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: C.C.

Date of Birth: [redacted]

Date of Hearing: 7/9/2015

CLOSED HEARING

ODR File No. 16178-14-15 KE

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Melissa Krishock, Esquire Law Office of Melissa Krishock 519 Walnut Street, 3rd Floor Reading, PA 19601
Local Education Agency Kutztown Area School District 251 Long Lane Kutztown, PA 19530	LEA Attorney Glenna Hazeltine, Esquire King, Spry, Herman, Freund & Faul Suite 700 One West Broad Street Bethlehem, PA 18018
Date Record Closed:	July 14, 2015
Date of Decision:	August 6, 2015
Hearing Officer:	Cathy A. Skidmore, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a high school-aged student in the Kutztown Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).[2] Student's Parents filed a due process complaint against the District asserting that it improperly imposed discipline upon Student in violation of the IDEA. At the hearing, the Parents also claimed that, after Student enrolled in a cyber-school program at their request because of the disciplinary action, the District denied Student the special education services that Student was provided prior to that change of placement.

The case proceeded to a due process hearing completed in a single session. The District's Motion to Dismiss made at the beginning of the hearing was denied, and the parties presented evidence on the issues presented. For the reasons set forth below, I find in favor of the District and the Parents' claims will therefore be denied.

ISSUES

1. Whether the District improperly imposed disciplinary action against Student; and

2. If it did improperly impose disciplinary action against Student, is Student entitled to compensatory education and/or other equitable remedies?

FINDINGS OF FACT

1. Student is a high school-aged student who is a resident of the District. Student is eligible for special education under the IDEA. (Notes of Testimony (N.T.) 26-27)

2. Student has an Individualized Education Plan (IEP). While attending school at the high school building, Student was able to go to the learning support classroom to take

[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. It should also be noted that Student's mother was the active participant at the hearing, but the plural Parents is used when it appears she was acting on behalf of both Parents.
[2] 20 U.S.C. §§ 1400-1482.

tests and to seek extra assistance as needed. This support was provided outside of content area class periods based on the availability of the learning support teacher. Classroom teachers could also give permission for a student to go to the learning support classroom during a class period. (N.T. 28, 102-03)

3. Student found the availability of the learning support classroom, with its smaller class setting, to be beneficial. (N.T. 28)

4. The building principal is responsible for discipline of students in the District. All staff may enforce level one infractions that are considered routine misbehavior; an administrator must be involved in level two infractions, described as "acts which disrupt the education process, result in violence to another person or property, and/or pose a direct threat to the safety of others in the school" (School District Exhibit (S-) 10 p. 17). (N.T. 105; S-10 pp. 16-17)

5. In October 2014, Student was involved in an incident on the school bus, and lost the privilege to ride the school bus for five days. The District did not consider this consequence to constitute any type of suspension because Student was not provided with transportation as a related service. Student did not miss any school days due to the loss of bus privileges. (N.T. 81, 97-98; S-7, S-8 pp. 1, 21)

6. Sometime prior to February 2015, Student and a peer were walking down the hallway when the peer kicked an object on the floor. The high school principal talked to both Student and the peer, and Student told him that Student did not kick the object. Later that day, the principal spoke with Student's mother and told her that he was proud of Student for accepting responsibility for kicking the object. No discipline was imposed for this incident. (N.T. 39-40, 48-49; S-8)

7. In early February 2015, Student was given a warning for disrespectful conduct. (S-8 pp. 1, 22)

8. On February 18, 2015, Student put on a hat during lunch period in the cafeteria, and a teacher removed it. Student then put on another hat borrowed from a peer. Students are not permitted to wear hats in the cafeteria. (N.T. 29)

9. The high school principal approached Student in the cafeteria and asked Student to go to the principal's office. Student and the principal went to the office and discussed the lunchroom incident. The principal also asked Student to write what occurred, and Student complied. (N.T. 29-33, 35; S-3 p. 3)

10. The high school principal called Student's mother to explain what happened in the cafeteria, and told her that Student had also made an obscene gesture. He advised Student's mother that Student would be suspended from school. (N.T. 50-51)

11. The principal imposed a three-day suspension for the lunchroom incident, which the District considered to be disrespectful conduct and insubordination to authority, after consultation with the assistant superintendent. This disciplinary action is permitted

by the District's Code of Student Conduct. Student's mother also picked Student up from school that afternoon before the school day ended. (N.T. 32-33, 51, 98-99, 108, 113, 116; S-3, S-10 pp. 17-19)

12. Following the lunchroom incident, Student and the Parents decided that Student should attend the cyber-school program rather than return to the high school building after the suspension was served. Student and the Parents were concerned about further discipline that might affect Student's employment. Student began the cyber-school program within approximately one week after Student served the out of school suspension. (N.T. 43, 53, 55-56, 88, 100-01; S-4, S-9 p. 22)

13. The District convened a meeting of Student's IEP team after the decision to enroll Student in the cyber-school program. (N.T. 101)

14. After Student began the cyber-school program, Student was able to access the learning support teachers once or twice a week. Student was required to make arrangements in advance for this support and generally not on the same day as the request was made. (N.T. 28-29, 41, 132)

15. Student did not attend school for all or part of twelve days during the 2014-15 school year, including the three days of out of school suspension. The other nine days were for excused or unexcused absences, not for disciplinary reasons. (S-7)

16. Student would be able to return to the high school building for the 2015-16 school year should Student and the Parents elect that option. (N.T. 104; S-5 p. 3, S-6)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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); *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, 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 each of the witnesses to be credible, testifying to the best of their recollection to the relevant events. In reviewing the record, the testimony of every witness and the content of each exhibit were carefully considered.

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. As an eligible student, the District was further required under the IDEA to provide Student with a "free appropriate public education" (FAPE). 20 U.S.C. §1412. Additionally, the IDEA and its implementing regulations provide for specific protections to eligible students who are facing a disciplinary change in placement. 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530-536. Those provisions include a process for conducting a manifestation determination when there has been a decision to change the child's placement for disciplinary reasons. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e). Where a parent disagrees with a disciplinary change of placement, they may request an expedited due process hearing. 20 U.S.C. §§ 1415(k)(3)(A), 1415(k)(4)(b).

However, "[s]chool personnel … may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities)." 20 U.S.C. § 1415(k)(1)(b).

The removal is considered to be a change in placement, and subject to those IDEA protections, when it is for a period of more than ten consecutive school days, or constitutes a pattern of removal because the series exceeds ten school days in one school year, the removal was based on substantially similar behavior, and the totality of other factors warrant such a finding. 34 C.F.R. § 300.536(a).

In this matter, the Parents initially sought an expedited hearing. However, following review of the due process complaint and upon consideration of a request to reschedule the hearing, this hearing officer concluded that the matter should proceed under the ordinary timelines for non-expedited hearings since the suspension in question did not constitute a disciplinary removal by the local education agency. At the hearing, the Parents did not contend that Student should have been afforded a manifestation determination, nor did they specifically challenge the three-day out of school suspension imposed. Rather, they claimed that the District pursued a pattern of discipline with Student over the course of the 2014-15 school year that was contrary to the IDEA. After review of the evidence, this hearing officer cannot agree.

The only discipline imposed by the District that removed Student from school was the three-day out of school suspension from the February 18, 2015 lunchroom incident. (Finding of Fact (FF) 5, 6, 7, 11, 15) Student was not removed from school by the District at any other time during the 2014-15 school year, nor did Student miss any school days as a result of District enforcement of its Code of Student Conduct. (*Id.*) Moreover, the decision for Student to enroll in the cyber-school program was made by the Parents, not the District (FF 12, 13), and there is no evidence that the brief delay before that program began was even remotely related to the out of school suspension imposed. Thus, there was no disciplinary change in placement that would invoke those protections in the IDEA.

The "pattern" about which the Parents complain is not related to a change of placement, but rather to their disagreement with approaches taken by, and the content of communications from, the high school principal. (N.T. 36, 49, 51, 52-53, 57-58, 99-100; S-5) While it is perhaps understandable and reasonable that the Parents would prefer that Student have no direct contact with that particular professional given the apparent tension between him and the family to date, it is his responsibility for discipline in the building. (FF 4) I decline to impose an Order on the District that would usurp its obligations and authority to administer the provisions of the various public school laws and policies under which it must operate. Nevertheless, as a matter of dicta, this hearing officer does suggest that the District give serious consideration to delegating to another staff person the duty of communicating with Student and the Parents as may be necessary if Student should return to the school building and engage in behavior that requires the principal's involvement. This relatively easy accommodation would not only foster a more positive relationship between the parties, but would also provide Student with the opportunity to complete the final year of public education, the critical senior year, alongside Student's peers.

Finally, Student and the Parents expressed a concern with the need to schedule time with the learning support teacher when Student needs that assistance with cyber-school programming. While this arrangement is likely not as convenient as when Student was present in the school building, practical considerations including Student's physical absence during instructional time required some change to the way the necessary special education support was provided. This hearing officer cannot conclude that the process that was in place at the end of the 2014-15 school year, delaying but not eliminating Student's learning support services, amounted to a denial of FAPE to Student under the circumstances.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, I conclude that the District did not violate the IDEA with respect to discipline imposed on Student.[3]

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parents' claims are denied, and the District is required to take no action.

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

Cathy A. Skidmore

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Cathy A. Skidmore
HEARING OFFICER

Dated: August 6, 2015

[3] To the extent that the District's Motion to Dismiss remains outstanding, it is denied as moot, as this decision is issued based on the evidentiary record.