

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:

26116-21-22

Child's Name:

J.D.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

March 21, 2022

Information and Procedural History

The Student¹ is [a mid-teenaged student] and enrolled in the [redacted] grade in the District. Student is eligible for and receives special education as a child with a specific learning disability. In December 2021, a disciplinary change in placement occurred following the Student's in-school assault against a peer. The manifestation determination proceeding concluded that the assaultive behavior was not related to Student's disability or the result of a failure to implement the IEP. To avoid a lengthy removal from school, the Parent waived a hearing and agreed to a term of expulsion as well as conditions for the Student's return to in-person instruction at the District.

The Parent filed a due process complaint alleging that during the expulsion, the District failed to provide the Student a free appropriate public education (FAPE), in violation of the IDEA and the federal and state regulations implementing that statute.² In response, the District maintained that its actions were appropriate for the Student and that no remedy is owed.³

¹ In the interest of confidentiality, 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 The Parent's IDEA claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified at 34 C.F.R. §§ 300.1-300.818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

³ The Parent filed an amended complaint with claims that did not require a non-expedited resolution. Those claims were bifurcated and will proceed pursuant to standard timelines. Nothing in this decision should be read as dispositive of or conclusive of those issues

For the reasons that follow, the Parent's claims are denied.

ISSUES

- 1) Has the District denied Student a FAPE since November 2021 through a disciplinary change in placement?

- 2) May the District require the Student to obtain a psychiatric evaluation before returning to school?

- 3) If the District denied Student a FAPE, what if any remedy is appropriate?

FINDINGS OF FACT

1. During the 2021-2022 school year, the Student was enrolled [redacted] grade in the District. The District's last reevaluation report identified Student with a specific learning disability with needs in reading. (S-3, S-5)

 2. On October 21, 2021, the District developed an IEP for implementation during the school year that provided the Student with itinerant learning support to assist with reading needs. (S-8)
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3. On November 30, 2021, the Student assaulted a peer in the District's high school resulting in injury to the victim. That same day, the Parent received written notice of the Student's suspension for three consecutive school days (11/30/21 through 12/02/21). The letter advised that the incident was still under investigation and could result in further disciplinary action. (P-1, S-3, S-10, S-12; N.T. 31, 65)
4. Before the November 2021 incident, the Student had no record of physical altercations. (S-3; N.T. 28, 64)
5. At a December 3, 2021, manifestation determination meeting with the Parent, the parties concluded that the Student's conduct was not caused by or had a direct and substantial relation to the Student's disability, nor was it the result of the LEA's failure to implement the IEP. In writing, the Parent indicated receipt of a procedural safeguards notice and agreement with the imposition of a ten-day suspension. (P-4, S-15; N.T. 33, 46, 57)
6. At the December 3 meeting, the District advised the Parent that the Student would be suspended for an additional seven days (12/3/21 through 12/13/21) for the simple assault that the incident was still under investigation, but further disciplinary action could result.⁴ (P-3, S-14, S-15)
7. On December 6, 2021, the District met with the Parent and Student and offered an admission and waiver form with a potential agreement. The District informed the Parent that the agreement did not have to be

⁴ Exclusion from school may take the form of suspension or expulsion, 22 Pa. Code § 12.6

finalized that day and could be reviewed at home before signing. (S-16; N.T. 82-83, 123-124)

8. On December 6, the Student signed a statement and admitted to committing a simple assault. The Parent signed the form consenting to the Student's admission, waiver of a hearing and due process requirements, and acceptance of the agreement and recommendation. The Parent and Student signatures were witnessed by an LEA official. (S-16)
9. The December 6, 2021, agreement recommended that the Student serve an expulsion until at least the first day of the second semester (January 20, 2022) and not return until a safety plan was established and initial steps completed. The initial step required the Student to undergo a psychiatric evaluation at District expense. The psychiatric evaluation was proposed to assess Student's potential safety and mental health concerns, identify needs because of the trauma experienced from the recent death of a Parent, and offer support if needed. (S-16; N.T. 33, 58, 79-80, 122-124)
10. The admission and waiver were offered to the family to avoid a full school year expulsion of 180 days. (N.T. 113-114)
11. Since the November incident, the District has offered the Student daily education that included itinerant learning support instruction through zoom sessions in a virtual platform. (S-4; N.T. 60, 104)
12. After notification that the Student had trouble accessing the internet to complete assigned schoolwork, the District provided a hot spot, which

was ineffective. The Student can complete assignments without logging on to zoom sessions. (P-10, S-4; N.T. 39, 50-51, 60, 105-107)

13. On January 19, 2022, the Parent contacted the District to discuss Student's reentry plan. The District reminded the Parent that the Student needed a psychiatric evaluation before returning. After contacting the District, the Parent attempted to schedule a psychiatric evaluation for the Student; but the first available appointment was about 45 days away. (N.T. 37, 49)
14. Between January 25, 2022, and February 2, 2022, the Student missed roughly seven zoom sessions. On some days when the Student failed to log in, a teacher telephoned the family home, left a message with a reminder to join the session, and offered to discuss concerns. (P-10, S-4; N.T. 104-105)
15. On February 21, 2022, the Parent requested an expedited due process hearing. (S-1)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that 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). Accordingly, the burden of persuasion, in this case, must rest with the Parent who requested this administrative hearing. Nevertheless, the

application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *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). This hearing officer found each of the witnesses who testified to be credible. Despite differing perspectives, the testimony was essentially quite consistent where it overlapped for purposes of the issues presented. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

IDEA Disciplinary Principles

In this proceeding, the Parent challenged the District's provision of special education programming during the expulsion as well as the agreed-upon terms of Student's reentry. Pursuant to the IDEA and its applicable regulations, the Parents had the right to challenge any District decision regarding a change in placement for disciplinary reasons in an expedited due process hearing. 20 U.S.C. § 1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c). When such an appeal is filed, the child remains in the current alternative education setting unless the parties agree otherwise, which occurred in this matter. 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.

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 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). 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 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). The relevant Pennsylvania regulations explicitly provide that disciplinary exclusion of a child with a disability that exceeds fifteen days in the same school year is deemed a pattern and, thus, a change in placement. 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).

Disciplinary Protections

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.*, and its implementing regulations provide for specific protections to eligible students who are facing a change in placement for disciplinary reasons. Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 if the conduct in question

was caused by, or had a direct and substantial relationship to, the child's disability; or that the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 20 U.S.C. § 1415(k)(E)(i). *See also* 34 C.F.R. §300.530(e).

If the local educational agency, the parent, and IEP team members decide that the conduct had a substantial relationship to the child's disability or was the result of failure to implement the child's IEP, the conduct "shall be determined to be a manifestation of the child's disability." 20 U.S.C. §1415(k)(E)(ii). If the conduct is determined to be a manifestation of the child's disability, the IEP team must take certain steps including conducting a functional behavioral assessment, implementing a behavioral intervention plan and in most circumstances returning the child to the placement from which the child was removed. 20 U.S.C. §415(k)(1)(F); 34 CFR 300.530(f).

By contrast, as in this matter, if the team determines that the behavior which resulted in discipline was not a manifestation of the student's disability, school personnel may apply the same disciplinary procedures applicable to all children without disabilities, except that child with disabilities must continue to receive educational services necessary to provide a free, appropriate public education. 20 U.S.C. § 1415(k)(1)(C) and (D); 34 C.F.R. § 300.530(c) and (d).

Parent's Claims

In this matter, the District convened an IDEA compliant manifestation determination review. The team, including the Parent and Student, determined that the Student's conduct in assaulting a peer was not caused by, and did not have a substantial relationship to, this Student's specific

learning disability. Following that process, the Parent and Student agreed to waive an expulsion hearing, and that Student could return to school in mid-January after obtaining a psychiatric evaluation. During the expulsion, the District provided online access to educational programming. The Student's terms of reentry and provision of education during the expulsion are now in dispute.

First, the Parent claims that during imposed discipline, the District denied Student a FAPE because the Student's internet connection prevented access to online school. In the Complaint, the Parent alleged: that the home internet connection was not strong enough to access virtual school, the District provided hot spot did not work, and that although the school library was offered, the Parent's disability made it difficult to get there. The record in this matter has established that the District fulfilled its FAPE responsibility toward this Student. The District offered educational programming through an online platform with connectivity that, although was not flawless, was still accessed by the Student through the end of January 2022. Once notified of the connectivity difficulty, the District provided the family with a "hot spot" to improve internet access. Although the provided hot spot was unsuccessful, the District proposed other solutions, which the Parent maintained were unsatisfactory. When the Student missed zoom sessions, the District contacted the Parent, left telephone messages and offered assistance. Furthermore, the evidence was clear that completing the offered schoolwork was not dependent on an internet connection. No denial of FAPE occurred concerning this issue.

Next, the Parent alleged the December 6 expulsion waiver agreed to and signed was invalid because the District lacked the authority to require the Student to obtain an outside psychiatric evaluation to return to school.

In support of this contention, the Parent concedes that agreement occurred to the psychiatric evaluation; however, it was invalid because it was signed without the advice of counsel. Again, the Parent has failed to establish through a preponderance of the evidence that the District denied Student a FAPE. The IDEA does not exempt a disciplined student removed from school from having to comply with agreed-upon readmission procedures. The Parent and Student were provided with the expulsion hearing waiver, given time to read and consider it before signing and offered time to take it home for further consideration. The requirements for the return to school were clearly delineated. The Parent voluntarily agreed to avoid a potential 180-day expulsion from the District. The Parent's confusion about which party had an obligation to schedule the psychiatric evaluation is also unpersuasive. The District thoroughly communicated its intention to fully fund the psychiatric as a condition to avoid a full school year expulsion. However, the Parent did not contact the District seeking clarification about this condition until later in January. Before that time, the Parent did not contact the District, ask questions or request clarification regarding the next steps so that the Student could resume in-person instruction. Furthermore, the Parent testified that after contacting the District, the soonest appointment that could occur was forty-five days away. If that appointment was scheduled in January, the same day the Parent contacted the District; the Student would have received the agreed-upon evaluation by the due process hearing session. It is unclear if this occurred.

For purposes of this expedited proceeding, the Parent has failed to prove that the District violated the IDEA through the imposition of discipline and the agreed-upon conditions for the Student's safe reentry. The Student was not denied a FAPE. Accordingly, no remedy is due.

ORDER

AND NOW, this 21st day of March 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Parent's claims are DENIED.

It is FURTHER ORDERED that any claims raised in this expedited proceeding not specifically addressed by this decision and order are DENIED and DISMISSED.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.
Special Education Hearing Officer

March 21, 2022