

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:

22799/19-20AS

Child's Name:

L. C.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Christa Miller, Esq.
Offices of Kenneth Cooper
45 E. City Avenue, No. 400
Bala Cynwyd, PA 19044

Local Education Agency:

Global Leadership Academy Charter School Southwest
5200 Pine Street
Philadelphia, PA 19143

Counsel for the LEA

David Annecharico, Esq.
Sand & Sidel
113 S. 21st Street
Philadelphia, PA 19103
dannecharico@sandsaidel.com

Hearing Officer:

James Gerl, CHO

Date of Decision:

November 6, 2019

DECISION

DUE PROCESS HEARING

BACKGROUND

The parent filed a due process complaint seeking to invalidate the expulsion of the student on the basis that the conduct for which the student was being disciplined was a manifestation of the student's disability. I find for the parent after concluding that the conduct in question was caused by or had a direct and substantial relationship to the child's disability and that the conduct in question was the direct result of the charter school's failure to implement the student's IEP.

PROCEDURAL HISTORY

An expedited due process hearing was convened for this matter. At the hearing, three witnesses presented testimony. At the hearing, the following joint exhibits (although they are designated "S" rather than "J") were admitted into evidence: S-1 through S-8; S-9.1; S-9.2 and S-10 through S-28. Exhibit S-9 was withdrawn as duplicative. (Joint exhibits shall hereafter be referred to as "S-1," etc.; references to testimony at the hearing is hereafter designated as "T" of Title of Witness and/or Notes of Testimony "NT page").

At the end of the hearing, counsel for each party submitted oral closing arguments. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

The two following issues were presented by this expedited due process hearing:

1. Whether the parent has proven that the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability?
2. Whether the parent has proven that the conduct in question was the direct result of the charter school's failure to implement the student's IEP?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the expedited due process hearing, the hearing officer makes the following findings of fact:

1. The student was born on [redacted] and is a 6th grade student at the charter school. (S-21, S-11)

2. The student was evaluated by the charter school in a report dated October 29, 2017. Among the assessments administered was the Behavior Assessment for Children, Third Edition (BASC-3). The student's score for aggression on this assessment resulted in a percentile rank of 99 and a finding that the student's tendency for aggression was in the clinically significant range. The assessment also found that the student had clinically significant scores in the areas of adaptability, internalizing problems, withdrawal, conduct problems, hyperactivity, anxiety, and depression. (S-1)

3. The operative IEP for the student was adopted by the student's IEP team on November 15, 2018. The IEP notes that the student's behavior impedes the student's learning and the learning of others. The student's IEP lists the student's primary disability eligibility category as specific learning disability and notes that the student has a secondary disability – other health impairment. The IEP recognizes that the student demonstrates clinically significant levels of hyperactivity, aggression, conduct problems, anxiety, depression, attention problems, learning problems,

adaptability, social skills and functional communication problems. The IEP states that permissions for a functional behavioral analysis were sent home but not returned. The IEP includes a number of objectives and goals for behavior, including using appropriate coping skills in frustrating situations 90% of the day. The baseline noted is that the student had been demonstrating appropriate coping skills for approximately 75% of the day. The behavior objectives in the IEP also include the student using words to verbalize frustration. The IEP also provides for counseling as a related service to address the student's behavioral needs 60 minutes per week throughout the term of the IEP and additional grief counseling of unspecified duration and frequency. (S-21)

4. The student's mother never received any documentation concerning permission to conduct a functional behavioral analysis. The student's mother had no objection to signing a permission for the charter school to conduct a functional behavioral analysis if she had received one. (T. of student's mother -NT 17 – 37)

5. The purpose of the counseling as a related service specified in the student's IEP was to provide anger management and coping skills training to the student. During the relevant timeframe, the IEP called for the student to receive two 30-minute counseling sessions per week throughout the term of the student's IEP. (T. of charter school counselor – NT 37 – 79; T. of director of special services – NT 80 – 81; S-21)

6. During the month of January 2018, the student received a total of 45 minutes of counseling at the charter school. In February of 2018, the student received no counseling at the charter school. In March of 2018, the student received one hour of counseling. In April of 2018, the student received one hour and 25 minutes of counseling. In April of 2018, the student received no counseling. In May of 2018, the student received 30 minutes of counseling. (S-26; T. of counselor – NT 37 – 79)

7. In September of 2018, the student received 30 minutes of counseling at the charter school. In October 2018, the student received 30 minutes of counseling. In November 2018, the student received 40 minutes of counseling. In December 2018, the student received 10 minutes of counseling. In January of 2019, the student received one hour of counseling. In February 2019, the student received no counseling. In March 2019, the student received 30 minutes of counseling. In April 2019, the student received no counseling. In May 2019, the student received one hour of counseling. (S-27; T. of counselor)

8. In September 2019, the student received one hour of counseling at the charter school. In October of 2019, the student received no counseling at the charter school. (S-28; T. of counselor – NT 37 – 79)

9. The student had a number of previous disciplinary incidents at the charter school, many of them resulting from aggressive tendencies and poor coping skills. On October 11, 2017, the student [incident redacted]. On October 26, 2017, the student

[incident redacted]. On February 7, 2018, the student [incident redacted]. On February 9, 2018, the student [incident redacted]. On February 14, 2018, the student [incident redacted]. On February 14, 2018, the student [incident redacted]. On February 20, 2018, the student [incident redacted]. On February 20, 2018, the student [incident redacted]. On February 22, 2018, the student [incident redacted]. On February 23, 2018, the student [incident redacted]. On February 23, 2018, the student [incident redacted]. On December 3, 2018, the student [incident redacted]. On January 29, 2019, the student [incident redacted]. On January 29, 2019, the student [incident redacted]. On February 6, 2019, the student [incident redacted]. On September 12, 2019, the student [incident redacted]. On September 12, 2019, the student [incident redacted]. (S-15; T. of counselor – NT 37 – 79)

10. On September 17, 2019, the student engaged in inappropriate aggressive behavior at the charter school. [Incident redacted.] (S-14) During the course of the incident on September 17, 2019, the student made a statement that there was a knife in the student's book bag. When the charter school staff searched the student's book bag, they found two inappropriate objects. One was a kitchen knife with the blade broken off. The length of the remaining blade on the kitchen knife was approximately one and a half inches. In addition, the student's book bag contained a multi-tool with a number of small blade attachments. The length of the blades on the multi-tool was approximately two to two and a half inches. (S-14, S-18)

11. On September 17, 2019, the charter school recommended that the student be expelled effective September 18, 2019, because the student possessed two weapons and the student stated that [statement redacted]. (S-22)

12. On September 25, 2019, a manifestation determination for this incident was conducted. Present at this meeting were the student's mother, the charter school's director of special services and a charter school special education liaison. The team considered the student's eligibility categories of specific learning disability and other health impairment and determined that the conduct in question was not caused by those eligibility categories. The team also concluded that the student's conduct was not the direct result of the charter school's failure to implement the IEP. The manifestation determination review document indicates that the student was to receive counseling and has a behavior goal but does not mention the number or frequency of counseling sessions provided to the student. The student's mother disagreed with the conclusions of the manifestation determination team. (S-19)

13. The conduct in question by the student on September 17, 2019 was caused by or had a direct and substantial relationship to the student's disability, particularly the student's clinically significant problems with aggression and lack of adaptive, coping and social skills. (Record evidence as a whole)

14. The conduct in question by the student on September 17, 2019, was the direct result of the charter school's failure to implement the counseling services provided by student's IEP. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as the independent legal research by hearing officer, the hearing officer makes the following conclusions of law:

1. The special education laws provide that in general a student with a disability may not be punished by means of a change of educational placement for conduct that is a manifestation of his/her disability. Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA") 20 U.S.C. § 1400, *et seq.*, § 615(k); 34 C.F.R. § 300.530(f); 22 Pa. Code § 14.143. The unique circumstances of a student with a disability must be considered on a case-by-case basis in such circumstances. § 615(k)(1)(A); 34 C.F.R. § 300.530(a)

2. When a local education agency decides to change the educational placement of a child with a disability because of a violation of a code of student conduct, it must within 10 school days convene a manifestation determination review meeting with the local education agency, the parent and relevant members of the student's IEP team. The manifestation determination review team is to 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 or substantial relationship to the child's disability; or

(ii) If the conduct in questions was a direct result of the local education agency's failure to implement the IEP.

IDEA § 615(k)(1)(E); 34 C.F.R. § 300.530(e).

3. If the manifestation determination review team determines that either of the two prongs of the test are answered in the affirmative, the local education agency may not change the student's educational placement. If the answer to both questions is no, the student may be disciplined in the same manner and for the same duration as children without disabilities. 34 C.F.R. § 300.530(e)(2) and 300.530(c).

4. If it is determined that the student's behavior was a manifestation of the student's disability, the student's IEP team must either conduct a functional behavioral assessment and implement a behavioral intervention plan for the child or, if a behavioral plan had previously been developed, review the behavioral intervention plan and modify it as necessary to address the student's behavior. In addition, where the student's conduct was a manifestation of the student's disability, the student must be

returned to the placement from which he was removed unless the parent and local education agency agree otherwise as a part of the modification of the behavioral plan.

34 C.F.R. § 300.530(f)

5. When a parent challenges a manifestation determination review with a due process complaint, there must be an expedited hearing within 20 school days after the filing of a complaint and a decision within 10 school days after the hearing. 34 C.F.R. § 300.532(c); Letter to Gerl, 51 IDELR 166 (OSEP 2008). When a local education agency violates the IDEA discipline rules, a special education hearing officer has broad authority to order appropriate equitable remedies, including changes to the placement of the student and/or elimination or reduction of the disciplinary penalty. 34 C.F.R. § 300.532(b); See District of Columbia v. Doe ex rel. Doe, 611 F.3d 888, 54 IDELR 275 (D.C. Cir. 2010).

6. To the extent that any state statute might conflict with IDEA, a federal statute, IDEA prevails pursuant to the supremacy clause of the United States Constitution. Article VI, Cl. 2; English v. Elec Co., 496 U.S. 72, 78 – 79 (1990); Lower Merion Sch. Dist. v. Doe, 931 A.2d 640, 48 IDELR 255 (Penna. S. Ct. 2007); In re Student with a Disability, 108 LRP 45824 (SEA W. Va. 2008).

7. The parent has proven that the charter school's decision to expel the student for the student's conduct on September 17, 2019 violates IDEA because the conduct in question was a manifestation of the student's disability.

DISCUSSION

I. Merits

IDEA provides special protections regarding student discipline because prior to the passage of the predecessor to IDEA, local education agencies often misused disciplinary measures in order to exclude children with disabilities from the school altogether. Honig v. Doe, 484 U.S. 305, 324, 559 IDELR 231 (1988).

The key protection provided by the law is the requirement that students with disabilities cannot be punished by means of a change of educational placement for conduct that is a manifestation of his/her disability. IDEA § 615(k); 34 C.F.R. §300.530(f); 22 Pa. Code § 14.143. Thus, when a change of placement of a student with a disability is contemplated because a student violated a student code of conduct which is not covered by one of the exceptions, a local education agency must convene a manifestation determination meeting. IDEA § 615(k)(4); 34 C.F.R. § 300.530(e).

In closing argument, counsel for the charter school contended that the student's conduct was sufficient to be considered under the exceptions to the manifestation determination rule that allows a local education agency to place a student in an interim alternative educational setting (hereinafter sometimes referred to as "IAES") because the student possessed a weapon on school grounds. See, 34 C.F.R. § 300.530(g)(1).

After the charter school's closing argument, the hearing officer questioned counsel concerning the charter school's position to ensure that its position was clear. Counsel for the charter school stated that the charter school could have requested an IAES for the student under the exception for the use of a weapon, but that the charter school felt compelled under Pennsylvania Act 26, 24 Pa. Code. § 13-1317.2, to expel the student because the student carried a weapon on the premises of the school. Accordingly, the charter school proceeded with a manifestation determination in an effort to expel the student rather than assign the student to an IAES. Thus, although the charter school has cited the IAES weapon provision, it is not applicable in this case because the charter school did not in fact assign the student to an IAES for up to 45 school days as a result of the possession of a weapon.

To the extent that the charter school is arguing that the Pennsylvania statute takes precedence over IDEA concerning the discipline of students with disabilities, the charter school's argument is rejected. Under the supremacy clause of the United States Constitution, a federal statute, such as IDEA, prevails over a state statute, such as Act 26. The charter school was not required to expel the student; the charter school's argument concerning a state law requirement that it expel the student is rejected. Instead, under IDEA, there must first be an analysis of whether the proposed expulsion was a manifestation of the student's disability. In the event that the conduct in question was not a manifestation, then the charter school would have been free to apply Act 26

and any other procedures that apply to all students in deciding how to discipline a student with a disability.

1. Whether the parent has shown that the conduct in question was caused by, or had a direct and substantial relationship to the child's disability.

The first prong of the manifestation determination analysis involves whether the conduct in question was caused by or had a direct or substantial relationship to the child's disability.

In the instant case, the charter school's evaluation of the student found that the student's score on the aggression subtest of the BASC-3 was in the 99th percentile. The evaluator found the score to be clinically significant and noted that the student had a history of being argumentative, defiant and threatening to others. The same assessment found that the student had a percentile rank of 99 on the conduct problems assessment. The evaluator noted that the student's teachers reported frequent rule breaking behavior by the student. The student's IEP and the evaluation note that the student demonstrates clinically significant levels of aggression, conduct problems, adaptability, social skills and functional communication problems. The student's IEP includes goals and objectives pertaining to the student's expression of frustration or angry feelings, using the student's words when frustrated, complying with adult directives, and the use of appropriate coping skills in frustrating situations. The IEP provides that the student

will receive counseling services 60 minutes per week as a related service, as well as additional unspecified grief counseling.

Given that the charter school recognized in the student's IEP that the student's disability caused the student to have clinically significant levels of aggression, and problems with adaptability, social skills, and functional communication problems, hyperactivity, conduct problems, anxiety, depression, attention problems, and learning problems, it is clear that the student's conduct in getting into a fight with another student and threatening the other student and in bringing a broken kitchen knife and multi-tool to school were all manifestations of the student's disability.

Moreover, although that IEP mentions a functional behavioral analysis, it states that the mother failed to return a permission form. It was the unrebutted testimony of the student's mother, however, that she never received a permission form and that she would have signed one if she had received one. The mother's testimony on this point was very credible and persuasive. It is concluded that the charter school did not take reasonable steps to address the student's problem behaviors, such as a functional behavioral analysis, despite the evaluation and IEP mentioning many clinically significant behavior tendencies of the student, especially the aggressive tendencies. Even after numerous disciplinary incidents involving aggression by the student at the charter school, it failed to conduct a functional behavioral analysis. Although the IEP

states that the student's behaviors interfered with the student's learning, the charter school did not take sufficient steps to address the student's problem behaviors. 34 C.F.R. § 300.324(a)(2)(i).

The charter school, in closing argument, focused upon the student's eligibility categories of specific learning disability and other health impairment. However, the analysis for manifestation determination must include all of the effects of the student's disability in assessing whether or not the behavior in question was a manifestation. Bristol Township Sch Dist v ZB by KB & RB, 67 IDELR 9 (E.D. Penna 2016); Analysis of Comments to Proposed Federal Regulations, 71 Fed. Register No. 156 at p. 46720 (OSEP August 14, 2006). The charter school's focus upon the disability categories, as opposed to the full range of disabilities and conditions caused by the student's disability, is rejected.

The parent has demonstrated that the behaviors for which the charter school sought to expel the student were manifestations of the student's disability.

2. Whether the parent has proven that the conduct in question was a direct result of the charter school's failure to implement the student's IEP?

The second prong of the manifestation determination analysis involves whether the conduct in question was a direct result of the local education agency's failure to implement the IEP.

In the instant case, the student's IEP required 60 minutes of counseling per week for the student in view of the student's problems with anger and aggressiveness, as well as the student's problems with adaptability, coping and social skills. The charter school failed to provide this important counseling to the student.

The logs of the charter school show that the student did not regularly receive counseling at the charter school. Although the charter school makes the point that the student was absent from school on a number of occasions when counseling sessions were scheduled, the logs and the supporting testimony of the charter school's counselor demonstrate that the student generally did not receive anything close to the student's full allotment of counseling, 60 minutes per week. In many whole months the student received 60 minutes or less of counseling for an entire month, rather than per week. In some months the student received no counseling at all. It is apparent that when the student missed a counseling session, no effort was made to reschedule the counseling. In the month of February, 2018 for example, the parent notes in closing argument that

the student received no counseling at all at the charter school despite the student being involved in nine disciplinary incidents that month, at least six of which involved acts of aggression.

This is a case where the student's IEP team determined that the student needed counseling because of the student's disabilities, in particular the student's aggressive tendencies and lack of adaptability, coping and social skills. The purpose of the counseling was to help the student with anger management and coping skills. The student clearly needed this counseling. Despite that recognition, however, the charter school did not provide the counseling services that the student so desperately needed.

It is readily apparent from the evidence in the record that the incident [details redacted] and the possession of a broken kitchen knife and a multi-tool at school was the direct result of the charter school's failure to provide the related service of counseling as prescribed by the student's IEP. The failure to implement the counseling related services provisions of the student's IEP by the charter school was material to the student's education and directly resulted in the conduct for which the charter school sought to expel the student.

Counsel for the parent has cited a hearing officer decision concerning the implementation argument. As counsel for the charter school stated in response, however, that decision is distinguishable because the facts are significantly different.

Nonetheless, for the reasons stated above, it is concluded that the parent has proven that the conduct for which the charter school seeks to discipline the student was a direct result of the charter school's failure to implement the student's IEP.

II. Relief

Because the Manifestation Determination Review team clearly reached the wrong conclusion on both prongs of the analysis, it is concluded that the conduct for which the charter school sought to discipline the student was a manifestation of the student's disabilities. Accordingly, the charter school's decision to expel the student will be invalidated.

It is concerning, however, that the student did bring a broken kitchen knife and a multi-tool to school with [redacted]. Accordingly, before the student returns to the charter school as a student, the charter school will be required to retain the services of a board certified behavior analyst to conduct a thorough and complete functional behavioral analysis of the student. The functional behavioral analysis must be completed within 30 days of the date of this decision. Parent will immediately sign any necessary consent forms. Thereafter, working with a board certified behavior analyst, the student's IEP team should meet and develop a positive behavior support plan for the student and make any necessary changes or adjustments to the student's IEP to ensure that the student's aggressive tendencies and the student's lack of social skills,

coping and adaptability are properly under control and that the student's problem behaviors are addressed.. The IEP team should meet within 14 days of the date of the functional behavioral analysis report by the board certified behavior analyst. The IEP team and a board certified behavior analyst should discuss whether any additional evaluations of the student would be helpful prior to the student's return to school.

The charter school took a very hard line with this student. It definitely violated the mandate of IDEA that discipline of students with disabilities be handled on a case-by-case basis. IDEA § 615(k)(1); 34 C.F.R. § 300.530(a). It is apparent from the tone of the expulsion package documents in the record prepared by the charter school, as well as the charter school's apparent desire to enforce a "zero tolerance" philosophy of student discipline, that the staff of the charter school needs additional training concerning the law pertaining to discipline of students with disabilities, as well as potential alternatives to the traditional "zero tolerance" philosophy of student discipline, including training on restorative justice and restorative practices. See, Larimer County Sch. Dist., 115 LRP 36469 (SEA Colo. 2015); San Francisco Unified Sch Dist, 117 LRP 26084 (SEA Calif 2017); Dear Colleague Letter, 68 IDELR 76 (OSERS & OSEP 2016); Consensus Report on School Discipline (Council on State Governments 2014) available at http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf ;

Restorative Justice and Special Education,

<https://www.cadeworks.org/resources/cadre-materials/restorative-justice-practice-special-education-resolving-conflict-and> ; See additional materials concerning restorative justice on the website of CADRE, the OSEP funded technical assistance agency for dispute resolution in special education, <https://www.cadeworks.org/>

Because equitable relief under IDEA should be flexible and because IDEA is a collaborative process, Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), the parties shall have the option to agree to alter the relief awarded, so long as both parties and their lawyers agree in writing.

ORDER

Based upon the foregoing, it is HEREBY ORDERED:

1. The manifestation determination review and the expulsion of the student challenged herein are invalidated;
2. Within 30 days of the date of this decision, the charter school will hire or contract with a board certified behavior analyst who will complete within that time frame a functional behavioral analysis of the student;
3. Within 14 days of the report of the functional behavioral analysis by the board certified behavior analyst, the student's IEP team will meet with the functional behavioral analyst and prepare a positive behavior support plan for the student, as well as determine whether any changes or adjustments to the student's IEP are appropriate

to control the student's aggressive tendencies, problem behaviors and lack of skills in the area of adaptability, coping and social skills, as well as consider whether any other evaluations of the student are required;

4. Within 180 days of the date of this decision, the charter school shall conduct training for all staff who participate in manifestation determination reviews or decisions to discipline students with disabilities, concerning the IDEA discipline provisions as well as alternatives to the traditional "zero tolerance" philosophy of discipline, including training in restorative justice and restorative practices, as it relates to the behavior of students with disabilities; and

5. The parties may amend or adjust the terms of this order by mutual written agreement signed by all parties and all counsel of record.

IT IS SO ORDERED.

ENTERED: November 6, 2019

James Gerl

James Gerl, CHO
Hearing Officer