 2020, the report classified the Student's behavior as "reckless endangerment," although the description indicated this charge was for leaving the room without permission; (3) On the same date, the Student was also charged with being involved in a "mutual fight" at another school; (4) On January 30, 2020, the Student was charged with "reckless endangerment" for "group cutting"; (5) On February 5, 2020, the Student was charged for being involved in a "mutual fight" off school grounds; (6) On February 12, 2020, the Student was charged with engaging in a "mutual fight" off school grounds; (7) On February 25, 2020, the Student was charged with "reckless endangerment" for "roaming the building" at "an offsite alternative placement facility"; (8) On February 26, 2020, the Student was charged with "reckless endangerment" for leaving the classroom without permission at "an offsite alternative placement facility"; (9) On February 27, 2020, the Student was charged with "reckless endangerment" for being tardy "off school grounds-jurisdiction other school" (P-4, 1-5). Four of the incidents involved a particular teacher who, according to the School Principal, had "poor classroom management and poor classroom control" (N-70) and is no longer employed by the District (NT-67). The incidents characterized as "reckless endangerment" and "mutual fight" were designated as such because those were the closest available classifications to assign, and the teachers are able to "self-select" the categories they assign in the

disciplinary reports (NT-69). There was no evidence regarding why so many of the incidents occurred off School grounds.

7. On November 19, 2021, a Notification of Alternative Educational Placement was issued to the Parent which indicated that the Student was to be placed at an AEDY (Alternative Education for Disruptive Youth) placement (SD-15).
8. On December 16, 2021, a Manifestation Determination meeting was held. The participants included the: (1) Parent's attorney; (2) District's attorney; (3) Parent; (4) School Psychologist; (5) Special Education Case Manager; (6) District Special Education Director; (7) School Principal; and (8) one of the Student's [redacted] teachers (NT 155). The team reviewed the following information: the [redacted] teacher's interactions with the Student in the classroom and the Student's performance; behavior, and prior disciplinary infractions and included input from the Parent.
9. On December 16, 2021, the District issued a Permission to Evaluate (PTE) to determine the Student's eligibility for special education services (SD-19).
10. The Student's [redacted] Math and Science Teacher observed that the Student is easily distracted, engages in horseplay, and responds well to redirection (NT-136). This Teacher perceives the Student as respectful toward him and friendly with peers (NT-137). The Teacher observed the November 1, 2021 altercation and identified the Student as the instigator (NT-139). The Teacher intervened but was unable to control the situation without additional support from other adults (NT-140). This Teacher participated in the manifestation determination and agreed with the conclusion that the Student's participation in the altercation was not a manifestation of a disability (NT-144).

11. The Student has not attended school since November 19, 2021 because the Parent is concerned about the [student] taking public transportation to the AEDY placement. The School issued the Student a SEPTA pass to use public transportation to and from home and the AEDY school (NT 192-193).

### **Parent's Claim**

The Parent claimed that in making its determination that the November 1, 2021 incident was not a manifestation of the Student's disability, the District ignored the "pattern of behavior" as demonstrated in the Student's disciplinary record. The Parent pointed to teacher reports that the Student lacks focus, engages in "play fighting," and has poor impulse control to support the connection between the Student's behavior and the suspected learning disability, which until the evaluation is concluded may also include Emotional Disturbance, Attention Deficit Hyperactivity Disorder (ADHD), or Other Health Impairments. The Parent contended that the November 1, 2021 fight was "one more fight" in a documented series of fights and was undoubtedly a manifestation of a suspected disability. The Parent alleged that the School Psychologist who was part of the manifestation determination had made up her mind prior to the meeting. Furthermore, the School Psychologist has never met the Student. Therefore, the Parent argued that the Student should be allowed to either come back to the School or be placed another non-disciplinary school in the District.

### **District's Claim**

The District argued that the manifestation determination was appropriate. The disciplinary record and the testimony at the hearing show the Student engaged in "play fighting" several times, and those incidents may have been classified as "mutual fights," however, they were not acts of



malicious physical aggression similar to what occurred on November 1, 2021. Furthermore, the District argued, the School Psychologist's testimony that she reviewed the Student's academic records prior to the manifestation determination, fully considered the Parent's and the Parent's Counsel's input at the manifestation determination, and addressed the issues that were raised at that meeting directly contradicts the Parent's assertion that the School Counselor had made a predetermination prior to the manifestation determination meeting. The District averred that in light of the filing of the Complaint and the Parent's email in April 2021 expressing concern in writing to a teacher that the Student may be in need of special education and related services, it agreed to treat the Student as "thought to be eligible" and conducted a manifestation determination meeting. The Parent's stated concern was reading comprehension and retention, which are academic issues. The District argues that a relationship or causal connection cannot be made between a suspected learning disability and the Student's instigation and participation in a violent group assault against a student victim which continued notwithstanding the intervention of multiple teachers and resulted in injuries to the victim and at least two teachers. The District argued that that keeping the Student at the school would threaten the welfare and safety of the student community and therefore, and the decision to transfer the Student to a disciplinary school as supported by the evidence and testimony presented was appropriate.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden of Proof**

In general, the burden of proof essentially consists 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).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipoise.” When the evidence is in “equipoise,” the party seeking relief and challenging the program and placement must prove their case by a preponderance of the evidence in order to prevail. See *Schaffer* above; see also *Ridley S.D. v. M.R.*, 680 F.3d 260 (3d Cir. 2012); *L.E. v. Ramsey Board of Education*, 435 F.3d 384 (3d Cir. 2006).

On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above rules, the District proved by a preponderance of the evidence that the manifestation determination and the placement of the Student in an alternative educational setting were appropriate.

## **Credibility Determinations**

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses’ testimony. See 22 Pa. Code §14.162 (requiring findings of fact); 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*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented.

### **Thought to be Eligible**

Prior to the incident that gave rise to this Complaint, the Student attended general education classes. The Student had never been evaluated. There was no Individualized Education Plan (IEP) nor a Section 504 Plan. The District proceeded to subject the Student to the disciplinary measures applied to students without disabilities who engage in comparable behaviors. See *34 C.F.R. §300.534 (d)(1)*

In general, students who have not been determined eligible for special education and related services and who have engaged in behavior that violated a code of student conduct, may assert any of the protections provided for students who have been deemed to be eligible to receive special education services if the District had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. See *34 C.F.R. §300.534(a)*

Ultimately, the District agreed to consider the Student to be "thought to be eligible" for special education services.

### **Basis of Knowledge**

At least one of three conditions must have occurred prior to the behavior that precipitated the disciplinary action to demonstrate that the LEA had a basis of knowledge that the student may have a disability eligible

for special education services: (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the District 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; or (3) The teacher of the child, or other personnel of the District, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the District or to other supervisory personnel of the agency. See *34 C.F.R. §300.534(b)*

In this situation, on April 21, 2021, the Parent emailed a teacher of the Student to express her concerns that the Student was having trouble with reading comprehension and retaining information. No evidence was presented that the School did anything until November 17, 2021, a few weeks after the November 1, 2021 incident that precipitated the disciplinary action that is the matter of this dispute. A teacher of the Student belatedly responded to the Parent via email, and copied the School Counselor on the email. Therefore, the School *did* have a basis of knowledge that the Student may be eligible for special education services.

The Parent's allegation that it should have been obvious to the District that the Student's disciplinary record demonstrated a "pattern of behavior" and that the November 1, 2021 incident was just one more in a series of fights is weakened by the fact that the disciplinary record amassed by the District is unclear because the labelling of the incidents and the its misleading and vague classifications. The District's procedure for labelling the incidents leaves much to be desired. While the disciplinary record is extensive, the entries do not appear to be violent in nature despite the provocative labels. Classifying "leaving the classroom without permission" as "reckless endangerment" and assigning "mutual fight" to "play fighting" which ends in laughter cannot be considered a pattern of aggressive behavior. The Hearing Officer finds that the Student's disciplinary record

does not demonstrate a pattern of the kind of violent behavior that occurred during the November 1, 2021 incident.

Only one of the conditions must be met to prove a basis of knowledge. Despite not having a “pattern of behavior,” the Parent met its burden of proving that the District had a basis of knowledge in light of the Parent’s email on April 21, 2021 expressing concern in writing to a teacher that the Student may be in need of special education and related services.

### **Manifestation Determination**

In light of the Complaint and the April 21, 2021 email from the Parent, the District properly agreed to treat the Student as “thought to be eligible” and conducted a manifestation determination meeting.

Within ten (10) school days of any decision to change the placement of a child with a disability or suspected disability because of a violation of a code of student conduct, the LEA, the parent and relevant members of the child's IEP team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (i) If the conduct in question 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 student's IEP. See *34 C.F.R. §300.530(e)*

In this case, the manifestation determination occurred on December 16, 2021, nine (9) school days after the Parent’s filed the Complaint on December 3, 2021. Until that time, the Student was not offered the protections as “thought to be eligible.” The District considered the Complaint and the Parent’s email on April 21, 2021 expressing concern in writing to a teacher that the Student may be in need of special education and related services, and agreed to treat the Student as “thought to be eligible.”

The manifestation determination review team appropriately reviewed all relevant information in the Student's file, teacher observations, and any relevant information in determining whether the Student's behavior was a manifestation of the student's disability. The team concluded that the Student's conduct – participation and possibly the instigation of the violent group assault on another student – was NOT caused by the Student's suspected learning disability or had a direct and substantial relationship to the Student's suspected learning disability.

### **Appropriateness of the Alternative Placement**

The District determined that it would be in the best interests of the safety and welfare of the School community to place the Student in an alternative placement. A 45-day alternative placement may only be imposed if the incident involved possession or use of weapons or drugs, or for inflicting serious bodily injury. In this situation because there was no evidence of a weapon or drugs, this Hearing Officer must conclude that the Student was placed in a 45-day alternative educational placement for inflicting serious bodily injury on another student, although there was no evidence regarding the nature or severity of the injuries sustained by the victim.

The Parents failed to provide evidence regarding the length of the placement, only the location of the placement, so the Hearing Officer must conclude that the length was appropriate.

### **Placement during the Pendency of the Ruling**

The Parents argued that the Student should have been allowed to remain in the School or be placed in a different non-disciplinary school because the commute to the alternative school is unsafe and takes more than an hour on public transportation.

It is established that the child's placement during the pendency of any such dispute is the alternative setting. See *20 U.S.C. § 1415(k)(4)(A)*; *34 C.F.R. § 300.533*. This procedure is an exception to the standard rules of pendency. See *20 U.S.C. § 1415(j)*; *34 C.F.R. § 300.518(a)*.

The District provided the Student with a SEPTA pass to cover the cost of the commute to and from home and the disciplinary school, as it does for all other regular education students who receive an alternative placement. The Parents may have legitimate concerns regarding the commute on public transportation. The Student's failure to appear at the alternative disciplinary educational school was a family decision. While the Hearing Officer sympathizes with the Parent's concerns, without evidence offering other, more reasonable options, the District's placement stands.

### **Connection between a Suspected Learning Disability and the Student's Conduct**

Any nexus between the Student's suspected learning disability and the aggressive behavior demonstrated during the incident on November 1, 2021 is difficult to prove without an evaluation or a functional behavioral assessment (FBA).

The School Counselor recounted the discussions of ADHD and Emotional Disturbance at the manifestation determination. She considered Emotional Disturbance to be unlikely because the Student is capable of maintaining satisfactory relationships with peers in the classroom and with the adults in school, there do not seem to be any symptoms of depression, and that the Student responds appropriately under normal circumstances. She opined that ADHD and impulse control are connected, but that physical aggression is not. The Hearing Officer does not find the School Psychologist's assertion that aggression is not connected to ADHD to be persuasive.

IDEA does not categorize ADHD as a learning disability. The Student has not been diagnosed as having either a learning disability or ADHD yet.

The expedited evaluation will shed some light on this matter. It is premature to definitively prove a nexus to meet the Parent's burden of proving that there is a relationship between the suspected disability and the Student's aggressive participation in the November 1, 2021 incident.

In summary, the manifestation determination was appropriate in that it included input from one of the Student's teachers, carefully considered all relevant information in the Student's file, considered information received from individuals having relevant information regarding the November 1, 2021 incident and teacher observations. Therefore, based on the information available to the manifestation determination team and without the benefit of an evaluation or an FBA, the conclusion that the Student's conduct was not a manifestation of a suspected learning disability was appropriate.

### **Compensatory Education**

In light of the finding herein that the decision to place the Student at an alternative disciplinary school was appropriate, the Parent's claim for compensatory education for the Student's time out of School is denied.

### **CONCLUSION**

While the Hearing Officer finds for the District, it must be noted that the teachers' labelling of incidents in the disciplinary record leaves much to be desired. While there is no evidence that the District addressed the Parent's concerns about the length and safety of the commute to the alternative school, the Hearing Officer hopes that in the spirit of cooperation the District considered other placements and reached out to the Parent to explain why it did not select a more convenient placement. Despite the Hearing Officer's concerns about the District's choices here, it does not change the fact that the Parent failed to meet her burden of proof.



**ORDER**

The Parent's claims are denied in their entirety.

*Cheryl Cutrona*

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**Cheryl Cutrona, J.D.**  
**Special Education Hearing Officer**

**Date of Decision**

January 18, 2022

**ODR 25828-20-21**