

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. 28820-23-24

Child's Name:

A.W.

Date of Birth:

[redacted]

Parents (Pro Se):

[redacted]

Local Education Agency:

Philadelphia City School District
Office of General Counsel
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Hearing Officer:

Cheryl Cutrona, J.D.

Date of Decision:

January 2, 2024

PROCEDURAL HISTORY

The student named on the cover page¹ (hereafter “Student”), resides in the School District named on the cover page (hereafter “District”). The Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on classification of Specific Learning Disability. On November 15, 2023, the Student participated in a group assault on another student (hereafter “Victim”). On November 17, 2023, the Student was suspended for five days. On November 20, 2023, the Parent filed an Expedited Discipline due process complaint requesting that her child not be expelled. On November 21, 2023, a Manifestation Determination review was held and it was found that the Student’s behavior was not a manifestation of the Student’s disability. On November 27, 2023, the District issued a Notification of Alternative Educational Placement (NAEP) to a transition school until a disciplinary hearing could be held.

The Complaint proceeded to a closed, remote, expedited due process hearing held on December 19, 2023.

For the reasons set forth below, the Parent’s claim is denied.

ISSUES

1. Was the District’s decision to transfer the Student to an alternative educational setting for a period of 45 days in compliance with the IDEA?

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 details appearing on the cover page of this decision, will be redacted prior to its 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 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

FINDINGS OF FACT

All evidence including the exhibits admitted to the record, the transcripts of the testimony and the parties' oral closing statements was considered.³ The only findings of fact cited in this Decision are those needed to address the issues resolved herein. All exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. On September 26, 2019, while the Student was in the [redacted] grade, an initial Evaluation Report, identified the Student as one with a Specific Learning Disability (SLD) in Reading⁴ in need of special education services (S-1 at p. 11; NT at pp. 73-76).
2. On June 10, 2022, the Reevaluation Report, indicated that the Student continued to need special education services to address an SLD (S-2 at p. 14).
3. The Student has a current Individualized Education Plan (IEP) dated May 17, 2023 (S-3; NT at pp. 77-80).
4. The Student has no previous behavioral incidents prior to this infraction (NT, at p. 34, S-17, at p. 10) and has a current academic record showing four "A"s, three "B"s and one "C" (S-17, at p. 1; NT at pp. 112-113; 116-117).
5. On November 15, 2023, the Student participated in a group altercation on the way home from school (NT, at p. 127). [redacted] (S-6; NT, at pp. 92-95).
6. On November 17, 2023, the parents and the other two students involved in the incident met with the Principal (NT, at pp. 96).

³ References to the record throughout this decision will be to the Notes of Testimony (NT), School Exhibit (S-) and/or Parent Exhibit (P-) followed by the Exhibit number and page number, and Hearing Officer Exhibits (HO) followed by the exhibit number.

⁴ The Parent's Complaint identified the Student as having an Intellectual Disability (ID). It was discovered during the due process hearing that the ID category was listed by mistake and the Student has not been identified as a Student with an ID (NT at 86-87).

7. On the same day, the Parent and the Student met with the Principal. They were shown the video and an Interim Safety Placement was discussed (NT, at pp. 97, 99).
8. Prior to receiving medical documentation of the Victim's injuries, the Principal determined that there was "serious bodily injury" to the Victim (S-7, at p. 1) and he issued a five-day, out-of-school suspension pending a disciplinary hearing (S-9, NT, at p. 108) and completed the Interim Safety Placement form (S-7). On the same day, the School issued a Notice of Disciplinary Hearing Referral for violating the School Code of Conduct, specifically rule #14, Instigation and/or Participation in a Group Assault (S-10, NT, at pp. 108-109).
9. On November 20, 2023, five days following the incident, the Victim went to a Philadelphia-based urgent care facility to document the injuries attributed to the incident. The diagnosis included [injuries] (S-12, at p. 2; NT, at pp. 111-112).
10. A Manifestation Determination review meeting was held on November 21, 2023. It was determined that the Student's behavior was not a manifestation of the Student's disability nor was it a result of not implementing the Student's IEP (S-15; NT, at pp. 61, 63, 114-115). The Manifestation Determination meeting was attended by the Parent, the School Principal, the special education teacher, the regular education teacher, the school psychologist, the school counselor, and the Dean of Students (S-15, at p. 7; NT, at p. 64). The participants signed the Manifestation Determination signature page attesting to their belief that the Student's participation in the altercation was not a manifestation of the Student's disability (NT, at p. 65-67).
11. A NOREP documenting the change of placement for disciplinary reasons was completed following the Manifestation Determination

meeting (S-16, at p. 1; NT, at p. 68). The Mother did not sign the NOREP.

12. On November 27, 2023, the District issued a Notification of Alternative Educational Placement to a transition school for up to 45 days pending a disciplinary hearing (S-18).
13. The other two students who participated in the assault were subject to the same disciplinary procedure as the Student: five-day suspensions, interim safety placements, disciplinary hearings and AEDY placements (NT, at pp. 110, 115).
14. The Student has not attended school since the five-day suspension because the Parent disagrees with the AEDY placement.

Parent's Claim

The Parent admits that the Student participated in the assault on the victim, however, she believes that sending the Student to an AEDY placement violates the Student's IEP and will "set [student] up for failure." She contends that the decision to expel the Student was predetermined before the Manifestation Determination review so it was improper. She requests that the 45-day alternative placement be rescinded.

District's Claim

The District argued that it followed all of the legal requirements of IDEA. The manifestation determination was appropriate, and the Student's behavior is not related to an SLD in reading. Because the Student's actions were not related to the disability, the Student is subject to the same discipline as the students who are not receiving special education services. And, all of the students involved received the same disciplinary procedures.

The video and the testimony at the hearing show the Student instigated and engaged in the incident that caused the Victim serious bodily harm. Therefore, the interim placement is appropriate.

The District contends that it the Parent failed to meet the burden of proving that the Student's rights were violated and therefore the Complaint must be denied.

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. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

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

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

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

In the present matter, based upon the above rules, the Parent failed to prove by a preponderance of the evidence that the manifestation determination or the District's decision to place the Student in an alternative educational setting were not in compliance with IDEA.

Credibility Determinations

It is the responsibility of the hearing officer, as factfinder, to determine the credibility and reliability of the witnesses' testimony. See *22 Pa. Code §14.162* (requiring findings of fact); See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence to make the required findings).

This Hearing Officer found each of the School witnesses to be candid, credible and convincing, testifying to the best of their ability and recollection concerning the facts necessary to resolve the issues presented. The Student, who was the only witness called by the *pro se* Parent, did not seem to be prepared to present a cogent synopsis of what happened and was clearly uncomfortable testifying. [Student's] testimony, however, was credible and reflected what appears in the video.

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 his or her 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 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)(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).

Interim Change in Placement

The IDEA recognizes three special circumstances under which schools may remove a student to an Interim Alternative Educational Setting (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).

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

DISCUSSION

In this case, the District fulfilled its legal obligations in regard to addressing the Student’s involvement in the infraction of the code of student conduct.

There are two prongs the manifestation determination review team must decide: (1) whether or not the Student’s behavior was connected to the disability; and (2) whether or not the IEP was being implemented. In this case, both prongs were met. The District held a Manifestation Determination review meeting six days following the incident. The review team appropriately consisted of the Student’s Parent and relevant members of the Student’s IEP team. They considered information in the Student’s file,

including the current IEP; viewed the video of the altercation; and the Parent was given a copy of the Procedural Safeguards. The Manifestation Determination review team concluded that there is no nexus between the Student's learning disability and the Student's behavior during the incident on November 15, 2023. Furthermore, the review team found no failure to implement the Student's IEP. The Parent signed the manifestation determination signature page indicating that she agreed with the review team's decision. Therefore, the record confirms that the District followed the IDEA process for manifestation determination reviews.

The District decided to place the Student in an interim alternative educational placement pending a disciplinary hearing⁵ to ensure the safety of the Victim. The School appropriately issued a NOREP documenting the Change in Placement. The Parent did not sign the NOREP and filed a Complaint seeking a due process hearing.

A 45-day alternative placement may only be imposed if the incident involved possession or use of weapons or drugs, or for inflicting serious bodily injury. In this situation there was no evidence of a weapon or drugs. The District decided to place the Student in a 45-day alternative educational placement in light of what it considered "serious bodily injury" on another student. This decision appears to have been made after viewing the video, but prior to receiving any medical documentation of the injury to the Victim. All of the students involved in the incident were subject to the same disciplinary consequences.

The Parent wants the Student to be allowed to remain in the School and not be sent to an alternative interim educational placement. The Parent argued that that the transfer was predetermined before an investigation was conducted. The Parent presented no evidence to support her allegation that

⁵ The Hearing Officer was informed that the Disciplinary Hearing was scheduled to be held the day after the due process hearing.

the decision to place the Student in an alternative school was not appropriate.

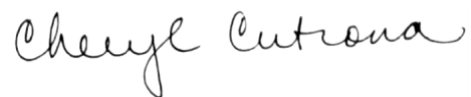
The Student's failure to appear at the alternative placement was a family decision. While the Hearing Officer sympathizes with the Parent's concerns, without evidence proving that the District's placement decision was not in compliance with the IDEA, the District's decision must stand and the Complaint must be denied.

CONCLUSION OF LAW

The District complied with IDEA when it placed the Student in an alternative interim educational placement for up to 45 days.

ORDER

AND NOW, this 2nd day of January 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parents' claim is DENIED. It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. The Hearing Officer's jurisdiction is relinquished.



Cheryl Cutrona, J.D.
Special Education Hearing Officer

Date of Decision

January 2, 2023

ODR 28820-23-24