

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: S. S.

Date of Birth: [redacted]

Date of Hearing: 3/5/2015

CLOSED HEARING

ODR File No. 15919-14-15 KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Pittsburgh School District
341 South Bellefield Avenue
Pittsburgh, PA 15213-3516

LEA Attorney
Rebecca Heaton Hall Esq.
Weiss Burkardt Kramer, LLC
445 Fort Pitt Boulevard, Suite 503
Pittsburgh, PA 15219

Date Record Closed:

March 17, 2015

Date of Decision:

March 21, 2015

Hearing Officer:

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a teenaged student in the Pittsburgh School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with Autism. Student's Parents³ filed a due process complaint against the District after they disagreed with the discipline it imposed on Student in February 2015.

The case proceeded to a due process hearing convening over a single session,⁴ at which the parties presented evidence in support of their respective positions. The Parents challenged the disciplinary placement in an alternative educational setting (AES), and the District sought to establish that its actions in making this placement determination were proper under the IDEA.

For the reasons set forth below, I am compelled to find in favor of the District, with modifications, and will include specific directives to the District related to this disciplinary incident.

ISSUES

1. Whether the District properly determined that Student could be removed to an alternative educational setting for a 45-day period, in addition to a 2-day suspension; and
2. Whether Student's Individualized Education Program can be implemented in that AES placement.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ Student's father was the active participant throughout this case; the plural "Parents" is used where it appears he was acting on behalf of both Parents.

⁴ This hearing officer also convened a conference call on March 16, 2015, over the District's objection, and that teleconference was reported as part of the record. The transcript of that conference call has been included as part of this hearing record marked as Hearing Officer Exhibit (HO-) 1.

FINDINGS OF FACT

1. Student is a mid-teenaged, tenth grade student who resides in the District and is eligible for special education on the basis of Autism. (Notes of Testimony (N.T.) 26, 37, 51, 89-90, 95-96; School District Exhibit (S-) 5 p. 5)
2. Student's most recent reevaluation consisted of a records review completed in March 2014 and summarized in a Reevaluation Report (RR). At the time, Student was in regular education for all classes. Student's teachers recommended that the team consider additional support for the 2014-15 school year to help Student focus on and improve reading, mathematics, and writing skills. (S-5)
3. The District conducted a Functional Behavioral Assessment (FBA) in April 2014 due to concerns with Student exhibiting frustration toward peers. The FBA hypothesis was that the function of Student's behavior was to avoid or escape a task, situation, or environment. (S-6)
4. A Positive Behavior Support Plan (PBSP) was developed following the FBA. The PBSP included a goal for use of coping skills and social skills to self-regulate Student's behavior, and program modifications and items of specially designed instruction including social skills instruction. (S-7)
5. Student's current Individualized Education Program (IEP) was also developed in April 2014, and the team agreed that Student's level of special education support would increase to supplemental for the 2014-15 school year, consistent with the recent RR and with needs identified for Student for post-secondary transition. Goals addressed academic needs, and the IEP also included program modifications and items of specially designed instruction. (S-8)
6. On February 9, 2015, Student arrived at school and proceeded through the metal detector at the entrance to the building. A police officer and two teachers were present at the metal detector. (N.T. 26-27, 43)
7. The metal detector alarm sounded as Student proceeded through it. The officer asked one of the teachers to check Student's coat pockets, and Student willingly handed over the coat to the teacher. (N.T. 26-28, 43)
8. The teacher felt a heavy metal object inside one of the pockets of Student's coat. The teacher observed the object and saw that it was a knife, and showed it to the police officer. The knife was folded closed and was approximately 4" long. (N.T. 28-29, 31-32)
9. The knife, when opened, was approximately 7.5 inches in length including a blade of approximately 3". (N.T. 29-30; S-1 p. 1)
10. Student had had the knife in Student's coat after Student and the father were at camp

- the day before. Student used the knife at camp with permission of the Parents. (N.T. 96-97)
11. Student's Parents were called to pick up Student following the incident on February 9, 2015, and Student was dismissed from school for the day. (N.T. 57, 75-76)
 12. The District provided a discipline packet to the Parents on February 11, 2015, the date of an informal hearing for the incident. (N.T. 52-55, 57; S-1)
 13. The District recommended that Student receive a 2-day out of school suspension and be placed in an AES for a 45-day period. The 2-day suspension occurred on February 10 and 11, 2015. (N.T. 56-57, 62; S-1 pp. 5, 14, S-3 p. 5)
 14. The District issued a Notice of Recommended Educational Placement (NOREP) for the 45-day placement at the AES after the February 11, 2015 informal meeting. The Parents did not agree with the AES proposed in the NOREP. (S-2)
 15. A manifestation determination meeting was held, and the team determined that Student's conduct on February 9, 2015 was not a manifestation of Student's disability. The Parents did not agree with that decision. (N.T. 44-45, 69; S-3)
 16. At the due process hearing, the District revised its conclusion on the manifestation determination and agreed with the Parents that the conduct on February 9, 2015 was a manifestation of Student's disability. (N.T. 19-20, 69-70)
 17. The District planned to conduct a new FBA and, if needed, revise Student's PBSP because of the revised manifestation determination decision. Student's IEP is also due for revision in April 2015. (N.T. 45, 113-14; S-8 p. 3)
 18. Student is cooperative at school has not been disciplined by the District in the past seven years prior to the February 9, 2015 incident, and has not exhibited problematic behaviors over the course of the 2014-15 school year. Student was earning mostly A and B grades in the 2014-15 school year. (N.T. 48, 84, 91-92, 99; Parent Exhibit (P-) 1, P-2; S-1 pp. 16, 24, S-4)
 19. In the AES placement, Student receives supplemental autistic support services as provided by Student's current IEP. (N.T. 41, 71-72, 82-84; S-8)
 20. District-provided transportation to and from the AES has not been consistent. Student was not able to attend the AES for the first four school days (excepting snow days when the District cancelled classes) because there was no transportation. After transportation began on February 23, 2015, Student would frequently be picked up and arrive home at different times than scheduled. (N.T. 84-85, 97, 99, 106-09, 110-11; HO-1 pp. 3-5)
 21. As of the date of the due process hearing, Student was not experiencing problems attending the AES other than with the transportation. The inconsistencies with transportation including absences caused Student's grades in some subjects to

decline. (N.T. 103; P-3)

22. Student's 45-day placement in the AES is due to end with a return to the high school on May 4, 2015. (N.T. 113)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. Ordinarily, 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). Often the same party also has the burden of production, or going forward with the evidence, at least initially. However, this hearing officer determined that the logical order of presentation in this matter was for the District to proceed first, establishing the discipline imposed and the reasons for that action; and the parties did not object. Application of the principles of the burden of proof determines which party prevails only in cases where the evidence is evenly balanced or in "equipose," and the outcome of a due process hearing is much more frequently determined by which party has presented preponderant evidence in support of its position. Here, the preponderance of the evidence favors the District on the ultimate issue based on the law.

Hearing officers, as 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 Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found the witnesses all testified to the best of their recollection and knowledge, and were generally

credible with respect to facts necessary to decide the issues presented. It should be further noted that the entire record was thoroughly considered in issuing this decision.

The Parents' Claims

The Parents' due process complaint challenged the District's decision to remove Student to the AES placement for 45 days after the February 9, 2015 incident. Pursuant to 34 C.F.R. § 300.532(a) and (c), the Parents had the right to challenge any decision regarding such a placement in an expedited due process hearing.

The relevant provision provides as follows.

(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

- (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA.

34 C.F.R. § 300.530(g); *see also* 20 U.S.C. § 1415(k). The definition of "weapon" in this regulation is that set forth in Section 930 of the U.S. Code: "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 pocket knife with a blade of less than 2 ½ inches in length." 18 U.S.C. § 930(g)(2).

The evidence unequivocally establishes that Student had possession of a knife on Student's person at school on February 9, 2015. The Parents do not dispute this fact. (*See* Due Process Complaint (S-A); N.T. 16, 96) The Parents' argument is that Student did not intentionally possess the knife at school, and that the consequences of the incident are too severe for what amounts to a mistake on Student's part. While there is no evidence in the record to suggest that Student's possession of the knife on February 9, 2015 was anything but

unintentional, and this hearing officer is certainly sympathetic toward the Parents' position, the decision on the District's removal to the AES must be based on the applicable law.

Section 300.530(g)(1) quoted above makes no mention of intent, nor does the definition of weapon to which Section 300.530 refers, 18 U.S.C. § 930. By contrast, Section 530.300(g)(2) permits a school district to remove a student for 45 days if he or she “[k]nowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance” on school property. (Emphasis added.) The District in this matter contends that the weapons provision in the IDEA provided it with the authority to remove Student to the AES for a period of 45 days, and that its reaction to the incident in this case is consistent with its zero tolerance policy. I am compelled to agree that the fact that Student did not intend to bring the weapon to school is immaterial, because the applicable provision contains no requirement of intent. Accordingly, this hearing officer finds no basis to read such an element into that subsection of the regulation.

Further, the knife found in Student's coat is clearly capable of causing serious injury; and is depicted in the record as having a blade of approximately 3” in length. Consequently, there can be no question that the knife meets the definition of a weapon under the relevant provisions quoted above. The District, thus, had the authority to remove Student to the AES for a period of up to 45 days, and the disciplinary action must be upheld subject to modification discussed below.

The Parents also raised concerns with the delay in arranging, and ongoing difficulties with, Student's transportation to and from the AES, and the District conceded that there were such problems. Student was not able to attend at least the first four days of the AES placement because transportation was not yet in place (amounting to more than a week because of several snow days when classes were cancelled), and the Parents were not advised that Student could

attend the regular high school in the interim.⁵ To its credit, the District did indicate some willingness to make an adjustment to the end date of the AES placement due to the transportation concerns, which are evidently ongoing. While I recognize this is a large school district and that transportation may be an inherent challenge, such an adjustment is appropriate in this case.

The District is required to provide educational services to enable Student to continue to participate in the general education curriculum, and to make progress toward IEP goals. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d). The record supports a conclusion that Student's IEP can be appropriately implemented in the AES. However, after careful consideration, this hearing officer further concludes that Student must be credited with a total of ten days of attendance at the AES so that Student may return to the high school on April 20, 2015. This ten day credit is to provide an appropriate remedy for the period of time that Student was not able to attend school at all at the beginning of the AES placement in February 2015, in addition to the ongoing transportation inconsistency that undoubtedly has had a negative impact on Student's ability to benefit from the educational services provided at the AES. This credit will also provide Student with the opportunity to return to the regular high school setting at the beginning of the week to allow for consistency and a smooth transition, elements of Student's educational program that have been lacking since February 12, 2015. In all other respects, the disciplinary removal was appropriate under the law.

Lastly, there are a number of inaccuracies in the District's records relating to this disciplinary action, and the District conceded that several errors exist. (*See, e.g.*, N.T. 59-61, 62-

⁵ The transcript reflects the answer to this hearing officer's question about whether the Parents were so notified as having been made by the father; however, it is this hearing officer's recollection that the answer appearing at the top of page 112 of the transcript was made by a District witness. In any event, there was no evidence that the District informed the Parents that Student could attend the regular high school prior to the date transportation was arranged, February 23, 2015.

63, 75-76; S-1 pp. 4, 10-11, 14, S-9) To the extent it has not already done so, the District will be ordered to correct Student's education records to reflect that the discipline imposed for the February 9, 2015 incident was a 2-day suspension and a 45-day AES placement; that the conduct on February 9, 2015 was a manifestation of Student's disability; and that Student was excused from school with an early dismissal on February 9, 2015.

CONCLUSION

For all of the foregoing reasons, I conclude that the District had the authority to remove Student to an alternative placement for 45 days, but that the District must provide credit to Student for ten days of attendance due to the delayed and inconsistent transportation to and from the AES. The District must also correct Student's education records to accurately reflect the discipline imposed following the February 9, 2015 incident.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District had the authority to remove Student to the AES placement for a period of 45 days and impose a 2-day suspension as a result of the February 9, 2015 incident.
2. The District shall give Student credit for ten days' attendance at the AES so that Student may return to the high school on April 20, 2015. Any existing District policy on absences that may occur before April 20, 2015 that are not due to a lack of transportation will determine whether any adjustment to this return date should be made. To eliminate any other uncertainty, if the District cancels classes on any currently scheduled school day between the date of this Order and April 20, 2015, Student's return to the regular high school shall not be delayed as a result.
3. To the extent that it has not already done so, within ten calendar days of the date of this Order, the District shall correct all of Student's education records to reflect that the discipline imposed for the February 9, 2015 incident was a 2-day suspension and a 45-day AES placement; that the conduct on February 9, 2015 was a manifestation

of Student's disability; and that Student was excused from school with an early dismissal on February 9, 2015.

4. Within five calendar days of completing the corrections in Paragraph 3 of this Order, the District shall provide written assurance to the Parents that Student's education records have been corrected.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and Order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: March 21, 2015