

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

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

Closed Hearing

ODR No. 29523-23-24

Child's Name:

S.B.

Date of Birth:

[redacted]

Father:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

May 14, 2024

INTRODUCTION

S.B. (hereafter "Student")¹ resides with Father within the boundaries of the Marple Newtown School District (hereafter "District"). The Student originally became eligible for special education services based on the classification Specific Learning Disability ("SLD"). The Student received Itinerant Learning Support services, counseling, and related services. The February 2024 Reevaluation Report ("RR") and subsequent March 2024 Individualized Education Plan ("IEP") changed the primary disability to Emotional Disturbance ("ED"), added Other Health Impairment ("OHI"), and recommended a psychiatric evaluation. The District offered and arranged for an independent psychiatric evaluation in March 2024. The Student's placement was changed to remote learning and weekly counseling sessions for the rest of the 2023-2024 school year.

The District filed a Complaint on April 10, 2024 requesting an expedited due process hearing seeking approval to change the Student's placement to an Interim Alternative Education Setting ("IAES") for not more than 45 school days in a therapeutic, highly structured, small setting because returning the Student to the current placement was substantially likely to result in injury to the Student or others. The Parent rejected the District's offer, disputing the District's conclusion that maintaining the Student's placement was unsafe for the Student or for others.

The Complaint proceeded to a one-day, closed, expedited due process hearing that was convened via video conference on May 1, 2024.

For the reasons set forth below, the District claim is granted.

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 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).

ISSUE

Whether the District's proposed change of placement to an IAES for up to 45 days is warranted.

FINDINGS OF FACT

All evidence including the exhibits admitted to the record, the transcripts of the testimony and the parties' closing statements was considered.² The only findings of fact cited in this Decision are those needed to address the issue resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The District is a local educational agency (LEA) within the meaning of 20 USC § 1401(15), 34 CFR § 300.28, 22 Pa. Code 14.102(a) (2)(vii) and a recipient of federal funds within the meaning of the IDEA, 20 USC § 1401 and Section 504, 29 USC § 794(b)(2)(B).
2. The Student lives with the family's [redacted] Father [redacted], [redacted], [redacted] (SD-2, p. 4; NT, p. 124-125).
3. The Father reported to the School that the Student watches inappropriate videos about wars and Hitler (SD-2, p.2). However, the Father denied saying this and claimed that he was misunderstood (NT, p. 141-142).
4. The Student told the art teacher about watching a controversial social media influencer and made racial comments (SD-2, p. 2).
5. During the Fall of 2023, the Father reported that the Student was being bullied and harassed with racial comments. The Father indicated that he did not want the Student to know that he reported the bullying. After an investigation, the alleged bullying was not confirmed by the Student and peers (NT, p. 64-66).

² References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (SD-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number.

6. On December 12, 2023, the Student [redacted]. After the District investigated the incident, the Student was suspended for three days (SD-2, p. 2). The District conducted a threat assessment which the Assistant Principal described as "bizarre." She noted that the Student's responses were defensive, aggressive, hostile, and sarcastic (NT, p. 44). Following the [redacted] incident, counseling services were implemented (NT, p. 72).
7. A Reevaluation was conducted in February 2024. The Student has a full-scale IQ of 96, which falls within the average range (SD-1, p. 13).
8. During the interview with the assessor, the Student shared a planned "escape route" from the school in case of an intruder/active shooter scenario (SD-1, p. 30).
9. The RR listed the Student's primary disability category as ED due to "Unsatisfactory Interpersonal Relations and self-reported symptoms of emotional dysregulation," added OHI, and recommended that a psychiatric evaluation be conducted (SD-1, p. 34-35).
10. The March 14, 2024 IEP provided Related Services (i.e., counseling services and a 1:1 aide), and Specially Designed Instruction (i.e., preferential seating, movement breaks, access to the Emotional Support Room, and prompts for redirection) (SD-1, p. 8; SD-3, p. 3-4) to address the recent escalation of the Student's inappropriate conduct and comments.
11. The District offered and arranged an independent psychiatric evaluation which was conducted by a highly qualified expert with more than 24 years' experience (SD-2).
12. On March 1, 2024, a peer[redacted]. In retaliation, the Student punched the peer in the ribs twice (SD-2, p. 2). Later, the Student went to the School Nurse complaining of a sore hand (NT, p. 50). The Student was suspended for three days (SD-8, p. 2).

13. The School received a Safe2Say report of an incident that occurred on the school bus. The Assistant Principal obtained a video that showed the Student [redacted]. Following the physical attack, the Student began verbally assaulting the peer, threatening to blackmail him and to get others to beat him up after school. Then the Student reached out to shake the peer's hand and said, "No hard feelings" (NT, p. 55-56). The Student was supposed to receive a Saturday suspension as a result of the incident; however, on April 1, 2024, while talking with the Assistant Principal following the incident on the bus, the Student insinuated plotting something big to "get me expelled." The Student also threatened to "do something big" if the School didn't remove the 1:1 aide. (NT, p. 60-61; SD-4, p. 3, 8). The suspension was changed to a three-day, out-of-school suspension (SD-8, p. 3) as a result of the Assistant Principal's conversation with the Student. The Student's Father was called, and his response was that the Student had been bullied and was angry. The School investigated the bullying report, which was unfounded (NT, p. 62-63).
14. On April 3, 2024, a Manifestation Determination hearing was held regarding the Student's written and verbal comments about plotting something big. The manifestation review resulted in a finding that the Student's conduct had a direct and substantial relationship to the Student's disability (SD-4, p. 4-5).
15. The Assistant Principal, who regularly worked with Students diagnosed with ED, noted that the Student's hostile, aggressive responses to peers had escalated in just over three months. And, following these overreactions, the Student deescalated quickly and returned to whatever was happening just prior (NT, p. 64). She found the Student's comments to be concerning, the Student's thought processes to be erratic,

scattered, and coming out of nowhere. And, following physical incidents, the Student showed no remorse afterwards (NT, p. 69).

16. During the March 8, 2024 Psychiatric Evaluation the psychiatrist noted that the Student was “restless and agitated,” disrespected and mocked the examiner and Father, demonstrated impaired insight and judgment, and frequently interrupted, talked over others, and at times the Student’s thought processes were disorganized and tangential (SD-2, p. 3, 5-6).
17. The psychiatrist found a developing psychopathology and diagnosed the Student with “Other Specified Bipolar and Related Disorder – Hypomanic without prior depressive episode vs. Other Mood Disorder, Rule out Bipolar Affective Disorder – Mania and Unspecified Neurocognitive Disorder.” She recommended partial psychiatric hospitalization for safety and stabilization (SD-2, p. 6). The medical findings required receiving education in a school that can provide psychiatric monitoring, mental health specialists, therapeutically-run and behaviorally-run classes, small class size, and low teacher-student ratio (SD-2, p. 7).
18. On April 19, 2024, the School District issued a NOREP recommending placement in an alternative school that could provide emotional supports. The proposed options were rejected by the Parent, however, “remote instruction and virtual weekly counseling sessions” were implemented for the remainder of the 2023-2024 school year (SD-7, p. 2). On April 25, 2024, the Parent signed the NOREP rejecting the recommendation and filed for Mediation (SD-11, p. 2).

District’s Arguments

The District alleges that beginning in the Fall and Winter of 2023, the Student began experiencing and manifesting an escalating, diagnosed psychiatric, mental health disorder. The District contends that because this

decline has manifested itself in a number of concerning behaviors in a short period of time, the Student should be placed in a therapeutic setting to ensure the safety of the Student, others while the District and the family collaborate to create an appropriate plan for the Student (NT, p. 23).

The District reports that there are appropriate placements available where the Student could attend school (SD-5), but the family is not cooperating with the District to secure an alternative placement.

Parent's Claims

The Parent refuses to consider an outside educational placement with a higher level of support.

The Parent argues that the injuries involved in the incidents described above did not result in "serious bodily injury" as contemplated by the law and, therefore, a change in placement is not appropriate. And, furthermore, the School District must show it made reasonable efforts to accommodate the student's disability so as to minimize the likelihood of injury.

The Parent requests Compensatory Education for each school day from April 1, 2024 to the present.

GENERAL LEGAL PRINCIPLES

Burden of Proof

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

In the present matter, the burden rests upon the District, who filed the Complaint. In essence, the District must prove by a preponderance of the evidence that the Student should be placed in a therapeutic IAES for up to 45 days based on safety.

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 finds the educators and the highly qualified psychiatrist who testified to be candid, credible and convincing. They all testified to the best of their ability, recollection, and perspective on the issues. They expressed their concerns about the Student's conduct and comments, and their desire to ensure that the Student receives the emotional supports needed. The Father's testimony contradicted the District's testimony about what he has stated in the past and he painted a

different picture of the Student. The Father believes that the differences are the result of being misunderstood based on bias and a language barrier.

IDEA Discipline Principles

When discipline is imposed, the IDEA provides important protections to students found to be eligible for special education services. A local education agency (LEA), including a school district, is permitted to remove a child with a disability from their current educational setting for violating 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 consequences is met if a removal for more than ten consecutive school days is imposed on an eligible student. 34 C.F.R. § 300.536(a).

“Any unique circumstances” 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).

Manifestation Determination

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 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). See *J.H. v. Rose Tree Media School District*, 2018 U.S. Dist. LEXIS 157803 (E.D. Pa. 2018) (upholding manifestation determination that conduct was not related to the student’s disability when the team considered all available relevant information, including the student’s disability-related manifestations, and agreeing there was no causal relationship); *Fitzgerald v. Fairfax County School Board*, 556 F.Supp.2d 543 (E.D. Va. 2008) (same).

Within ten 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 Manifestation Determination review team – including 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 student's IEP, the student’s disability, any teacher observations, and any relevant information provided by the parents.

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 remains entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.530(c) and (d). More specifically, the child shall continue to be provided educational services enabling him or her to participate in the general education curriculum, and to make progress toward meeting the IEP goals; and, where appropriate, have an FBA conducted and implementation of behavior interventions. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d). The student’s IEP team determines the services to be provided during the period of removal as well as the setting. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530(d)(5).

Unilateral Change in Placement and Serious Bodily Injury

The IDEA recognizes three special circumstances under which schools “may remove a student to an [IAES] for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability.” 20 U.S.C. § 1415(k)(1)(G). A District may remove a student to an IAES for not more than 45 school days, if the child: (1) Carries a weapon to or possesses a weapon at school, on school premises or at a school function; (2) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function; or (3) Has *inflicted serious bodily injury* upon another person while at school, on school premises or at a school function. 20 U.S.C. § 1415(k)(1)(G)(iii).

The IDEA borrows its definition of “serious bodily injury” from the criminal code which states in pertinent part, “(3) the term “serious bodily injury” means bodily injury which involves— (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty...” 18 U.S.C. (h)(3).

In this situation there was no evidence of weapons or drugs or a “serious bodily injury.” The School District asks the Hearing Officer to focus on the safety of the Student and others who are at risk of harm. Under the IDEA, if a district establishes that maintaining a student's current placement is substantially likely to result in injury to the student or to others, a hearing officer may order the student's removal to an appropriate IAES for up to 45 school days. 34 CFR 300.532(b)(2)(ii).

Compensatory Education

It is well settled that compensatory education may be an appropriate remedy where a District knows, or should have known, that a child's special

education program is not appropriate or that the student is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has also endorsed an alternate approach, sometimes described as a “make whole” remedy, where the award of compensatory education is crafted “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005); *J.K. v. Annville-Cleona School District*, 39 F.Supp.3d 584 (M.D. Pa. 2014). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

DISCUSSION

A special education hearing officer’s authority is limited in Expedited Discipline hearings. The hearing officer may (1) Return the eligible student to a placement from which the student was removed if the hearing officer determines that the removal was a violation of §300.530 or that the student’s behavior was a manifestation of the student’s disability; or (2) Order a change of placement of the eligible student to an appropriate IAES if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others. 34 CFR 300.532(b)(2)(ii). In this matter, the Hearing Officer focuses on the second prong; the issue of safety.

There are four incidents in which the Student was involved for which the Student received discipline. They occurred between December 2023 and

March 2024: (1) cutting a peer[redacted]; (2) punching a peer in the cafeteria [redacted]; (3) attacking and threatening a peer on the school bus; and (4) uttering concerning comments to the Assistant Principal. All of these incidents occurred during unstructured time; not in the classroom. None of these incidents involved weapons or drugs, and the injuries sustained by the students did not constitute "serious bodily injury" under the law. As a result, the Parents urge the Hearing Officer to find that the change in placement is inappropriate. However, this case isn't really about discipline; it's about providing emotional supports to a Student who has been diagnosed with psychiatric needs that the District believes would benefit from specialized services that go beyond what the District can offer at the [redacted] school attended by the Student.

A procedurally appropriate Manifestation Determination was held and the team concluded that the Student's conduct was a manifestation of the Student's disability.

There was no evidence that the Student's conduct was a direct result of a District failure to implement the Student's IEP. In fact, during this three month period, the District made several changes to the IEP to keep up with the Student's rapidly changing and escalating needs.

There was also no evidence that the District failed to continue to provide the Student with access to the general curriculum and counseling. Pending the expedited hearing and decision, the District continues to provide access to the general education curriculum and counseling, remotely, from home.

The Parent's allegation that the School District did not offer the Student the supports necessary to prevent injury must fail. The Hearing Officer finds that the District provided a preponderance of evidence that it did, in fact, offer supports beginning shortly after the first incident in December 2023 despite the Student's resistance to counseling and the 1:1

aide. The last three incidents occurred within three months during which the District conducted investigations and assessments, and increased services. Recognizing that the emotional supports it was providing were falling short, the District immediately sought a psychiatric evaluation to determine if the Student needed additional support.

If a district “believes that maintaining the current placement of [a child with disabilities] is substantially likely to result in injury to the child or to others, [it] may request a hearing.” 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a). When the Parent refused the additional supports recommended by the psychiatrist, the District immediately filed a Complaint and requested an expedited hearing requesting the change in placement.

Substantial Likelihood of Injury

The District met its burden of proving that a change in placement is warranted in light of the unique circumstances surrounding the Student’s escalating inappropriate behavior and comments, and the psychiatrist’s medical diagnosis. The Parent argued that the Hearing Officer should return the Student to school with no IAES because there was no evidence of a serious bodily injury. While the School wrote “*no injury*” on the incident reports in the Student’s disciplinary record, there is (1) evidence that the peer’s [redacted]; (2) a video of the Student punching a peer [redacted] during lunch in the cafeteria; and (3) a video showing that the Student [redacted]. The Hearing Officer believes that “injuries” occurred, no matter how the School coded them on the incident reports. It is also possible that the peers were reluctant to reveal that they were “hurt” to save face and/or avoid retaliation.

It is impossible to know if the Student would have caused a future “serious bodily injury” if the Student remained in the middle school, but that is irrelevant. The IDEA does not require the substantial likelihood of a

serious bodily injury. Rather, the IDEA requires only the substantial likelihood of “*injury*.” While the Hearing Officer does not have a crystal ball, I find that in light of the Student’s escalating behavior and “bizarre” and “hostile” comments, there is a substantial likelihood that the student or others might have been injured if the Student remained in the educational setting without the emotional supports the psychiatrist recommended and that go beyond the capacity of the [redacted] school to provide. For the Hearing Officer to ignore the recommendations of the well-educated, experienced psychologist would be ill-advised; so I must rely on the expert testimony of the psychiatrist.

The Hearing Officer concludes that the record in this case overwhelmingly supports the District’s determination that maintaining the Student’s placement is substantially likely to result in injury to the Student or to others. The record of this case shows a pattern of rapidly escalating behavioral incidents and threatening comments, which are not without risk, by the Student. In fact, the Student’s behavior and comments (whether or not injuries to peers were substantiated) are the basis for a host of legitimate safety concerns.

The Parent disagrees with the psychiatrist’s findings, yet the Parent did not offer an expert to rebut the conclusions reached by the psychiatrist who recommended that the Student attend a partial hospitalization program, and if this service was refused, an inpatient hospitalization.

Based on her medical diagnosis of the Student, the psychiatrist recommends a more therapeutic educational setting than is available in the [redacted] school classroom. For the Hearing Officer to ignore the expert’s serious concerns and medical diagnosis would be folly, putting the Student and others at risk. Therefore, the Hearing Officer finds in favor of the District.

Compensatory Education

The Hearing Officer finds no denial of a Free Appropriate Public Education (FAPE). There was no evidence provided by the Parent to substantiate the claim. The Student was receiving remote education and counseling from home during the relevant time period. Therefore, the Parent's claim for compensatory education is denied.

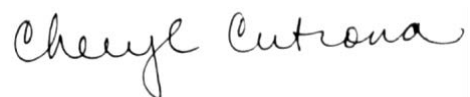
LEGAL CONCLUSIONS

The District met its burden of proving by a preponderance of the evidence that there is a substantial likelihood that the Student's current placement might result in injury to the Student or others. Therefore, an IAES placement for up to 45 days is appropriate.

1. The IEP team shall meet within one calendar week of the date of this decision to discuss "appropriate" IAES placements, as defined by the psychiatrist, with current availability.
2. The Parent shall cooperate and provide any necessary information needed by the District and the IAES to implement the placement.

ORDER

AND NOW, this 14th day of May, 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the District's request to place the Student in an Interim Alternative Educational Setting be GRANTED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.



Cheryl Cutrona, J.D.

Hearing Officer

Date of Decision

May 14, 2024

ODR 29523-23-24