Pennsylvania Special Education Hearing Officer

Final Decision and Order

Closed Hearing

ODR File Number:
30454-24-25KE
Child's Name:
[redacted]

Date of Birth:
[redacted]
Parent:
[redacted]
[redacted]
[redacted]

Counsel for Parent
Makalya Harrison, Esq. and Margie Wakelin, Esq.
Education Law Center
1800 JFK Blvd., 1900A
Philadelphia, PA 19103

Local Education Agency:
Shamokin Area School District
2000 W. State St.
Coal Township, PA 17866-2807

Counsel for LEA
Shawn Lochinger, Esq.
Sweet Stevens, Katz & Williams
331 E. Butler Ave.
New Britain, PA 18901

Hearing Officer:
Joy Waters Fleming, Esq.

Date of Decision:
November 29, 2024

INFORMATION AND PROCEDURAL HISTORY

The Student (Student)[1] is an eleven-year-old child enrolled in the fifth grade in a District elementary school. The Student is eligible for special education programming as a child with emotional disturbance and Other Health Impairment (OHI) and is entitled to procedural protections under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and the regulations implementing those statutes.[2]

After an incident on October 9, 2024, at school, the District advised the Parent they could not meet the Student's needs, enrollment needed to occur in the District's asynchronous virtual program, and an interim alternative educational setting (IAES) would be pursued. The Parent filed this complaint and requested an expedited due process hearing with allegations that the District denied the Student a FAPE on the grounds that it failed to conduct a manifestation determination before removing the Student from school and consideration of an IAES was not appropriate. In response,

[1] In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] 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). Section 504 is found at 29 U.S.C. § 794. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11.

the District maintained that it has fulfilled its legal obligations to the Student.

For the following reasons, the Parent has established by a preponderance of evidence that the District's disciplinary procedures did not comply with the IDEA and denied the Student a FAPE. The claims of the Parent are granted.

ISSUES

1) Did the District fail to conduct a manifestation determination meeting before the removal of the Student, for more than 10 days, for an alleged violation of the school code of conduct?

2) Did the District fail to adhere to proper disciplinary procedures for the removal of the Student to an IAES?

FINDINGS OF FACTS

1. The Student is currently eleven years old, enrolled in the fifth grade in the District and eligible for special education as a child with emotional disturbance. (P-1, p. 17)

2. According to the Parent, the Student has diagnoses of disruptive mood dysregulation disorder, depression, anxiety, bipolar disorder, ADHD and oppositional defiance disorder (ODD). (P-3; N.T 21)

3. On July 28, 2024, the Student enrolled in the District as a new student. (N.T. 23, 159)

4. In November 2023, March 2024 and August 2024, the Student received inpatient psychiatric treatment. (S-7, p. 1)

5. On August 7, 2024, a psychiatric hospital emailed the District, advised of the Student's admission to the facility and requested any additional information that would benefit treatment. (S-3)

2024-2025 School Year-Fifth Grade- Current Education

6. On August 19, 2024, the inpatient hospital emailed the District and provided the Student's educational summary and discharge information. (S-3)

7. August 20, 2024, was the first day of school in the District. On that day, the Student made three visits to the nurse's office demonstrating anxious, crying behaviors. (S-13; N.T. 71)

8. On August 20, 2024, the District issued a NOREP that adopted the IEP of October 30, 2023, from the previous school district attended by the Student. The NOREP offered to provide itinerant learning support until a new IEP could be developed. (S-4, S-5; N.T. 40, 140-141, 159)

9. On August 23, 2024, the District received the RR conducted by the Student's previous school district. The RR determined eligibility for special education based on other health impairment (OHI) and specific

learning disability (SLD). The District adopted the reevaluation report from the previous school district. (P-1, p. 1-2, S-6; N.T. 181)

10. On September 4, 2024, the Student received a three-day out-of-school suspension for fighting and inappropriate behavior after hitting a classmate. The District noted peers' concerns that the Student made them feel uncomfortable by talking about pregnancy, cutting/self-harm, vaping, and allegedly having photos of a naked male. (N.T. 54, 68)

11. On September 18, 2024, an IEP was developed, although no meeting occurred. (P-3; N.T. 58, 134-135)

12. On September 20, 2024, the Student received a three-day out-of-school suspension for disruptive conduct, fighting, inappropriate behavior/language, and threatening a school official/student after an incident in the cafeteria. (N.T. 59)

13. On September 26, 2024, a team meeting occurred to discuss the Student's behaviors. The team included the Parents, school counselor, Principal, teachers, and a mental health representative. After the meeting, the team agreed to reconvene in eight weeks. (S-7)

14. On October 3, 2024, the Student was transported to the hospital by EMS from school after demonstrating erratic and aggressive behaviors, hitting and kicking a school staff. The Student was restrained and received a neck injury. A toxicology screen performed at the hospital was negative for all illegal substances. The Student received a one-day suspension. (P-6, P-7, P-8, S-9; N.T. 74-75)

15. On October 4, 2024, the Student received a one-day suspension. (P-8)

16. On October 7, 2024, the Student received a one-day suspension for disrespect, inappropriate behaviors, insubordination and threatening a school official/student. (P-9; N.T. 92)

17. On October 9, 2024, the Student became aggressive with a peer and injured a teacher by grabbing a chunk of hair. After the incident, the Student's teacher sought medical treatment and was diagnosed with a concussion. After the incident, the District issued a one-day, out-of-school suspension. (S-11; N.T. 123-124)

18. After the October 9 incident, the District telephoned the Parent and advised that the Student could not return to school. The District advised that the Student had to remain in the District's asynchronous cyber program until an appropriate placement could be found. (N.T. 34, 138, 168)

19. Between August 20, 2024, and October 9, 2024, the District documented that the Student had 35 visits to the school nurse, expressed anxiety about being at school and/or asked to leave school early due to sickness. (S-13 p. 1-17)

20. On October 14, 2024, a teacher injured by the Student filed a workers compensation claim after receiving a kick in the left cheek. (S-14)

21. The District did not hold an IEP meeting, develop an FBA or conduct a manifestation determination hearing following the behavioral

incidents and the imposition of discipline. The District did not request due process in response to any behavioral incidents. (N.T. 188-189)

22. The Student has not been permitted to return to in-person instruction in the District. (N.T. 95)

23. On October 31, 2024, the Parent filed a due process complaint and sought an expedited hearing. (S-1)

DISCUSSION and CONCLUSIONS OF LAW

General Legal Principles

The burden of proof consists of two elements: the burden of production and persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. [3] The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. [4] In this case, the Parent is the party seeking relief and bears the burden of persuasion.

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); *A.S. v. Office for Dispute*

[3] Schaffer v. Weast, 546 U.S. 49, 62 (2005); L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

[4] See N.M., ex rel. M.M. v. The School Dist. of Philadelphia, 394 Fed. Appx. 920, 922 (3rd Cir. 2010).

Resolution (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts. The Parent, elementary school Principal, emotional support teacher, and supervisor of special education testified at the due process hearing. In the few instances that there were contradictions, those are attributed to lapses in memory or recall or to differing perspectives rather than an intention to mislead, and in any event, credibility was not determinative on any issue.

IDEA DISCIPLINARY PRINCIPLES

The IDEA provides a number of protections when a local educational agency (LEA) seeks to impose discipline on a student with a disability. Specifically, when an eligible student is facing a change in placement for disciplinary reasons, a meeting must convene to determine whether or not the conduct in question was a manifestation of the student's disability:

(E) Manifestation determination

(i) In general. Except as provided in subparagraph (B), within 10 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—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if 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)(1)(E)(i) (italics added); see also 34 C.F.R. § 300.530(e).

If it is determined that the conduct in question had either the causal relationship with the disability or was a result of the 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)(1)(E)(ii); see also 34 C.F.R. § 300.530(e)(2).

If the conduct is determined to be a manifestation of the child's disability, the LEA must take certain other steps which include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F); see also 34 C.F.R § 300.530(f). By contrast, if the team determines that the behavior which resulted in discipline was not a manifestation of the student's disability, the LEA may apply the same disciplinary procedures applicable to all children without disabilities, except that children with disabilities must continue to receive educational services necessary to provide a free, appropriate public education (FAPE). 20 U.S.C. §§ 1415(k)(1)(C) and (D); 34 C.F.R. §§ 300.530(c) and (d).

Unilateral Change in Placement – Serious Bodily Injury

The IDEA provides disciplinary protections to children with disabilities that prevent schools from unilaterally changing a student's placement if the disciplinary infraction is a manifestation of the child's disability. See, 20 U.S.C. § 1415(k). However, the IDEA recognizes three special circumstances under which schools "may remove a student to an [IAES] for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(G). Those special circumstances concern weapons, drugs, and serious bodily injury (SBI).

Parent's Claims

In their complaint, the Parent contends the District violated the Student's right to FAPE without regard to IDEA disciplinary procedures through a unilateral removal from the assigned educational placement following a series of suspensions from school. The Parent also contends that consideration of placement in an IAES is inappropriate. The Parent seeks reinstatement of the Student, a functional behavior assessment and a positive behavior support plan. On this hearing record, the Parent has met the needed burden of proof. The District failed to comply with the requirements under the IDEA addressing disciplinary removal and has denied the Student a FAPE. The Parent's claims for relief are granted.

The evidence is undisputed that this elementary school special education Student has a constellation of psychiatric diagnoses and demonstrates behavioral challenges during the school day that frequently disrupt education and demand the attention of school staff. As a consequence, the District imposed multiple days of out-of-school suspension culminating in a removal for an indefinite period. Although this Student's needs are complex and may be unable to be met in the current setting, the District lacked the authority to remove this special education child from school without due process. That process should have occurred either through a manifestation determination hearing or by invoking the available procedures that permit removal when specific criteria are met. This District did neither.

A manifestation determination should have occurred before the Student was removed from the educational placement for more than ten days. After the October 9 incident, the District advised the Parent that the Student could not return to school for an undefined period. As of the date of

the final due process hearing, the Student remained out of school, ostensibly with asynchronous instruction, and awaiting the development of a different programmatic option. Although the District characterized the removal as a "change of placement due to safety concerns," it adhered to no IDEA-compliant process or procedure to support this unilateral decision. Based on the evidence of this hearing record, this Student's exclusion from school was a disciplinary removal. As such, the District was required to conduct a manifestation determination in accordance with 34 CFR § 300.530. Its failure to do so constituted a denial of FAPE.

Next, the Parent raised concerns that the LEA would remove this Student to an IAES on the basis that they caused substantial bodily injury to school staff during behavioral incidents. Although the Student's behaviors are of significant concern, removal from the current placement without regard to whether the behavior is a manifestation of disability can occur only when circumstances involve a dangerous weapon, controlled substances or the infliction of serious bodily injury as defined in 20 U.S.C. § 1415 (k)(1)(G)(i), 34 CFR § 300.530 (g)(3). These special circumstances are tightly defined and narrowly construed and can be implemented only after the procedural protections inherent in the IDEA are applied. 34 CFR § 300.530. In this matter, the Student did not have a weapon, possess or use controlled substances, and no NOREP was issued that proposed a placement change. Furthermore, the District conceded, in its closing brief, that a unilateral placement under 34 CFR §300.530(g)(3) was not appropriate because injuries attributed to the Student's behavior did not rise to the level of "serious bodily injury."

Last, the District cannot now request a removal to an IAES without invoking the proper disciplinary procedures on the basis that the Student’s behaviors are substantially likely to cause injury. If a school district "believes that maintaining the current placement of [a child with disabilities] is

substantially likely to result in injury to the child or to others, [it] may request a hearing." 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a). After the expedited hearing, the Hearing Officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if it is determined that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. 20 U.S.C. § 1415(k)(3)(B)(ii). The operative procedure to invoke a removal through this provision is that a LEA must request hearing. The District has not requested a hearing or the associated relief in this matter. Thus, removing the Student on the basis that injury is substantially likely is not an appropriate issue for consideration and disposition at this time.

Based on the evidence of this hearing record, the Parent has established by a preponderance of the evidence that the District denied the Student a FAPE through a unilateral removal from the special education placement at the elementary school. To address this Student's well-documented and demonstrated behavioral needs, the District must identify and evaluate those needs and develop and offer appropriate and responsive interventions. The District will be ordered to conduct a functional behavioral assessment, a PBSP if appropriate and offer programming consistent with those conclusions.

ORDER

AND NOW, this 29th day of November 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District denied the Student a FAPE and is ordered to return the Student to the District elementary school last attended and implement the last agreed upon IEP.

2. The District is ordered to conduct a functional behavioral assessment, a PBSP if appropriate, and offer programming consistent with those conclusions.

3. After the FBA, the IEP team must convene to discuss the conclusions, update the Student's programming and determine the most appropriate placement.

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 FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Joy Waters Fleming, Esquire

Joy Waters Fleming

HEARING OFFICER
ODR File No. 30454-24-25

November 29, 2024