

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:

22944-19-20

Child's Name:

J.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

None

Local Education Agency:

York Academy Regional Charter School
32 W. North Street
York, PA 17401

Counsel for the LEA

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Exton, PA 19341

Hearing Officer:

James Gerl, CHO

Date of Decision:

December 16, 2019

BACKGROUND

The charter school filed a due process complaint seeking to change the student's placement to an interim alternative educational setting. The charter school seeks the interim alternative educational setting because it alleges that the student possessed a weapon at the charter school. In the alternative, the charter school seeks that the hearing officer assign the student to an interim alternative educational setting because the student is likely to injure self or others. The due process complaint also sought a ruling that the charter school's manifestation determination review conclusion was correct- that the student's problem behaviors were not a manifestation of the student's disabilities. At the due process hearing, the charter school withdrew the issue concerning the manifestation determination review. The parents disagree with the charter school's conclusion that the student's placement should be changed to an interim alternative educational setting. I find in favor of the parents; that is, I find that the charter school has not proven that that the student's placement should be changed to an interim alternative educational setting.

PROCEDURAL HISTORY

The parties completed the administrative record in the one-day expedited hearing. Five witnesses testified. The parents' Exhibits 1 through 15 were admitted into evidence. The charter school's Exhibits 1 through 9 and 11 through 16 were admitted into evidence. Charter school's Exhibit No. 10 was withdrawn.

At the conclusion of the hearing, the parents and counsel for the charter school presented oral closing arguments. Neither party offered any proposed findings of fact.

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 following single issue was presented by the due process complaint in this case:

1. Whether the charter school has proven that the student's placement should be changed to an interim alternative educational setting?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact.¹

1. The student was born on [redacted] and is [a redacted] student at the charter school. (S-6)
2. On April 4, 2019, the student's parents filed a mediation request and a due process complaint stating that the student had been at the charter

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

school for five months without an IEP and that the student needs more help. (P-9)

3. The student received an independent psychological evaluation on July 16, 2019. The evaluator administered the Wechsler Intelligence Scale for Children, Fifth Edition, and determined that the student's full-scale IQ was 113, which places the student at the 81st percentile. The evaluator also administered the Wechsler Individual Achievement Test, Third Edition, and the student's achievement abilities fell in the average to high average range. The only weakness was reading comprehension, which fell into the low average range. The evaluator administered the Conners Behavior Assessment and determined a trend of severe inattention, hyperactivity and destructive behaviors with scores ranging from severe to profound. The evaluator concluded that the student had autism spectrum disorder, without intellectual impairment, attention deficient hyperactivity disorder combined presentation, speech sound disorder and disruptive mood dysregulation disorder. (P-14; S-3; NT 68)
4. The independent evaluator recommended that the student be provided an IEP because the student's current 504 plan was clearly not meeting the student's educational needs and that the student required additional support and accommodations through special education. The evaluator recommended specially designed instruction in the area of arithmetic. The evaluator also recommended a number of specific accommodations and suggested that medication management may assist the student, if the family is open to meeting with a pediatric psychiatrist. (P-14; S-3)
5. Pursuant to a previous due process complaint, a special education hearing officer ruled that the student needed more than supplemental learning support and required special education in reading

comprehension and mathematics. The hearing officer also ordered an independent speech evaluation and independent functional behavioral analysis. The charter school implemented the decision in a Notice of Recommended Educational Placement dated August 26, 2019. (S-7; P-9; S-12; NT 168-170, 36, 68)

6. On August 26, 2019, the charter school developed an IEP for the student. The student was found to be eligible for special education under the category of autism with a secondary category of other health impairment. The student's IEP placed the student in the general education classroom approximately 83% of the school day. The IEP contained goals for math, reading and behaviors, as well as modifications and specially designed instruction. The student received the related service of counseling for 25 minutes per week, and the student received the related service of social skills instruction twice a week for 25 minutes each. (S-6)
7. On September 30, 2019, a functional behavioral assessment of the student ordered by a hearing officer was completed by a board-certified behavior analyst. The behavior analyst identified specific problem behaviors: calling out, running, refusal, touching others, inappropriate vocalizations, and leaving the location. The behavior analyst hypothesized that the function of the behaviors was gaining peer attention, attention from additional staff members, and avoiding demands/delaying or escaping completion of work tasks. (S-8; S-12; NT 36)
8. On October 4, 2019, an independent speech language evaluation of the student ordered by a hearing officer was conducted. The evaluator made a number of recommendations concerning speech and language support that might be added to the student's educational plan. (S-9; S-12; NT 36)

9. A positive behavior support plan was developed for the student on October 10, 2019. (S-11)
10. The student had approximately 24 disciplinary office referrals at the charter school from August 14, 2019 through October 30, 2019. Almost all of the infractions were classified as disrespectful behavior, insubordination, or disruptive behavior. (S-4)
11. The student was suspended for a total of 12 school days for the period from August 14, 2019 through November 11, 2019. The charter school applied its disciplinary rules to the student in a very harsh manner. (S-4; NT 187-189)
12. On October 23, 2019, the student spent most of the class period [redacted]. The student refused to stop when asked to do so. During class transition, the student [redacted]. The [redacted] teacher got in-between the student and the other students. The student pushed the teacher out of the way. About an hour later, the student jumped onto the [teacher] when the teacher was throwing out paper that the student had thrown around the classroom. The student was charged with disruptive behavior, insubordination and repeated violations. The student's parents were called for a conference with the CEO and the student was suspended from school for two days as a result of these incidents. (S-4)
13. On October 28, 2019, an IEP was developed for the student. It added the related service of speech language therapy. The IEP included the student's behavior plan. The student was to be in the general education classroom approximately 61% of the day. (S-14; NT 87)
14. On October 31, 2019, [redacted]. The student was written up for disruptive behavior, disrespectful behavior and repeated violations. The student's parents were was called and a conference with the

student and the parents was held. The student's actions [redacted] was not endangering the other students in the classroom. (S-4; NT 98 - 100)

15. On November 8, 2019, the student attempted to get into the [redacted] classroom, but because the teacher had seen the student slamming the student's shoulder into the whiteboard, the teacher blocked the door. The student attempted to get in the door and the teacher asked the student to go around into the [redacted] classroom instead. The student forced self into the gap between self and the teacher and then [redacted]. The teacher asked other staff to escort the student out of the room and asked another teacher to monitor the class. The teacher charged the student with physical aggression. (S-4)
16. On November 11, 2019, the student was observed [redacted] during lunch. Staff members attempted to redirect the student. When the charter school CEO came to the cafeteria and asked the student to come with her to the office, the student refused. The student then ran into the gym in order to play basketball. While playing, the student was throwing the ball toward some other students and running full speed at others. The student received a disciplinary referral for insubordination and stealing. (S-4)
17. The student received fifty minutes per day of Math and English Language Arts one-on-one from the special education teacher. The student did not display any inappropriate behaviors when working one-on-one with the special education teacher. (NT 87-90, 45, 68-70)
18. On October 28, 2019, the charter school conducted a manifestation determination because of the student's conduct in [redacted] class on October 23, 2019. Present for the manifestation determination meeting were the student, both parents, a school psychologist, the

special education teacher who worked with the student and two representatives of the local education agency. The manifestation determination review team determined that the student's conduct in [redacted] were not manifestations of the student's disability and were not directly caused by a failure to implement the student's IEP. The student and the student's parents disagreed with the conclusion of the manifestation determination review team. (S-13)

19. The charter school did not convene the student's IEP team as a result of the student's behaviors to discuss whether changes were needed to the behavior support plan or whether a more restrictive placement, such as a separate special education class, might be more appropriate for the student. The charter school does not have available any separate special education classes for students with disabilities. (NT 87 – 90)
20. The charter school proposed that the parents apply to a private school as a possible interim alternative educational setting. A program at the Intermediate Unit was discussed as an alternative placement during the resolution meeting for this due process complaint. (NT 47 – 48, 57)
21. The charter school did not issue to the parents a prior written notice, or a Notice of Recommended Educational Placement, or any other notice or written documentation concerning the interim alternative educational setting that it was recommending for the student. (NT 57 – 60)
22. The [implements/tools] that the student possessed and that the student and all other students in the design classroom possessed, are not "dangerous weapons." These items are not used for, or readily

capable of, causing death or serious bodily injury. (record evidence as a whole)

23. Maintaining the student's current educational placement is not substantially likely to result in injury to the child or others. (record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of counsel and the parties, all of the evidence in the record, as well as the independent legal research conducted by the 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. IDEA § 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 convene a manifestation determination review meeting. IDEA § 615(k)(1)(E); 34 C.F.R. § 300.530(e).
3. An exception to the general rule that the educational placement of a student with a disability may not be changed because of conduct that is a manifestation of the disability, is that a local education agency may, regardless of manifestation, remove a student to an interim

alternative educational setting for not more than 45 school days, if the child:

- i) Carries a weapon to or possesses a weapon at school, on school premises or at a school function;
- ii) 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
- iii) Has inflicted serious bodily injury upon another person while at school, on school premises or at a school function.

When a removal occurs for one of these three reasons, the local education agency must notify parents on the date on which the decision is made and provide the parents with a copy of the procedural safeguards notice. For purposes of this section, weapon is given the same meaning as dangerous weapon under Section 30 of Title 18 of the United States Code. 34 C.F.R. § 300.530(g) and (h); IDEA § 615(k)(1)(G).

- 4. The definition of "dangerous weapon" is a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocketknife with a blade of less than two and half inches in length. 18 U.S.C. § 930(g)(2); 34 C.F.R. § 300.530(g), (h) and (i)(3).
- 5. An additional exception to the rule that a student with a disability may not have his or her placement changed because of conduct which is a manifestation of the disability, is that a local education agency can file a due process complaint in order to attempt to persuade a hearing officer that the student's placement should be changed to an appropriate interim alternative educational setting for not more than

45 school days because maintaining the current placement for the student is likely to result in injury to the student or others. 34 C.F.R. § 300.532(b)(ii); IDEA § 615(k)(3)(B).

6. When a current disciplinary sanction or proposed interim alternative educational setting is challenged, there must be an expedited hearing within 20 school days after the filing of the complaint and a decision within 10 school days after the hearing is completed. 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).
7. A local education agency must provide prior written notice to a parent whenever it proposes or refuses to initiate or change the identification, evaluation, educational placement or the provision of FAPE to a child with a disability. Such prior written notice must include a description of the action or refusal, an explanation of why the agency proposes or refuses to take the action, a description of each evaluation or assessment considered, a statement that the parents have protection under the procedural safeguards, sources for the parent to contact to obtain additional assistance and understanding these protections, a description of other options that the team considered and the reasons why those options were rejected and description of other factors that are relevant to the local education agency's proposal or refusal. 34 C.F.R. § 300.503; IDEA § 615(c).
8. A local education agency must "... to the maximum extent appropriate (ensure that) children with disabilities ... are educated with children

who are non-disabled and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 PA Code § 14.195.

9. The Third Circuit has stated that the least restrictive environment provision sets forth a "strong congressional preference" for integrating children with disabilities in regular classrooms. *Oberti v. Board of Education*, 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993).
10. As a part of the least restrictive environment requirement of IDEA, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. 34 C.F.R. § 300.115.
11. An IDEA hearing officer has broad equitable powers to remedy a violation of the Act. *Forest Grove School District v. TA*, 557 U.S. 230, 52 IDELR 151 (2009); *Stapleton v. Penns Valley Area School District*, 71 IDELR 87 (M.D. Penna 2017); *In re Student With a Disability*, 52 IDELR 239 (SEA W. Va. 2009).
12. The charter school has not proven that the student's educational placement should be changed to an interim alternative educational setting for not more than 45 school days because the student possessed a weapon at school.
13. The charter school has not proven that the student's educational placement should be changed to an interim alternative educational

setting for not more than 45 school days because maintenance of the current placement is substantially likely to result in injury to the student or others.

DISCUSSION

Whether The Charter School Has Proven That The Student's Placement Should Be Changed To An Interim Alternative Educational Setting?

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

The charter school contends that the student's placement should be changed to an interim alternative educational setting because the student possessed a dangerous weapon, or in the alternative, because the student is likely to injure self and others if the student remains in the current placement.

The charter school has never identified an interim alternative educational setting for the placement that it seeks. Although a prior written notice, or a Notice of Recommended Educational Placement, is required by law whenever a local education agency seeks to change the placement of a student with a disability, the charter school admits that it never issued a prior written notice or a Notice of Recommended Educational Placement concerning the proposed change to an interim alternative education setting for the student. It appears that the charter school attempted to offload its responsibility to find an alternative placement for the student by asking the parents to attempt to get the student into a private school. This is not appropriate.

It should be noted that there are two separate written notice requirements that apply to the removal of a student from his/her current educational placement to an interim alternative educational setting. There is the general prior written notice requirement of IDEA for any change of placement (34 C.F.R. § 300.503). There is also an additional notification requirement specific to the removal of a student to an interim alternative educational setting (34 C.F.R. § 300.530(h)). In the instant case, the charter school failed to provide either the general prior written notice or the notice specific to an interim alternative educational setting. The failure to provide such notice to the parents substantially impairs the parents' right to participate in the process and accordingly invalidates the charter school's claim that an interim alternative educational setting would be appropriate. The testimony of the CEO of the charter school revealed that the charter school never identified in writing to the parents the setting being proposed as an interim alternative educational setting. Thus, the charter school never complied with the legal requirement that the parents have the information necessary in order to make such an important decision. The CEO testified that the idea for the program at an intermediate unit first arose during conversations with the parents at the resolution session held after this complaint was filed. (It appears that the parties held a resolution session in this case, even though one was not required because the complaint was filed by the local education agency and not the parents. See 34 C.F.R. § 300.510.) Although these cases have expedited timelines for a reason, it is nonetheless important that an interim alternative educational setting be identified and articulated to the parents prior to the filing of a due process complaint. The charter school's request for an interim alternative educational setting as the student's change in placement is rejected because it failed to comply with the important written notice requirements of the law.

Assuming *arguendo* that the charter school had properly provided written notice to the parents concerning the interim alternative educational setting, the charter school has also not proven that the student possessed a “dangerous weapon” while at school. The testimony of the classroom teacher and the documentary evidence supporting the incident in question involves the student’s use of a [redacted] in the design classroom. Although the student [redacted] these items are not weapons. They are not knives or guns or other instruments readily capable of causing death or serious bodily injury. There is no evidence in the record as to [redacted]. It is concluded that the student did not possess a dangerous weapon at school. Indeed, to accept the logic of the charter school’s position would mean that every student in the [redacted] class should be expelled because they were all in possession of a dangerous weapon. Clearly, this is not what Congress had in mind when enacting the disciplinary protections for students with disabilities. The charter school has not proven that the student possessed a dangerous weapon at school. This argument is rejected.

In the alternative, the charter school argues that the hearing officer should permit a change of the student’s placement to an interim alternative educational setting because maintaining the student’s current placement is substantially likely to result in injury to the student or others. It is apparent from the evidence in the record, however, that the student does not constitute a substantial danger to self or others. Indeed, the incident reports filled out by charter school staff concerning the incidents in question mark the conduct as insubordination or failure to respond to directions or physical contact. None of the incidents mentioned during the testimony of the witnesses in this case were labeled as physical aggression or dangerous conduct or anything of that nature. The labels applied by the charter school staff to the problem behaviors of the student reveal that they did not view

the conduct to be likely to cause injury. The evidence does not support the argument.

It appears from the evidence in the record that the charter school wanted to rid itself of the student. IDEA does not permit that result. As the parent testified, the charter school's application of discipline to the student has been too harsh.

Accordingly, the student will be ordered back to the student's previous placement because the charter school has not met its burden. It is also apparent from the record evidence, however, that the student's IEP team should meet to consider whether any changes to the student's behavior intervention plan or placement consistent with changes to the behavior plan are necessary. See, 34 C.F.R § 300.530(f). It is significant, for example that the special education teacher testified that the student does not display any problem behaviors when the special education teacher is working with the student in a one-on-one setting. Thus, it is possible that the team may conclude that the student needs a slightly more restrictive setting while still being consistent with the least restrictive environment requirement of IDEA.

It is also significant, however, that the special education teacher testified that there are no separate special education classes available at the charter school. It is the responsibility, under IDEA, of a local education agency, such as the charter school, to have available a continuum of alternative placements, including separate classes. Thus, the charter school must either provide a separate class at the charter school, if that is what the IEP team determines that the student needs, or else make it available through some other source and pay for it, including any transportation costs.

The testimony of the parent was more credible and persuasive than the testimony of the charter school employees who testified at the hearing based upon the demeanor of the witnesses, as well as the following factors:

the charter school testimony that the student was unsafe or a danger or in possession of dangerous weapons is impaired by the fact that the school district pursued a manifestation determination review for the purpose of suspending the student. Such a course of action would be inconsistent with the idea of placing the student into an interim alternative educational setting, which does not require a showing of no manifestation. The charter school dropped the argument concerning the appropriateness of the manifestation determination review that was originally in the due process complaint at the due process hearing. The fact that the charter school pursued a manifestation determination review, however, contradicts its position in this case. In addition, the documentary evidence and testimony does not support the extreme position that the charter school has taken that the student constitutes a danger or a safety risk.

The charter school has not demonstrated that the student's placement should be changed to an interim alternative educational setting.

RELIEF

The student will be returned to the student's previous placement, but the charter school will be ordered to reconvene the student's IEP team to review the student's positive behavior support plan and determine whether any changes, modifications or additions are necessary as well as to determine whether any changes to the student's placement or IEP are needed.

In addition, it apparent that the staff of the charter school that deal with students with disabilities is not sufficiently aware of its responsibilities under the special education laws. Accordingly, the charter school will be ordered to provide its staff with training concerning the law pertaining to discipline of students with disabilities, as well as potential alternatives to the traditional discipline methods, 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 and OSEP 2016); *Consensus Report on School Discipline*, (Counsel of State Governments 2014); [Restorative Justice and Special Education](#)²; See additional materials concerning restorative justice on the [website of CADRE](#)³, the OSEP funded technical assistance agency for dispute resolution in special education.

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 any attorneys representing them agree in writing.

ORDER

Based upon the foregoing, it is HEREBY ORDERED:

1. That the relief requested by the charter school's due process complaint, specifically that the student be assigned to an interim alternative educational setting, is denied;
2. The student will be returned to the student's previous placement, and within fifteen (15) days of the date of this decision, the charter school will convene an IEP team meeting to review the student's behavioral intervention plan and modify it, as necessary, to address the student's behaviors, and whether any changes to the student's placement are appropriate. If any change to a slightly more restrictive placement is needed, the charter school, as the local education agency, is

² <https://www.cadeworks.org/resources/cadre-materials/restorative-justice-practice-special-education-resolving-conflict-and>

³ <https://www.cadeworks.org/>

responsible for ensuring that any placement needed by the student on the continuum of placements is provided;

3. Within one hundred eighty (180) days of the date of this decision, the charter school shall conduct training for all staff who participate in decisions concerning discipline of students with disabilities, concerning the IDEA discipline provisions, the required provision of the continuum of alternative placements, as well as alternatives to traditional discipline, including training in restorative justice and restorative practices, as it relates to the behavior of students with disabilities; and
4. 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: December 16, 2019

James Gerl

James Gerl, CHO
Hearing Officer