

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. 30360-24-25

Child's Name:

C.C.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

11/25/2024

INTRODUCTION AND PROCEDURAL HISTORY

The student, C.C. (Student),¹ is a mid-teenaged student residing within the boundaries of the Bethlehem Center School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student currently attends an agreed substitute placement for education following an expulsion.

In the fall of 2024, the Parent filed a Due Process Complaint under the IDEA raising an expedited disciplinary claim related to Student's expulsion; and, as a remedy, [parent] sought reversal of the expulsion decision, a return to the District high school, and compensatory education. The District denied the Parents' contentions and the relief demanded. The matter proceeded to an efficient single-session due process hearing.³

Following review of the record and for all of the reasons set forth below, the claims of the Parent must be granted in part.

ISSUES

1. Whether the District's disciplinary actions taken September 2024 were appropriate under the IDEA; and

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).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The parties commendably provided a set of stipulations that was marked and admitted as Hearing Officer Exhibit (HO-) 1. That exhibit is cited extensively although not necessarily verbatim for stylistic reasons.

2. If the District's disciplinary actions in September 2024 were not appropriate, should Student's expulsion be reversed with Student returning to the District high school and receiving compensatory education?

FINDINGS OF FACT

1. Student is a mid-teenaged student residing within the District. Student is eligible for special education based on an Emotional Disturbance and a secondary disability category of Other Health Impairment.⁴ (HO-1 at ¶¶ 1, 2.)
2. Student at times has historically engaged in verbal and physical aggression against peers, and exhibited difficulty with focus/attention, redirection, and following directions. The aggressive behaviors have decreased over time. (N.T. 26-27, 203.)
3. Student has had private behavioral health services since 2016. (N.T. 28-29.)
4. Student was identified by the District as eligible for special education when Student first moved into its boundaries. (N.T. 25.)
5. The District conducted a Functional Behavioral Assessment (FBA) in January 2019, its last FBA for Student. (HO-1 at ¶ 3.)
6. A Positive Behavior Support Plan (PBSP) was developed in October 2021. The annual goal addressed improving coping skills. Antecedent strategies (planned ignoring, proximity to teacher, frequent attention, verbal reinforcement, posted rules, social work and counseling services, test and assignment accommodations, directions broken

⁴ The secondary disability category in the stipulation and February 2023 Reevaluation are not consistent, although both are supported by the record.

down into steps, calm tone of voice) were included, with the replacement behaviors noted as completion of non-preferred assignments and use of words or signals to request a break or a meeting with the guidance counselor. Consequences for both replacement behaviors and behavior of concern were also set forth. (P-3.)

7. Late in the 2021-22 school year, the District sought permission to conduct another FBA for Student, but the Parent declined. (N.T. 149-50, 160-61.)
8. When Student experienced agitation at school, Student would generally send a text message to the Parent. Student had access to the school social worker as needed. (N.T. 36.-37.)
9. Sometime in 2022, [redacted]. Student was diagnosed with Post-Traumatic Stress Disorder after that incident but this information was not shared with the District, although the school social worker strongly suspected that diagnosis. (N.T. 32, 34, 162-63, 182-83.)

Reevaluation February 2023

10. The District conducted a reevaluation of Student that was completed in February 2023. (P-4; S-15.)
11. The February 2023 RR summarized Student's behaviors over the 2022-23 school year, and included harassment (touching/grabbing a peer; poking peers with an object on a bus); disruption in the classroom (changing seat without permission and refusing redirection); disrespect (changing seat without permission, calling out, feet up on desk); and two instances of possessing tobacco. Student served two days of in-school suspension and four days of out-of-school suspension for these behaviors. (P-4; S-5 at 3.)

12. Previous assessment information was also contained in the February 2023 RR. Cognitive assessment from 2016 reflected below average range aptitude; academic achievement scores also in 2016 were in the average (reading composite, written language composite) to below average range (reading comprehension subtest, mathematics composite, and academic skills battery composite). (P-4; S-5 at 4-7.)
13. The Behavior Assessment Scale for Children – Third Edition for the February 2023 RR reflected no concerns of the teacher. The Parent’s ratings, by contrast, indicated clinically significant concern with hyperactivity, anxiety, depression, and attention problems; she also rated an at-risk concern with atypicality. (P-4; S-5 at 7-13.)
14. Progress monitoring information on goals in the February 2023 RR indicated progress with both reading comprehension and mathematics problem solving as well as coping skills. Other teacher input was generally positive but included some concerns with inappropriate comments, being off-task, and leaving seat. (P-4; S-5 at 14-15.)
15. The February 2023 RR determined that Student remained eligible for special education on the bases of Emotional Disturbance and a Specific Learning Disability; a new FBA was recommended. (P-4; S-5 at 9.)

Discipline 2023-24 School Year

16. In the fall of 2023, Student had the following disciplinary referrals: copying a peer’s assignment; disrespect (arguing with a teacher about a directive in the cafeteria and making inappropriate verbal comments toward the teacher); horseplay (throwing an object at a peer on a bus); and turning in an assignment completed by a peer. Student was issued warnings/reprimands and served one day of in-school suspension for these infractions. (P-7 at 2-4.)

17. During the spring of 2024, Student had the following disciplinary referrals: threatening a peer through social media resulting in two days of out-of-school suspension; failing to respond to several redirections resulting in one day of out-of-school suspension; and disrespect for refusing redirection with peers resulting in a warning/reprimand. (P-7 at 1.)

Individualized Education Program April 2024

18. An Individualized Education Program (IEP) was developed in April 2024. (P-1.)
19. Parent input into the April 2024 IEP included personal circumstances for Student that impacted Student both in and outside of school, but she hoped those would resolve soon. She believed Student was doing well at school. (P-1 at 35.)
20. Teacher input into the April 2024 IEP reflected overall positive comments with a few concerns (distractibility by the smartphone, attention and focus, negative comments toward peers, lack of motivation). (P-1 at 15-17.)
21. The January 2019 FBA was summarized in the April 2024 IEP. The identified behaviors of concern were impulsive actions (physical contact with peers, leaving seat, calling out) and defiance (failing to complete assignments and follow directions). The hypothesis of the function of these behaviors after ten observations was determined to be task avoidance or peer attention following redirection, refusal, or direction for non-preferred tasks. (P-1 at 22-29.)
22. Needs in the April 2024 IEP related to reading, mathematics, behavior, and social skills. Individual social worker services on a weekly basis were recommended. (P-1 at 35-36.)

23. Annual goals addressed reading comprehension, solving mathematics problems, and identifying and using coping skills. Program modifications/items of specially designed instruction related to study guides, preferential seating, test and assignment accommodations, access to a quiet environment when agitated (learning support room, guidance office, special education office, or main office), and communication to the Parent when grade averages fell below 65%. Weekly individual social work services were identified as a related service. Student's program was one of supplemental learning support with Student not participating in regular education for mathematics and social worker sessions; English and Science classes were to be co-taught. (P-1.)

Incidents on September 6, 2024

24. On September 6, 2024, Student was directed to the office of an administrator for discipline after an alleged altercation with a peer in a restroom. A School Resource Officer joined the administrator and Student in the office to discuss the altercation. (N.T. 117-20; HO-1 at ¶ 6-7.)
25. The administrator called the Parent at 12:11 p.m. on September 6, 2024 to advise her of Student's three-day suspension for the altercation, and asked the Parent to pick up Student. Student also received a two-day suspension for disrespectful conduct. (N.T. 38, 40-41, 121; HO-1 at ¶ 8-9.)
26. Student asked to see the school social worker while in the administrator's office, and became agitated after learning that the events of that day would prevent Student from participating in an after-school activity that was important to Student. The administrator

and Parent both attempted to contact the school social worker but were not successful. (N.T. 43-47, 52, 110-11, 188; S-15 at 1.)

27. The school social worker, who had a good relationship with Student in the fall of 2024, was present at the District high school on September 6, 2024 but did not have access to his smartphone and did not receive the messages from the Parent and administrator. (N.T. 176-78, 180-81, 183-85.)
28. Student made several statements in the administrator's office that included the word "terrorize" and indicated that District professionals would "wish" that Student was expelled. (HO-1 at ¶ 10.)
29. The District reported that Student also made statements in the administrator's office that included a term for a weapon and the word "terrorize" a second time. (HO-1 at ¶ 11.)
30. The Parent and Student left the school building without further incident. The administrator later sent an email message to the Parent that a meeting would convene the following week. (HO-1 at ¶ 13.)
31. On September 6, 2024, the District received two phone calls from unknown individuals who made threatening statements toward its staff about the incident with Student. (N.T. 122-23; S-1.)
32. Student did not return to the District after September 6, 2024. (HO-1 at ¶ 14.)
33. On September 9, 2024, two police officers visited the family's home and spoke with the Parent and Student about the September 6, 2024 incident. (N.T. 86; S-1.)
34. The District convened an informal meeting to include a manifestation determination on September 10, 2024, which the Parent attended.

Student's IEP and PBSP were not reviewed at that meeting. (N.T. 57-58, 154-55; HO-1 at ¶¶ 15-16.)

35. The District offered an alternative educational placement for Student at the September 10, 2024 meeting. (HO)1 at ¶ 17.)
36. The manifestation determination worksheet indicates that Student's IEP was provided to the team "prior to the meeting". (P-10 at 4.)
37. The team at the meeting concluded that the behavior in question was not a manifestation of Student's disability and was not a direct result of a failure to implement the IEP. (HO-1 at ¶¶ 18-19.)
38. The District members of the team that met on September 10, 2024 believed that Student's behavior on September 6, 2024 was unique for Student rather than part of a pattern or typical of Student, which is the reason for finding it was not a manifestation of Student's disability. (N.T. 124-25, 127, 164-667, 201-02, 204-06; P-10 at 6-7.)
39. The Parent did not agree with the manifestation determination or an alternative educational placement. She also did not approve a Notice of Recommended Educational Placement (NOREP) for the alternative educational setting. (P-10 at 7HO-1 at ¶¶ 20-22.)
40. The Parent also disapproved a NOREP for an alternative education placement for a period of 45 days in September 2024. (P-12.)
41. On September 19, 2024 the District extended Student's suspension through September 23, 2024 based on Student presenting a "clear and present danger." A second suspension was imposed on September 30, 2024 for the remainder of the month of September. (P-8; HO-1 at ¶¶ 23-25.)
42. The District Board of School Directors expelled Student following an expulsion hearing on October 1, 2024. (HO-1 at ¶¶ 26, 28.)

43. Student was never disciplined by the District for physically injuring a teacher or staff member, although there are records of Student engaging in physical aggression against peers as an elementary school-aged student. (HO-1 at ¶ 29.)
44. The Parent filed a complaint with the Bureau of Special Education after the expulsion. (N.T. 63-64.)
45. The parties agreed to a substitute educational setting that began in October 2024. (N.T. 64, 95.)
46. An expedited due process hearing convened on November 12, 2024. The tenth school day after that hearing is November 26, 2024. (N.T. 1; HO-3.)

DISCUSSION AND APPLICATION 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. 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, 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.

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*

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. Their testimony was essentially quite consistent where it overlapped. In the relatively few instances that there were contradictions, those are attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead. The weight accorded the evidence, however, was not equally placed based upon application of the relevant legal principles.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

IDEA Disciplinary Principles

For purposes of this decision, the Parent's Due Process Complaint challenges the District's imposition of discipline in September 2024. Pursuant to the IDEA and its applicable regulations, the Parent 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).

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).

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). The manifestation determination must be made within ten school days of any decision to change the eligible child's placement, and must be made by "the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA)." 34 C.F.R. § 300.530(e); *see also* 20 U.S.C. § 1415(k)(1)(E). To do so, the IEP team "must 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[.]" 34 C.F.R. 300.530(e)(1). The U.S. Department of Education has opined that this list is not exhaustive and that "all relevant information" can go far beyond those examples. 71 Fed. Reg. No. 156, 46719 (2006).

If the team determines that the behavior was a manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed unless the parent and LEA agree otherwise; and the team must also either conduct an FBA and implement a behavior intervention plan, or review and modify an existing behavior plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f). 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 is entitled to special education services. 20 U.S.C. §§ 1415(k)(1)(C) and (k)(1)(D); 34 C.F.R. §§ 300.101(a), 300.530(c) and (d).

When a Parent seeks an expedited hearing to challenge disciplinary action taken by an LEA, the hearing officer has authority to order a change of placement through one of two explicit remedies: return the child to the placement from which he or she has been removed; or direct a change of placement in circumstances not present here. 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. § 300.532(b). The law does not, however, preclude other relief within the hearing officer's jurisdiction. The IDEA in general confers the hearing officer with broad discretion in fashioning an appropriate equitable remedy. *See, e.g., Stapleton v. Penns Valley Area School District*, 2017 U.S. Dist. LEXIS 204143, *14 (M.D. Pa. 2017).

The Manifestation Determination

The Parent challenges the District's manifestation determination review procedure and conclusion. Despite a potentially contrary statement on the worksheet, the witnesses who attended the meeting on September 10, 2024 and recalled the discussion agreed that Student's IEP was not reviewed. It is far from clear how any conclusion could be drawn that the behavior was not a result of a failure to implement that IEP when it was not actually

considered at all at the meeting. The process was fatally flawed on this basis alone.

With respect to the determination itself, the opinion of the District members of the team can only be described as cursory. Their unanimous focus on the severity of the behavior on September 6, 2024 as contrasted to prior experience as the only factor for consideration simply cannot stand. As noted above, the team is mandated to consider all available information, which should necessarily involve a meaningful discussion with participation by the Parent. This did not occur, and the evidence in this case is more than preponderant that the manifestation determination itself was not based on the requirements of the IDEA and its implementing regulations.

It is, of course, wholly understandable that school administrators and educators would take its obligation to provide a safe environment for its students and staff very seriously, particularly with the prevalence of school violence in recent years. Nevertheless, disregarding explicit procedural protections for eligible students is not an option in doing so. There is also no assertion or even a suggestion that Student's behavior constituted one of the specific exceptions for an automatic 45-day alternative education setting in 34 C.F.R. § 300.530(g).

Although the Parent seeks a ruling overturning the School Board's decision to expel Student, jurisdiction for that remedy is outside of this hearing officer's authority. 42 Pa.C.S. § 933(a)(2). She also asks that the manifestation determination be reversed. However, the record is not preponderant on whether or not the behavior on September 6, 2024 was a manifestation of Student's disability. The District now has formal confirmation of a mental health diagnosis, PTSD, in addition to those previously known and identified. The District will be required to convene a new manifestation determination review that complies with the IDEA in all respects including a specific review of all available information.

Finally, the Parent seeks compensatory education. It is well settled that compensatory education may be an appropriate remedy where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award is designed to compensate the child for the period of time of the deprivation of appropriate educational services, while excluding the time reasonably required for a school district to correct the deficiency. *Id.* Because the District did not comply with its obligations to conduct a proper manifestation determination review but, instead, expelled Student without any educational services at all from September 9, 2024 until Student began attending the substitute educational setting, compensatory education of 5.5 hours per day⁵ for each day that the District's schools were in session shall be awarded for that period of time.

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers any of Student's identified educational and related services needs in the areas of identified disability. The compensatory education may not be used for products or devices that are primarily for leisure or recreation. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEPs to assure meaningful educational

⁵ Students at the secondary school level are entitled to 990 hours of instruction per school year over 180 school days, equating to 5.5 hours per day. 22 Pa. Code §§ 11.1, 11.3.

progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age eighteen (18). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents; and the cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSIONS OF LAW

The District's manifestation determination review on September 10, 2024 was flawed and must be vacated, with a new review to be conducted under the IDEA in compliance with its mandates.

Student is entitled to compensatory education for the period of time Student was deprived of educational services.

ORDER

AND NOW, this 25th 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's manifestation determination review on September 10, 2024 did not comply with the requirements of the IDEA and its implementing regulations, and is VACATED.
2. Within seven school days of the date of this decision and order, the District shall convene another manifestation determination review meeting, to include the Parent, that complies with all legal requirements.

3. All due process protections shall be afforded to the Parent after completion of the second manifestation determination.
4. Student is awarded 5.5 hours of compensatory education for each day that District schools were in session beginning on September 10, 2024 and continuing through the date that Student began to attend the substitute educational setting. The terms and conditions in the attached decision apply as though set forth herein at length.
5. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED. Jurisdiction is RELINQUISHED.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 30360-2425

Sent to counsel for both parties this date as required by 34 C.F.R. § 300.515 by electronic mail message as requested by counsel consistent with 22 Pa. Code § 14.162(n).