

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. 28249-22-23

Child's Name:

K.L.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Pro Se

Local Education Agency:

Chichester School District
401 Cherry Street
Aston, PA 19014

Counsel for LEA:

Kalani Linnell, Esq.
Raffaele Puppio, LLP
19 W. Third Street
Media, PA 19063

Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

August 24, 2023

INTRODUCTION

K.L. (hereafter "Student")¹ resides within the boundaries of the Chichester School District (hereafter "District") with [redacted] and their Parents. The Student has been identified as eligible for special education services under the classifications of Specific Learning Disability (SLD) and Other Health Impairment (OHI).

The expedited issue here stems from several behavioral incidents that involved physical and verbal aggression, one of which resulted in a teacher being injured. Two manifestation hearings were held to discuss the incidents. The Parents did not attend either manifestation determination proceeding. The team concluded that the Student's behaviors were not a manifestation of the Student's SLD or OHI disabilities (NT, 124). The District asserted at the hearing that it would not be safe to maintain the Student's placement in the elementary school and proposed a change in placement.

The LEA filed an Expedited Due Process Complaint on June 26, 2023 requesting an Interim Alternative Education Setting (IAES) 45-day placement in a therapeutic, highly structured, small setting and an order compelling the Parents to release information to potential IAES placements and perform intake procedures.

The Complaint proceeded to a one-day, closed, expedited due process hearing on August 7, 2023.²

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).

² References to the record throughout this decision will be to the Notes of Testimony (NT) and School Exhibit (SD-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number. There were no Parent exhibits.

The Parents, albeit proper and timely notifications throughout the manifestation determination and pre-hearing processes, have failed to avail themselves and did not attend the due process hearing.

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the hearing officer. The only findings of fact cited herein are those needed by the hearing officer to explain the ruling. All exhibits and aspects of each witness's testimony are not explicitly referenced below.

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

ISSUE

Whether the School's unilateral change of placement to an IAES is appropriate under the circumstances.

FINDINGS OF FACT

1. [Redacted]. The Student enrolled in the District in August 2021, when the Student entered [redacted] grade (SD-2; SD-12, 15; SD-16, 6; NT, 116).
2. In the 2022-2023 school year, the Student accrued three excused absences and 60.5 unexcused absences. The Student had one excused lateness and 19 unexcused lateness (SD-3, SD-7, SD-8, NT, 118-119). During the 2021-2022 school year, the Student had four excused and nine unexcused absences, 23 unexcused lateness's, and was four half-day lateness's (SD-8, 1). The Student's inconsistent arrival times confounded the Student's ability to acclimate to the day's schedule, which led to increased verbal and physical aggression towards students and teachers (NT 101-102).
3. On September 28, 2022, the Student was referred to the Multi-tiered System of Supports (MTSS) team due to behavioral and learning acquisition issues (SD-8). As part of that referral process, the Student's reading level, math level and behavior were assessed. The Report concluded that the Student works well with an adult 1:1, does not work

well with other students (SD-8, 13), and has poor focus which adversely impacts the Student's ability to stay on track and miss learning points (SD-8, 15).

4. The Student regularly engaged in verbal and physical aggression towards staff and bullied other students. The Student had 25 disciplinary referrals during the 2021-2022 (SD-1) and the 2022-2023 (SD-6) school years including but not limited to incidents of defiance and noncompliance with staff requests, cursing, disrespectful language toward teachers and staff, name-calling, assaulting and bullying other students, eloping from designated areas, threatening harm to self and others, punching walls, jumping on furniture, threatening to jump out of a window, and throwing large objects (e.g., chairs).
5. The January 25, 2023 Evaluation Report determined that the Student was eligible for special education services under SLD after finding a severe discrepancy between the Student's cognitive ability and achievement (SD-12, 24; SD-16, 10), and a secondary diagnosis of OHI (SD-12, 20; SD-16, 10) that indicated attention issues. The Evaluation included observations and recommendations by teachers, specialists, and guidance counselors; a records review; curriculum-based assessments; and a comprehensive psychoeducational evaluation administered by the School District school psychologist. The assessments administered included the Wechsler Intelligence Scale for Children (WISC-V); the Wechsler Individual Achievement Test (WIAT-IV); the Behavior Assessment System for Children (BASC-III); and the Conners-3 Teacher Rating Report. The report concluded that the Student demonstrated significant behavioral challenges including impulse regulation, distractibility, aggression, adaptability, social skills, and executive functioning. The Student also demonstrated significant difficulty with grade-level academic skills, retaining learned material, and study skills. Further, the Conners-3

resulted in a Very Elevated Score consistent with Attention Deficit Hyperactivity Disorder (ADHD). The Psychoeducational Assessment indicated that the Student demonstrated average cognitive ability when compared to same-age peers, while experiencing remarkable academic weaknesses. In conclusion, the Student met the criteria for a student with SLD and OHI, and needed Specially Designed Instruction (SDI) in the areas of reading, math, and written expression (SD-12, 16, 19).

6. The Report recommended learning support for reading, written expression, and mathematics; small-group instruction; adaptations to the curriculum; preferential seating; social skills instruction; single-step directions with externally designed parameters; and a behavior plan (SD-12, 21-22).
7. An IEP meeting was held on February 15, 2023. The Father attended the meeting. The 2023 IEP (SD-16) included many program modifications and specially designed instruction (SDI) based on the 2023 Evaluation Report. Based on the Student's present levels of functional performance, an emotional support program "point and level" system was developed. Measurable goals and objectives were designed for reading, math, group counseling, and behavior (SD-16, 19-23), and 18 Program Modifications and SDIs were developed to address academic, behavioral, emotional support, social skills, and safety needs (SD-16, 24-25).
8. As a result of the school team's concerns about the Student's behavior, including physical and verbal aggression, property destruction and task refusal (NT, 90; SD-17, 2), a Functional Behavioral Assessment (FBA) was conducted by the Board Certified Behavioral Analyst (BCBA) assigned to the Student. The BCBA, employed by a service provider contracted through the School District, formally observed the Student on February 27, March 10, and March 15, 2023. A Behavior Intervention Plan (BIP) was developed for the Student and a Quick Reference Guide was

distributed to all of the Student's teachers and staff that provides a plan for preventing and responding to the Student's behavior (SD-17, 4). The BCBA consulted with the teachers and staff and modelled the strategies, and offered weekly support (NT, 97). During the short time the BIP was in effect, the Student's behaviors increased (NT, 101).

9. On April 27, 2023, the Student injured a teacher's knee. The teacher was wearing a knee brace for a previous injury that the Student knew about. The teacher's pants were torn and she suffered contusions. (SD-10, 5; NT, 24-27, 62)
10. On May 8, 2023, the Student [engaged in conduct that caused serious bodily injury to the same teacher]. As a result, the teacher went to the hospital, was diagnosed with a concussion and was on medical leave for several months. The teacher experienced extreme physical pain and still suffers from brain fog as a result of that injury (NT, 27-29, 66-67, 79-80, 108-109; SD-10, 13-16). The Student was suspended for two days (SD-21).
11. The Student demonstrated an intentional disregard for safety and behavior that risked harm to self and others (NT 44, 51-52, 55, 65, 75-82, 102-103, 110-112). In a level of heightened emotion, without adult intervention, the Student's awareness of the environment and the community decreased, which can lead to harm to self or others (NT 104).
12. On May 19, 2023, a Manifestation Determination review was conducted to discuss the May 8, 2023 injury to a teacher. The Parents did not attend the meeting. The conclusion was that the serious bodily injury to a teacher was not a manifestation of the Student's SLD or OHI (SD-22, 1-2).
13. On June 5 or 6, 2023, the Student climbed a ramp outside of the gym, then climbed up on the railings which were about five feet high, and became verbally aggressive toward the BCBA who intervened. The BCBA

redirected and de-escalated the Student's behavior, preventing the Student from tumbling off the railing (NT, 110).

14. A Manifestation Determination review was conducted on June 8, 2023 to discuss the June incident and whether a 45-day placement was appropriate. The Parents did not attend the meeting. The decision was that the behaviors of concern, attempting to hurt self and others, was not a manifestation of the Student's SLD or OHI and that a 45-day placement was necessary.
15. The Student has potential and has demonstrated the capacity for educational success with the right support (NT 32, 35, 68-69, 83-84, 113-114, 126).
16. Despite accommodations, the Student's behavior escalated to the point where meaningful progress has not been achieved (NT 48, 92, 101).
17. The School exhausted all of its in-house resources available to the Student and the Student would benefit from a more supportive setting (SD-126).
18. The Parents refused the School's offers to provide 1:1 support and declined to consider outside placements that can provide a higher level of support (NT 97-98).

Parents' Claims

The Parents did not submit evidence or attend the expedited hearing.

District's Claims

The School District argued that the concussion suffered by the teacher at the hands of the Student meets the legal definition of a "serious bodily injury" entitling the School to unilaterally move the Student to an IAES for not more than 45 days, where the Student will be provided with needed supports and ensure the safety of the Student, other students, and staff while the Parents and the School develop an appropriate educational plan for the Student.

The School District contended that it has exhausted all of their in-house resources available to the Student. Despite the resources provided, the Student's behaviors have escalated to the point where the safety of the Student and others is at risk. Therefore, the School District requested an order requiring the Parents to perform the necessary intake and referral procedures for a therapeutic, small-group, IAES where the Student can find educational success.

General Legal Principles and discussion

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief: the Parent. *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).

In the present matter the burden of persuasion rests upon the School District that filed the Complaint. In essence, the District must prove by a preponderance of the evidence that the Student meets the eligibility requirements for an IAES 45-day therapeutic placement. The Parents did not avail themselves of the opportunity to present evidence and offer their perspective of the situation. The evidence offered by the School District preponderantly proves that a 45-day IAES placement is warranted.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area School District*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

In this hearing, the Hearing Officer finds that the witnesses testified credibly and candidly when asked to share their relationship to the Student, their recollections of the incidents that occurred, and their opinions about the Student’s behavior, potential, and capacity to succeed with the proper supports. The teacher, who was injured as a result of the Student’s aggression, testified persuasively about her pain and suffering. The five witnesses painted a consistent picture of the Student and the events that precipitated this Complaint and the due process hearing.

IDEA Disciplinary Principles

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).

A "change of placement" based on disciplinary removals is defined as (1) removal for more than ten consecutive school days; or (2) a series of removals during the same school year that constitutes a "pattern." 34 C.F.R. § 300.536(a); see also 22 Pa. Code § 14.143(a). "Any unique circumstances" of a particular case may be considered by the LEA when determining whether a change in placement is appropriate for a child with a disability who violates a student code of conduct. 20 U.S.C. § 1414(k)(1)(A); 34 C.F.R. § 300.530(a).

Once a decision is made to change the placement of a child with a disability for violating the code of student conduct, the LEA must conduct a manifestation determination review to determine whether the conduct "was caused by, or had a direct and substantial relationship to, the child's disability; or ... was the direct result of" the LEA's failure to implement the child's IEP. 20 U.S.C. § 1415(k)(1)(E); see also 34 C.F.R. § 300.530(e). The team must consider "all relevant information in the student's file...including any relevant information provided by the parents[.]" 20 U.S.C. § 1415(k)(1)(E); see also 34 C.F.R. § 300.530(e). The manifestation determination must be made within ten school days of any decision to change the eligible child's placement, and must be made by "the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA)." 34 C.F.R. § 300.530(e); see also 20 U.S.C. § 1415(k)(1)(E).

If the team determines that the behavior was a manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and the team must also either conduct an FBA and implement a behavior

intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f).

If the team determines that the behavior was *not* a manifestation of the child's disability, the LEA may take disciplinary action that would be applied to children without disabilities, except that the child with a disability is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.101(a), 300.530(c) and (d). A parent who disagrees with a manifestation determination may appeal that decision. 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a).

In this case, the manifestation review hearings were held in a timely manner. The team concluded that the incidents that occurred were not a manifestation of the Student's disability. Whether or not that conclusion was appropriate is not an issue before the Hearing Officer.

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 interim alternative educational setting 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. The School District asks the Hearing Officer to conclude that the Student's actions caused a teacher to suffer a "serious bodily injury." The Hearing Officer finds that the injury suffered by the teacher was a "serious bodily injury" within the meaning of IDEA. The teacher's credible testimony regarding the concussion caused by the Student's actions indicates that she experienced pain, was under the care of a physician for three months before she was released to return to school, and still suffers from brain fog. As a result, the 45-day IAES placement recommended by the School District is warranted.

Substantial Likelihood of Injuries

The School District's alternative argument is that if the Hearing Officer did not find the teacher's concussion injury to be a serious bodily injury under IDEA, an alternative placement for no more than 45 days is appropriate because of the likelihood of future harm to the student and others.

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).

The testimony provided by five qualified and caring school teachers and staff as well as the behavior reports that describe a variety of disciplinary incidents, preponderantly establishes that a number of District professionals have genuine and serious concerns about Student's ongoing pattern of behavior.

In this situation, the evidence demonstrates that the Student revealed suicidal ideation and, in fact, announced the intention to commit suicide

when the Student attempted to jump out a window and off a ramp that would have caused serious injury to the Student had the staff not intervened. The School District responded appropriately by conducting a risk assessment, implementing a Safety Plan, and developing a Positive Behavior Plan for the Student.

Furthermore, the concussion incident was the second injury the Student caused by the Student to an individual teacher. The Student's record outlines a multitude of incidents involving physical aggression and behavior that could cause injury to the Student as well as others. Despite the SDIs and behavior plans in effect, the Student's behavior continued to escalate.

The District's determination that it would be in the best interest of the safety and welfare of the Student and the School community to place the Student in an alternative placement is appropriate. The evidence presented demonstrates that, without proper supports, the Student's behavior is substantially likely to cause self-injury and/or injure other students and staff. The District clearly demonstrated that it has exhausted its resources in providing education to the Student in the Least Restrictive Environment (LRE). The 45-day placement will offer the IEP team an opportunity to develop an educational plan while the Student is still young that will provide sufficient supports to develop the Student's potential and ensure educational success.

CONCLUSION

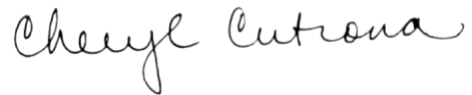
The School's request for a unilateral change of placement to an Interim Alternative Education Setting (IAES) for up to 45-days is warranted and hereby granted.

ORDER

AND NOW, this 24th day of August, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The Parents (or one designated Parent) shall make themselves available to attend an IEP Team meeting convened within ten (10) days of this Order, to discuss the IAES placements recommended by the School District.
2. The Parents shall cooperate with IAES intake procedures, and release any, and all, information requested by the School or the IAES placement within five (5) school days of any such request.

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
August 24, 2023
ODR 28249-22-23