

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

DECISION

Child's Name: R.H.

Date of Birth: [redacted]

Date of Hearing: January 3, 2011

CLOSED HEARING

ODR No. **01878-1011AS**

Parties to the Hearing:

Representative:

Parent[s]

Ms. Catherine Guzzo
Director of Special Education
Penn Hills School District
309 Collins Drive
Pittsburgh, PA 15235

Craig Alexander, Esquire
Bruce E. Dice & Associates, P.C.
787 Pine Valley Drive Suite E
Pittsburgh, PA 15239

Date Record Closed:

January 4, 2011

Date of Decision:

January 17, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a teen-aged eligible student in the Penn Hills School District (hereafter District). Student was suspended from school following an incident involving physical fighting. The District thereafter convened a meeting to determine whether Student's conduct was a manifestation of Student's disability, and the team concluded it was not.

The District filed a due process complaint seeking a determination that it could change Student's educational placement to an alternative education setting for a period of 45 days. For the following reasons, I conclude that its determination was proper and find in favor of the District.

ISSUE

Whether Student's conduct on [date] was a manifestation of Student's disability; and

If not, may the District place Student in an alternative education setting for a period of 45 days and then proceed with expulsion?

FINDINGS OF FACT

1. Student attends the District high school. Student first enrolled in the District in eighth grade, the 2008-09 school year. (Notes of Testimony (N.T.) 27; School District Exhibit (S) 5, S 6)
2. Student was referred by the Parent for an educational evaluation during the 2009-10 school year due to concerns with Student's academic progress, particularly in reading. Student obtained a General Intellectual Ability score in the low range on the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition. Student's academic achievement scores on the Woodcock-Johnson Tests of Achievement, Third Edition, fell within the very low to low range on all subtests and clusters. (S 6)
3. On the Behavior Assessment System for Children, Second Edition, rating scales by Student's Parent and teachers revealed clinically significant and at-risk scores in many areas. Student's own self-report reflected all average scores with the exception of the Sense of Inadequacy subscale which was in the at-risk range. Student's teachers also reported concerns with behaviors conducive to learning and atypical behavior in the learning environment on the Behavior Evaluation Scales, Third Edition (BES), while the

¹ Student's name and gender are not used in this decision to protect Student's privacy.

Parent reported concerns with all five subscales in the home environment on that measure. Nevertheless, the teachers' rating scales did not indicate that Student's behaviors at school were significantly problematic in the classroom environment. (S 6)

4. The Evaluation Report (ER) issued in January 2010 concluded that Student was eligible for special education by reason of a specific learning disability in reading comprehension and mathematics calculation. Student's Parent agreed with this determination. (S 6)
5. An Individualized Education Program (IEP) was developed on February 2, 2010. The IEP team determined that Student did not exhibit behaviors that impeded his/her learning or that of others. Goals addressed transition, reading comprehension, and mathematics computation. Program modifications and specially designed instruction were also included: adapted tests/quizzes, small group testing, extended time as needed, preferential seating, tests read aloud, frequent prompts to stay on task, and use of a calculator in mathematics class. Student's IEP provided for itinerant learning support. (S 5)
6. Student's disciplinary record in the fall of the 2010-11 school year included multiple occasions of being tardy to class, encouraging a fight, and insubordination. Student was disciplined for each of these incidents, receiving three days out-of-school suspension and one day in-school suspension. (N.T. 22; S 3)
7. On [date], before class instruction began, Student arrived late for [a] class and began to engage in a verbal disagreement with another student. The teacher asked the students to separate and Student became angry. The teacher then asked Student to go to the guidance office or the main office to speak with someone and calm down. Student left the classroom. (N.T. 13-14; S 2)
8. A few minutes after Student left the classroom, Student's sibling came to the door of the room and had a verbal exchange with the same student with whom Student had been arguing. Student then returned to the classroom. Student, Student's sibling, and another student began to engage in a physical altercation with the first student with whom the siblings had been arguing. (N.T. 14-16; S 2)
9. The teacher called other staff members and security to the classroom. The staff was able to break up the fight, and Student and Student's sibling were taken to an office where they discussed having "jumped" the victim. Student's Parent was called and picked Student up from school. (N.T. 16, 20-21, 40-41; S 1, S 2)
10. Student's conduct was a violation of the District's Student Code of Conduct. Student received three days out-of-school suspension and then seven additional days of out-of-school suspension. (S 3)
11. A manifestation determination meeting was held [three days after the incident]. Student's Parent was present but left before the team made the manifestation determination. Before the Parent left the meeting, the team reviewed Student's ER and IEP and discussed the conduct in question with the Parent and Student. The team then

concluded that Student's conduct on December 6, 2010 was not a manifestation of Student's disability. (N.T. 23, 24-27, 28-31, 34-35, 41-42; S 3, S 4)

12. The District issued a Notice of Recommended Educational Placement (NOREP) on that same date, but the Parent and Student left before signing it. Student's Parent was also provided with a copy of the Procedural Safeguards. (N.T. 31, 35; S 7)
13. If Student were placed in the alternative education setting, Student would continue to receive appropriate special education services. (N.T. 36-37)
14. The District filed its due process complaint on December 13, 2010 and provided a copy of that complaint to the Parent. (N.T. 46; S 8)
15. Student returned to school [sixteen days after the incident], after the suspensions had been served. Student's caseworker and the principal developed a safety or behavior plan with Student that day. The purpose of the plan was to allow Student the opportunity to avoid problems with other students before and after school and between classes. Student's IEP was revised to reflect that Student did exhibit behaviors that impeded his/her learning or that of others, and the behavior/safety plan was noted as a revision to the IEP. (N.T. 37-39, 48-49; S 5)
16. The Parent participated in a resolution meeting on [date] but no resolution was reached. (N.T. 44-45)
17. The Parent did not attend the due process hearing held on January 3, 2011 despite notice of the proceeding, and efforts to reach the Parent that morning were not successful. (N.T. 3, 51)

DISCUSSION AND CONCLUSIONS OF LAW

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);² *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School*

² The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

District, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony as a whole was essentially consistent. Credibility is discussed further in this opinion where necessary.

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.

(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)(E)(i). *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)(E)(ii). Additionally, if the conduct is determined to be a manifestation of the child's disability, the District must take certain other steps which generally include returning the child to the placement from which he or she was removed. 20 U.S.C. § 1415(k)(F).

By contrast, if school personnel determine 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 children 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).

Under Section 1415(k)(E)(i)(I), the clear language requires a determination that the conduct be "caused by" or have a "direct and substantial relationship to" the child's disability. A review of the Conference Committee Report when IDEA was last amended and reauthorized in 2004 provides some guidance on this determination:

The Conferees intend that in order to determine that the conduct in question was a manifestation of the child's disability, the local educational agency, the parent and the relevant members of the IEP team must determine the conduct in question be the direct result of the child's disability. It is intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability.

H. Rep. No. 108-779, at 225 (2004).

In this case, the District reviewed Student's IEP and ER and discussed the conduct in question with the Parent and Student before determining that Student's conduct on [date] was not a manifestation of Student's learning disability. (Finding of Fact (FF) 11) This hearing officer is compelled to agree. There is nothing in the record to suggest that Student's conduct, namely engaging in a physical fight with another student, was related in any way to Student's learning disability in reading comprehension or mathematics calculation. Furthermore, when Student's current IEP was developed, the team had determined that Student did not exhibit behaviors which impeded his/her learning or that of others. (FF 5) While Student had been subject to discipline during the 2010-11 school year prior to [the incident], this was the first instance of physical fighting (FF 6), and there is no indication in either the ER or the current IEP that aggressive behavior was of concern or that Student's disability had or might manifest itself through this type of conduct in the school setting. (FF 3, 5; S 5, S 6) Significantly, both teachers who completed the BES scales in early 2010 indicated that on the Interpersonal Difficulties subscale (which includes fighting), Student was in the average range. (S 6 at 11-13) Additionally, Student's conduct occurred at the beginning of a class before any instruction had taken place, and was plainly not the result of a failure to implement the IEP. (FF 7)

For all of these reasons, I conclude that the District properly determined that Student's conduct on [date] was not a manifestation of Student's disability. Accordingly, the District is permitted to remove Student to an alternative education placement and to pursue disciplinary procedures applicable to all children without disabilities, except that as a student with a disability, the District must continue to provide the educational services necessary for Student to receive a free, appropriate public education.

CONCLUSION

For all of the foregoing reasons, I conclude that the District has the authority to remove Student to an alternative placement for 45 days and pursue other disciplinary procedures applicable to all children without disabilities.

ORDER

In accordance with the findings of fact and conclusions of law as set forth above, the District may remove Student to an alternative educational placement for 45 days and pursue other disciplinary procedures applicable to all children without disabilities.

The District is not required to take any further action.

It is further ORDERED that any claims not addressed by this decision are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
Hearing Officer

January 17, 2011
ODR File No. 01878-1011AS