

This is a redacted version of the original hearing officer (or appeal panel) decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania
Special Education Hearing Officer

DECISION

AH

EXPEDITED DUE PROCESS HEARING

Date of Birth: xx/xx/xxxx

Date of Hearing: April 27, 2010

CLOSED HEARING

ODR No. 00977/09-10-AS

Parties to the Hearing:

Representative:

Parents:

Parent Attorney:
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School District:
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School District Attorney:
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Date Record Closed:
Date of Decision:

April 27, 2010
May 11, 2010

Hearing Officer:

Deborah G. DeLauro, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

(Student)¹ is a seventh grade student who resides in the Southern York County School District (District). Student had been identified as IDEA eligible by reason of an autism spectrum disorder and aspergers syndrome which primarily affects language and social skills. Student receives special education services through supplemental learning support with social skills, integrated occupational therapy consultation, and consultative speech and language support.² Student was involved in a bus incident when, without sufficient advanced notice, the bus driver changed the route due to weather conditions. [Redacted behavior/incident.] The IEP team determined that Student's behavior was a manifestation of his disability, but that his actions constituted a "serious bodily injury" under IDEA, thereby allowing the District to unilaterally remove Student to an interim alternative educational setting (IAES) for up to forty-five days.

This dispute centers on whether Student's behavior rose to the level of "serious bodily injury" as defined by IDEA.³ The District requested that this Hearing Officer also consider whether Student is a danger to himself or others pursuant to 34 C.F.R. 300.532(b)(1). Student's Parents appealed the forty-five day disciplinary placement.

¹ All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² Student also received 25 minutes of [Redacted services]. [P-20;NT: p.83]

³ 34 C.F.R. 300.530(g)(3).

For the reasons described below, I find for the Parents and reverse the out-of-District placement. IAES removal.

ISSUE

1. Whether Student's April 14, 2010 behavior meets the criteria for the "Serious Bodily Injury" as defined in the IDEA?
2. If so, then whether the Interim Alternative Educational Setting ("IAES") is appropriate?

FINDINGS OF FACT

1. Student (hereinafter "Student"), whose date of birth is [Redacted], is a [Redacted] seventh grade student currently residing within the District (hereinafter "District"). [P-17; NT:]
2. Student qualifies for special education services under the Individuals with Disabilities Education and Improvement Act (hereinafter "IDEIA") primarily within the disability category of Autism⁴ and secondarily with a Speech and Language Impairment. [P-17; P-23; N.T.]
3. Student has a behavior management plan which identifies "transitions" as triggers for behavioral incidents. [P-20; S-1 p. 21; N.T. pp. 62-64] Parents were to be notified if there was to be a change in the bus route. [N.T. pp. 62-63]

⁴ Student has been diagnosed with Autism Spectrum Disorder (hereinafter "ASD" and Asperger's Syndrome

4. Student had eleven incidents of misbehavior between the September 2009 and December 2009.⁵ [S-1,pp.1-29; N.T. pp.22-40]
5. The District did not conduct a Functional Behavior Assessment (hereinafter “FBA”) until January 2010. [N.T. p.56] Student entered middle school in September 2009 with a FBA which was completed in May 2009 when Student was in elementary school. [S-1 p.26; N.T. p. 53]
6. The District never contacted the Intermediate Unit (hereinafter “IU”) Autism specialist to support Student in his middle school placement⁶ [N.T. pp. 53-54] nor did they convene an IEP team meeting in order to offer a 1:1 aid or an emotional support class. [N.T. p.55]
7. After the a meeting in January wherein Assistant Principal conducted additional training on de-escalating techniques, Student was involved in three behavior incidents between January 2010 and April 14, 2010.⁷ [S-1 pp. 1-35;N.T. pp.44,56]
8. On April 14, 2010, Student was riding the bus to school when, without sufficient prior notice, the bus driver changed the route due to weather conditions. [P-22; N.T. pp.49, 63]
9. [Redacted behavior/incident] [P-19; P-22; N.T. p.64]
10. According to the School District’s Student Behavior Handbook (hereinafter “Handbook”), these are Class III violations.⁸ [P-22; NT:]
11. Student was suspended for five days. [P-22; S-1 p.36; NT: pp. 72, 74]

⁵ Critical Behavior Incidents occurred on: 9/17/09; 11/3/09; 11/6/09; 11/9/09; 11/16/09; 11/17/09; 11/19/09; 11/23/09; 12/10/09; 12/15/09; and 12/17/09.

⁶ District provided uncontradicted testimony that the school psychologist was an autism specialist and that she conducted training and support to Student’s teachers. [N.T. p.54]

⁷ These incidents occurred on: 2/2/10; 3/11/10; and 3/29/10.

⁸ The Handbook violations are as follows: 1) Physical assault directed towards any district employees or adult, and 2) Physical assault directed towards students.

12. The bus driver, bus attendant and bus dispatcher all completed incident reports after the April 14, 2010 incident. [P-19;N.T. p.64]
13. No one received outside medical care as a result of the April 14, 2010 incident. [N.T. p. 58] All District personnel returned to their work duties after the incident and no one missed work as a result of the incident. [N.T. p.59] Yet the District claimed that all three District employees received “serious bodily injuries.” [P-22;N.T. pp.59-60]
14. During the week of March 15, 2010, an anonymous middle school support group sent a letter to the high school teachers complaining about the middle school policies for handling homework, grading and the behavior of certain students, specifically naming Student. [P-3; N.T. pp.51, 52, 78] Both the middle school Assistant Principal and the Director of Special Education testified that they did not know who wrote the letter, but Student’s mother acknowledged that she was told that the middle school Principal authored the letter. [P-3; N.T. pp.51,75,78]
15. On April 20, 2010, the IEP team determined that Student’s behavior was a manifestation of his disability, and consequently agreed to conduct a FBA and modify Student’s Behavior Management Plan. [P-22; NT: p.62]
16. The IEP team also found that Student’s behavior involved “serious bodily injury” and therefore determined that Student would be placed in an out-of District IAES for up to forty-five days. [P-22; N.T. p.]
17. Serious Bodily Injury is defined in IDEA as “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or faculty. 34 C.F.R.

- 300.530(g)(3). Serious Bodily Injury has the meaning given the same term under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
18. Throughout the school year, Student's teachers conducted IEP monitoring. [P-7; N.T. p. 57] Point Sheets were used to address Student's emotional and social behavior skills. Student's positive point sheets reflected his progress. The point sheet showed that Student consistently met his behavior goals. [P-7; P-24; P-25; N.T. p.58]
19. As indicated on the [Redacted] progress monitoring, Student also met all of goals for all four marking periods. [P-25;N.T.pp.83-84]
20. On April 16, 2010, the District issued a Re-Evaluation Report [P-20; N.T. p. 82] which included among other things, a Summary of Student's FBA and Teacher Recommendations that Student should continue his enrollment in the Learning Support with Social Skills Program in a supplemental setting in Student Skills, Social Skills, and Advisory. [P-20 p. 20 of 25;N.T.p.83]
21. On April 20, 2010, Parents requested an expedited due process hearing under IDEA and Section 504 of the Rehabilitation Act, seeking 1) an Order from the Hearing Officer returning Student to the District as his actions do not meet the IDEA's definition of Serious Bodily Injury; 2) a finding that the IAES is inappropriate; 3) an Independent Educational Evaluation; and 4) compensatory education for Student's time out of school due to the disciplinary action. [Parents' Complaint Letter]

22. On April 23, 2010, the District, via email, requested that this Hearing Officer also hear evidence and issue a ruling that the Student is a danger to himself and others pursuant to 34 C.F.R. 300.532(b)(ii).⁹
23. Prior to the April 14, 2010 incident, the District never contended that Student was a danger to himself or others. [P-20; N.T.p.82]
24. On April 27, 2010, a two and a half-hour expedited due process hearing was conducted. This Hearing Officer bifurcated the issues¹⁰ and determined that the issues for the expedited hearing were limited to the following inquiry: 1) whether the student's behavior meets the criteria for serious bodily injury as delineated in IDEA; and 2) if yes, then whether the interim alternative educational placement is appropriate. [HO-1;N.T.p.9]
25. The District and Parents stipulated that the District would present its evidence first on both questions under both legal theories¹¹, and that the District would stipulate that it carries the burden with regard to the issue of its dangerousness exception. [N.T.p.13]
26. Hearing Officer exhibits 1 and 2 are admitted into the record. (N.T. 8, 10) Parent exhibits P3, P7, P19, P20, P23, P24, and P25 are admitted into the record. (N.T.

⁹ (b)(ii) A hearing officer under Sec. 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under (b)(1) of this section the hearing officer may-

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the placement of the child is substantially likely to result in injury to the child or others.[HO-2]

¹⁰ The remaining issues regarding the Parents request for an Independent Education Evaluation and Compensatory Education for the time Student spent out of school would be addressed, as needed, in another unexpedited due process hearing.[HO-1;N.T. p.9]

¹¹ The legal standard for the "serious bodily injury" issue is by a preponderance of the evidence; the legal standard for the "dangerous exception" is clear and convincing evidence. [N.T.p.16]

12, 14, 16, 17, 19, and 21) School District exhibits SD1 and SD2 are admitted into the record. (N.T. 5 and 6)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof: The Parents requested this hearing and therefore they generally bear the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. Generally, this burden remains on that party throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, in this expedited matter, the District agreed to present its evidence first and bear the burden with regard to the “dangerousness exception.” The Parents nevertheless continued to carry the burden with regard to the “serious bodily injury” issue.

The Individuals with Disabilities Education Improvement Act (IDEIA) provides that, when a disabled student’s behavior constitutes a serious violation of the Code of Conduct, such that a change of school placement is contemplated, but the student’s IEP team determines that the conduct in question was caused by, or had a direct and

substantial relationship to, the student's disability, the team must conduct a functional behavioral assessment or modify the already existing behavior intervention plan, and return the student to the placement from which he was removed, unless the Parents and the District agree to a change of placement as part of the modification of the behavioral intervention plan. 34 CFR §300.530(e) and (f)

Here, the IEP team determined that Student's misconduct was a manifestation of his disability but that in this case, special circumstances applied allowing school personnel to remove the Student to an interim alternative educational setting for up to 45 days because he "inflicted serious bodily injury upon another person" while on the school bus. Although Student's parents and the District do not argue that the Student's behavior was directly related to Student's disability, Parent do disagree with the District's removal of Student to an IAES. 34 CFR §300.530(g)(3)

"Serious bodily injury," for these purposes, is narrowly defined as: "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 USC §1365(h)(3) "Serious bodily injury" for these purposes, is not: "a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary." 18 USC §1365(h)(4)

Parents challenging a unilateral removal for infliction of serious bodily injury are entitled to an expedited due process hearing. 1415(k)(3)(A), (k)(4)(B); 34 CFR §300.532(c)

As noted above, the Parties disagree on whether Student's behavior meets the definition of "serious bodily injury". The District's Special Education Supervisor stated that she did not believe Student's behavior constituted "serious bodily injury."

Furthermore, the evidence reveals that although Student was involved in eleven serious behavioral incidents between September and December 2009, the District never before contended that Student's behavior resulted in serious bodily injury. In addition, the District's Assistant Principal noted that Student's behavior improved after the he conducted additional training and the Student's behavior plan was updated in January and February 2010. [P-7; P-23; P-24; N.T.p.58]

Moreover, at the time of the incident in question, progress monitoring data indicated that Student was consistently meeting his daily behavior goals, [P-24;N.T. p. 58] and Student's teachers were recommending that he continue in Learning Support with Social Skills and in regular education.[P-20; N.T. p.83]

Parents further suggest that the impetus behind the District's application of the "serious bodily injury" exception, is based on an "internal conflict" within the District. Parents speculate further that there are some District staff who are unhappy about how behavior is being handled, and they have named Student specifically. Although I found it troubling that District personnel claim to have no knowledge as to who wrote the letter and that Student was specifically mentioned in this anonymous letter, I will not reach the same conclusion that the District's "serious bodily injury" determination was premised on this letter. [P-3; N.T. pp. 51, 52,75,78,90]

Parents argue that the question of serious bodily injury is the only issue appropriate for the expedited hearing and that the District is attempting to latch onto an

unrequested due process hearing issue when it asserts that the appropriateness of the IAES should be addressed. Parents assert further that the only reason for the expedited hearing is that the District unilaterally placed Student out of District contending that he committed serious bodily injury. In response, Parents aver that the Student's behavior does not rise to the level of serious bodily injury as defined in IDEIA. I agree.¹²

As noted above, "serious bodily injury" for IAES purposes, is not: "a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary." 18 USC §1365(h)(4) Rather, the infliction of "serious bodily injury" for unilateral IAES placement purposes must involve "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 USC §1365(h)(3) Although Student's behavior was injurious and frightening, it does not fit within the IDEIA's narrow definition of the infliction of "serious bodily injury." Thus, I conclude that the District's unilateral removal of Student to an IAES was inappropriate. Therefore, in accordance with 34 CFR§300.532(b)(2)(i), I will order that the District shall return Student to the placement from which Student was removed.

CONCLUSION

Special education law permits school districts to unilaterally place children with disabilities into an IAES without regard to whether the behavior was a manifestation of the child's disability if the child has inflicted serious bodily injury upon another person at

¹² Similarly, after reviewing all of the evidence presented, I find that the District did not meet its burden with regard to whether the Student is a danger to himself or other.

school. In this case, I conclude that Student's behavior does not meet the narrow legal definition of "serious bodily injury."¹³ Therefore, I reverse the School District's unilateral IAES placement.

ORDER

- Student's April 14, 2010 behavior does not meet the definition of the infliction of "serious bodily injury" under IDEIA. Accordingly, the District's unilateral removal of Student to an IAES is reversed.
- The District must conduct a comprehensive FBA and convene an IEP team meeting within thirty (30) school days in order to develop an appropriate educational program including an appropriate behavior management plan for Student.

Deborah G. DeLauro

HEARING OFFICER

May 11, 2010

¹³ Nor does Student's behavior on April 14, 2010 meet the criteria for "danger to himself or others" under the IDEIA.