

TEA DOCKET NO. 054-SE-1109

Student,	§	
b/n/f Parent	§	BEFORE A
	§	SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
NORTH EAST	§	FOR THE
INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS
Respondent	§	

FINAL DECISION OF THE HEARING OFFICER

Appearances for Petitioner:

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Statement of the Case

The Petitioner (Student)¹ brings this action against the Respondent (District), under the Individuals with Disabilities Education Act (IDEA), as amended (20 U.S.C. §§ 1400 et seq.).

The Petitioner complains that the Respondent violated the discipline provisions of the IDEA by inappropriately removing the Petitioner to an interim alternative educational setting.

As relief, the Petitioner requests that the Respondent return the Petitioner to the educational setting the Petitioner was in prior to the disciplinary change in placement.

Procedural History

The Texas Education Agency (TEA) received the Petitioner's Due Process Complaint requesting an expedited due process hearing on November 2, 2009. This Hearing Officer held prehearing teleconferences with the parties on November 9, 10, and 12, 2009. During these teleconferences, the Petitioner's complaint was reviewed, a hearing timetable was established and pertinent topics, such as the production of records and the appearance of witnesses, were discussed.

The expedited due process hearing was set for and conducted on November 19, 2009. In total, eight witnesses were called and testified. Various exhibits were admitted into evidence including a video recording of the underlying incident involving the Petitioner at school. During the hearing, the Petitioner was afforded a fair opportunity to offer and solicit evidence and testimony to satisfy the Petitioner's burden of persuasion as assigned under *Schaffer v. Weast*, 546 U.S. 49, 57 – 58 (2005). The parties were permitted to submit written closing arguments.²

¹ To protect the privacy of the Petitioner, the Petitioner is also referred to as "Student" in this Decision.

² Following the Petitioner's submission of its posthearing brief via e-mail, the Respondent filed a motion to strike regarding the e-mail from the Petitioner to the Hearing Officer. The Petitioner did withdraw inadvertently disclosed attorney-client communication not intended for submission. The motion is granted regarding still pictures also attached to the e-mail transmitting the Petitioner's posthearing brief.

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, this Hearing Officer makes the following findings of fact:

1. On November 6, 2007, the District completed a full and individual evaluation (FIE) report on the Student. Among other things, the FIE report stated: “FIE completed 11-10-06 found [Student] exhibits inappropriate types of behavior or feelings under normal circumstances, but at the time the evaluation was completed neurological testing was being completed and a neurologist attributed behavior outbursts to migraine [sic] headaches. MRI testing was being done to consider whether there was brain asymmetry that could account for [the Student’s] sudden, intense behavior outbursts. However, since this evaluation was completed further neurological testing found no neurological reason for [the Student’s] behavior outbursts. Therefore, the behavior is better explained by Intermittent Explosive Disorder and Mood Disorder [not otherwise specified] NOS, as diagnosed by Claudio Cepeda, M.D. ([the Student’s] psychiatrist) on documentation from 11-10-06. Lesley Boyd, LSSP, spoke with [the Student’s] psychiatrist, Dr. Cepeda, on 11-01-07, to get feedback regarding proposed change of eligibility to that of Emotional Disturbance. Dr. Cepeda stated he was in favor of this and indicated his diagnosis and treatment of [the Student] have not changed. [The Student’s] mood shifts and angry outbursts have been occurring over a long period of time, and [the Student] is prescribed medication to address these behaviors. [The Student’s] parents started taking [the Student] to a therapist this summer due to excessive emotionality observed in the home setting. [The Student] has generally been able to maintain self-control this year, but has shown instances of increased irritability even with his medication. [The Student] had an outburst one day when [the Student] did not have . . . medication. Last year [the Student] was physically aggressive with adults but not this year. [The Student] is receiving social skills instruction again to review anger management skills taught last.” (Hr’g Tr. at vol. 2, pp. 237 – 38; Resp’t Ex. 4 at 2)
2. The November 6, 2007 FIE report further stated: “This student demonstrates significant emotional/behavioral deficits in the areas of: anger management; mood shifts; and disrespect to authority.” The FIE report concluded: “Based on information contained in this FIE, related disability reports, and/or the statement of recommendations and assurances, this student appears to meet criteria for the disability(ies) below: Emotional Disturbance.” (Hr’g Tr. at vol. 2, p. 234; Resp’t Ex. 4 at 5)
3. On March 26, 2008, the District completed a “crisis intervention plan” for the Student to address, among other things, instances when the Student became “violent” in the Student’s *** school classroom. (Hr’g Tr. at vol. 1, pp. 97 – 102; Pet’r Ex. 12 at 154)

4. On April 21, 2009, the District held an admission, review and dismissal (ARD) committee meeting for the Student. The Student's parents participated and signed in agreement. Among other things, the committee determined that the Student remained eligible under the IDEA as a child with an emotional disturbance. The committee noted that the current FIE was the November, 2007 FIE. (Hr'g Tr. at vol. 1, p. 155; Hr'g Tr. at vol. 2, p. 248; Pet'r Ex. 17 at 189 – 90, 197 – 98; Resp't Ex. 3 at 1 – 2, 8 – 10)
5. Among other things, the April 21, 2009 ARD committee noted under "present levels of academic achievement and functional performance" that the Student had three behaviors that affected educational programming and placement: "(1) physically and verbally aggressive; (2) makes negative comments about [self]; and (3) has low self esteem." The committee further noted that the Student's behavior "impedes his/her learning or that of others." (Pet'r Ex. 17 at 190 – 91; Resp't Ex. 3 at 2 – 3)
6. Among other things, the April 21, 2009 ARD committee incorporated a functional behavioral assessment (FBA) of the Student dated "11/5/2008." The FBA identified three categories of behavioral concern: "compliance," "social" and "social skills." Under the category of compliance, the FBA described the problem behavior as: "When [the Student] becomes frustrated with academics, [sic] peer interaction, schedule changes, or activities [sic] that [the Student] does not want to do [the Student] will shut down. When [the Student] shuts down [the Student] will act out physically, verbally, [sic] or just shut down by laying . . . head down on . . . desk and refusing to leave. [The Student] will also at times just *** and just leave the area that [the Student] is in without permission." No further information was provided under the category of compliance. Under the category of social, the FBA provided no information. (Hr'g Tr. at vol. 1, pp. 125 – 26; Pet'r Ex. 17 at 199 – 200; Resp't Ex. 3 at 11 – 12)
7. Under the category of social skills, the FBA described the problem behavior as: "When [the Student] becomes frustrated with academics, peer interaction, schedule changes, or activities that [the Student] does not want to do [the Student] will shut down. When [the Student] shuts down [the Student] will act out physically (***), hits peers, runs ideally to safe place or to an area away from peers or the problem), [sic] verbal aggression (***), or just shut down by laying . . . head down on . . . desk and refusing to leave. [The Student] will also at times just *** leave the area that [the Student] is in without permission." (Hr'g Tr. at vol. 1, p. 124; Pet'r Ex. 17 at 200 – 01; Resp't Ex. 3 at 12 – 13)
8. Under the category of social skills, the FBA described five "situational variables:" "A. Relative time, setting, and location of observation;" "B. Persons involved;" "C. Antecedents – What usually happens before the problem behavior occurs;" "D. Responses – How adults and peers respond when the behavior(s) occurred;" and "E. Other information gathered that relates to the behavior(s)." With regard to the "relative time, setting, and location of observation" situational variable, the

FBA indicated the following times and settings: “before school,” “classroom,” “morning,” “sm. group,” “lunch,” “afternoon,” and “other.” The FBA also indicated, under “other time, setting, and location information,” the following: “during PE, recess, lunch room and academic settings.” With regard to the “persons involved” situational variable, the FBA indicated the following persons: “teachers,” “peers,” and “other.” The FBA also indicated, under “details of involvement/other,” the following: “either general ed teachers, and/or redirection staff, deal with all episodes.” With regard to the “antecedents” situational variable, the FBA indicated the following usually happens before the problem behavior occurs: “directive/request,” “difficult task,” “peer provocation,” and “social interaction.” The FBA also indicated, under “details of antecedents/other,” [sic] the following: “difficult task (perceives self as being unsuccessful), problems with peers (many times [the Student] will take the words that [the Student’s] peers say to [the Student] and twist the meaning), changes in schedule, and subs. Many times [the Student] will dwell on situations that have taken place at home and this will cause behaviors to occur. [The Student] is currently on a monitor basis. [The Student] is successful with strategies that have been taught to [the Student] to help . . . cope with situations. (Asking for a break, telling a friend, using a signal, walking away).” With regard to the “responses” situational variable, the FBA indicated the following responses when the behavior occurred: “adult: ignore, redirect, response cost, office referral, alt. placement” and “peer: ignore.” The FBA also indicated, under “details of responses/other,” the following: “through walkie talkie, phone or im on computer, the redirection teachers are notified of what is going on with [the Student]. The redirection teachers will make a drive by and decide if the situation can be handled in the classroom or if [the Student] needs to be removed. [The Student] is given choices (lets [sic] take a walk, lets [sic] go to the redirection room, outside foyer to cool down) and if [the Student] does not comply there will be a removal of the students within the classroom. Many times when [the Student] shuts down there is not a lot of verbal interaction so there will be choices given and [the Student] will need a minute to process and comply. Sometimes allowing [the Student] a chance to regroup when a situation arises and leaving [the Student] alone [the Student] will redirect [self].” With regard to the “other information gathered that relates to the behavior” situational variable, the FBA indicated the following where the behavior is not a problem or is less severe: “in area where there is a high interest [sic] or [the Student] feels successful. When there is not a lot of work demand put on [the Student].” (Hr’g Tr. at vol. 1, pp. 127 – 28; Hr’g Tr. at vol. 2, pp. 216 – 18, 241, 243 – 44, 250; Pet’r Ex. 17 at 201; Resp’t Ex. 3 at 13)

9. Under the category of social skills, the FBA described the possible functions that the behavior may serve: “escape a demand/[request],” “escape an [activity],” “escape setting,” and “other.” The FBA also indicated, under “details of functions/other,” the following: “the function of [the Student’s] behavior is to escape an activity that is difficult or not of high interest. [The Student] can’t express the trigger and will shut down, things that have happened at home with family [the Student] will bring to school and it will carry over and will effect [sic]

[the Student's] entire day. Incidents that occur with peers at school and out of school will effect [sic] [the Student's] day and [the Student's] emotional state.” (Pet'r Ex. 17 at 201; Resp't Ex. 3 at 13)

10. Under the category of social skills, the FBA identified effective prior strategies to teach and reinforce replacement behaviors and to address antecedents and consequences: “use calming strategies,” “teach social skills,” “redirect,” and “provide safe areas to regain control.” (Hr'g Tr. at vol. 1, pp. 129, 132 – 33; Pet'r Ex. 17 at 201 – 02; Resp't Ex. 3 at 13 – 14)
11. Among other things, the April 21, 2009 ARD committee developed a behavioral intervention plan (BIP) for the Student. The BIP included six goals. The goals were: “the student will demonstrate appropriate verbal and physical actions with self and others;” “the learner will demonstrate measurable progress in the acquisition of developmentally appropriate social skills;” “the student will verbally demonstrate knowledge of the relationship between feelings, behavior and consequences;” “the student will improve academic functioning in the school setting;” “add, subtract, multiply, and divide to solve problems and justify solutions;” and “read with fluency and understanding in texts at appropriate difficulty levels.” (Pet'r Ex. 17 at 204 – 06; Resp't Ex. 3 at 16 – 18)
12. With regard to the “student will demonstrate appropriate verbal and physical actions with self and others” goal, the BIP included the following existing objective: “[the Student] will behave in a safe and positive manner, with [the Student] without any self harm behaviors, including verbal or gestural threats throughout [the Student's] school day with no incidences.” This objective was created on November 6, 2008 and was in progress. The BIP also included the following new objective: “[the Student] will function in a positive manner, with [the Student] and others without any self harm behaviors, including verbal or gestural threats throughout [the Student's] school day with no incidences.” (Hr'g Tr. at vol. 1, p. 46; Hr'g Tr. at vol. 2, p. 220; Pet'r Ex. 17 at 204; Resp't Ex. 3 at 16)
13. With regard to the “learner will demonstrate measurable progress in the acquisition of developmentally appropriate social skills” goal, the BIP included the following existing objective: “[the Student] will verbalize feelings to an adult (such as anger, disappointment) in a non-aggressive/nondestructive way in 3 out of 4 situations.” This objective was created on November 6, 2008 and was in progress. The BIP also included the following new objective: “When [the Student] is angry and needs to verbalize feelings to an adult (such as anger, disappointment, and frustration) [the Student] will do so in a non-aggressive/non-destructive way 4 out of 5 incidences.” (Hr'g Tr. at vol. 1, p. 47; Pet'r Ex. 17 at 204 – 05; Resp't Ex. 3 at 16 – 17)
14. With regard to the “student will verbally demonstrate knowledge of the relationship between feelings, behavior and consequences” goal, the BIP included

the following existing objective: “[the Student] will exhibit effective coping behaviors that have been explicitly taught during social skills training when in an unstructured/structured setting.” This objective was created on November 6, 2008 and was in progress. The BIP also included the following new objective: “[the Student] will show coping behaviors (asking for break, breathing techniques, feeling scale, walking away) that have been explicitly taught during social skills training when in an unstructured/structured setting.” The BIP included the following strategies for this goal and these objectives: “social skills, feeling scale, debriefings, check in’s [sic].” (Hr’g Tr. at vol. 1, pp. 47 – 48; Hr’g Tr. at vol. 2, pp. 218 – 19, 248; Pet’r Ex. 17 at 205; Resp’t Ex. 3 at 17)

15. Among other things, the April 21, 2009 ARD committee developed an individualized education program (IEP) for the Student. The IEP repeated the six goals and associated objectives in the BIP. These goals were: “the student will demonstrate appropriate verbal and physical actions with self and others;” “the learner will demonstrate measurable progress in the acquisition of developmentally appropriate social skills;” “the student will verbally demonstrate knowledge of the relationship between feelings, behavior and consequences;” “the student will improve academic functioning in the school setting;” “add, subtract, multiply, and divide to solve problems and justify solutions;” and “read with fluency and understanding in texts at appropriate difficulty levels.” The IEP timeframe was listed as through April, 2010. (Hr’g Tr. at vol. 1, p. 50; Pet’r Ex. 17 at 207 – 09; Resp’t Ex. 3 at 19 – 21)
16. For the 2009 – 10 school year, the Student is in the *** grade. The Student began the school year in a *** school in the District. (Hr’g Tr. at vol. 1, p. 79; Hr’g Tr. at vol. 2, p. 271)
17. On August 26, 2009, the District’s intervention team (known as the “iTEAM”) developed an “intervention proposal” for the Student. The intervention proposal was developed to “help achieve BIP goals” at the Student’s new *** school. The proposal included seven recommendations: “1. Review IEP/FBA/BIP”; “2. Adjust education environment”; “3. Adjust schedules”; “4. Positive behavioral supports”; “5. Decreasing specific behaviors”; “6. Increase specific behaviors”; and “7. Data collection and interpretation.” Under “decreasing specific behaviors” the proposal listed 22 strategies to decrease “physical aggression.” The proposal also included a “cheat sheet” that noted, among other things, that the Student has a history of aggression. (Hr’g Tr. at vol. 1, p. 82; Hr’g Tr. at vol. 2, pp. 263 – 69, 271 – 72; Resp’t Ex. 5 at 1 – 3)
18. In September, 2009, there was at least one episode where the Student exhibited aggression at school by ***. The Student regained composure and turned behavior around and “had a very good afternoon with some outside support.” (Hr’g Tr. at vol. 2, p. 274; Resp’t Ex. 6 at 5 – 6)

19. On October 2, 2009, there was an episode where the Student exhibited aggression toward an aide in a classroom. The episode was described as follows: “[The Student] chose to *** & [sic] even assault an assistant by ***.” (Hr’g Tr. at vol. 2, pp. 312, 315 – 16; Resp’t Ex. 7 at 22; Resp’t Ex. 10 at 4)
20. On October 21, 2009, the Student’s diagnoses were reported as “mood disorder not otherwise specified (NOS),” “anxiety disorder NOS” and “oppositional defiant disorder.” Irritability and overreaction are associated with the Student’s mood disorder. In at least one instance, the Student ***. When the Student is calm, the Student is capable of purposeful action. (Hr’g Tr. at vol. 1, p. 149; Hr’g Tr. at vol. 2, pp. 191 – 92, 200, 202; Pet’r Ex. 4 at 9)
21. On October 21, 2009, the Student was taken off a medication – *** – used for mood stabilization and anger difficulties. Without this medication, the Student might become more agitated. (Hr’g Tr. at vol. 1, pp. 152 – 54; Hr’g Tr. at vol. 2, p. 201; Resp’t Ex. 1, p. 13)
22. On October 22, 2009, there was an episode where the Student exhibited aggression toward an assistant principal in the ***. The iTEAM described the episode as follows: “Student became agitated when [the Student] had a *** confiscated from [the Student] as students were being dismissed ***. *** noticed [the Student] was agitated so she attempted to de-escalate [the Student] after she had dismissed all of the students from the ***. [The Student] stated loudly ‘****’ referring to the person who confiscated [the Student’s] ***. [The Student] then picked up the *** and dropped it letting it slam to the floor. *** continued to try and de-escalate [the Student] at his time but [the Student] picked up [the Student’s] books and proceeded to leave the ***. *** tried to intercept [the Student] as [the Student] walked away and [the Student] turned to ***. [The Student] was then escorted to the office with [iTEAM member], [assistant principal], [special education coordinator] and [case manager]. [The Student] was able to walk to the office independently.” (Resp’t Ex. 6 at 8; Resp’t Ex. 10 at 3)
23. The key sequence of events of the October 22, 2009 episode in the *** was: (1) A *** confiscated a *** from the Student. (2) The assistant principal arrived, instructed the Student to pack backpack on *** table and told the Student she would be back to talk after turning her attention to other students in the ***; the *** and assistant principal walked away from the Student. (3) The Student lifted up the *** and slammed it down. (4) The assistant principal called on her radio for assistance and returned to the Student. (5) The assistant principal began talking with the Student about not being upset and making positive choices. During the course of the conversation the Student “all of a sudden” said was going to “****” (referring to the ***). The assistant principal said “we don’t need to be threatening,” “it’s going to be okay,” and “it’s not something to get upset over.” (6) Two staff members arrived and the assistant principal stepped away from the Student and turned to direct them to assist with other students in another part of the ***. (7) The Student picked up the backpack, placed on right shoulder

and started to walk past the assistant principal. (8) The assistant principal put out her arm and asked the Student to remain in the ***. (9) The Student passed the assistant principal and together they took a few steps side-by-side with the assistant principal attempting to detain the Student by grasping the Student. (10) The Student and assistant principal stopped, the Student slung the backpack off the shoulder and onto a *** as they turned facing each other and the Student, ***. (Hr’g Tr. at vol. 1, pp. 30 – 43; Hr’g Tr. at vol. 2, pp. 204 – 07; Pet’r Ex. 20; Resp’t Ex. 8)

24. During the October 22, 2009 episode in the ***, the Student, upon lifting the *** was “activated” or aroused by negative mood and emotion. (Hr’g Tr. at vol. 2, pp. 209 – 10)
25. On October 23, 2009, an ARD committee meeting was held for the Student. The parents attended and participated. Among other things, the committee conducted a manifestation review of the incident of October 22, 2009. The committee determined that the Student’s *** was not a manifestation of the Student’s disability. (Hr’g Tr. at vol. 2, pp. 295 – 97; Pet’r Ex. 10 at 129, 135; Resp’t Ex. 2 at 13, 19)
26. On November 5, 2009, an ARD committee meeting was held for the Student. The parents attended and participated. Among other things, the committee performed another manifestation review of the incident of October 22, 2009. Among other things, the committee reviewed a letter submitted by the parents from the Student’s child psychologist – Dr. Barber. The committee determined that the Student’s *** was not a manifestation of the Student’s disability. The Student’s parents disagreed. (Hr’g Tr. at vol. 1, pp. 56 – 57; Hr’g Tr. at vol. 2, p. 305 – 08; Resp’t Ex. 1 at 11 – 15, 22 – 24, 31)
27. At present, the Student’s placement is in the District’s alternative *** school. (Hr’g Tr. at vol. 1, pp. 57, 71)

Discussion

The Petitioner is appealing a disciplinary placement decision. Specifically, the Petitioner is challenging the Respondent’s determination that the behavior that prompted the removal to an interim alternative educational setting was not a manifestation of the Petitioner’s disability.³ Under the IDEA, a school district may only make a disciplinary removal of a child with a disability for more than ten consecutive school days if the behavior that gave rise to a violation of the school code is determined not to be a manifestation of the child’s disability.⁴

The IDEA outlines specific procedures for making the manifestation determination. The pertinent federal regulation states in part:

³ Pet’r’s Posthearing Brief at 1.

⁴ 34 C.F.R. § 300.530(c).

“(e) Manifestation determination. (1) 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) 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 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 LEA's failure to implement the IEP.
(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.”⁵

This Hearing Officer will focus first on the substantive prong of the required review concerning the Petitioner's disability.

Whether Child's Disability Caused, Or Had A Direct And Substantial Relationship To, Conduct In Question

In determining whether the Petitioner's misbehavior was caused by the Petitioner's disability, or whether the Petitioner's misbehavior had a direct and substantial relationship to the Petitioner's disability, the Petitioner's disability must first be understood. Here, the Petitioner is identified as a child with an emotional disturbance under the IDEA. Specifically, the Petitioner's child psychiatrist testified that at the time of the incident in the *** the Petitioner's diagnoses were mood disorder, anxiety disorder and oppositional defiant disorder.⁶

The Petitioner's mood disorder, irritability and physical aggression with adults have been acknowledged by the Respondent since the Petitioner's FBA in 2007. According to nonregulatory guidance issued by the U. S. Department of Education to accompany the final federal regulations implementing the most recent statutory amendments to the IDEA, the manifestation review committee should consider the child's behavior as demonstrated across settings and across time in making its determination of whether the misconduct caused, or had a direct and substantial relationship to the child's disability. Specifically, the Education Department stated:

“The revised manifestation provisions in section 615 of the Act provide a simplified, common sense manifestation determination process that could be used by school personnel. The basis for this change is provided in note 237-245 of the Conf. Rpt., pp. 224-225 The Conferees further intended that ‘if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability.’”⁷

⁵ 34 C.F.R. § 300.530(e)(1) – (2).

⁶ Hr'g Tr. at vol. 2, pp. 191 – 92.

⁷ 71 Fed. Reg. 46720 (2006).

In terms of other settings, the Petitioner demonstrated the specific behavior – physical action against school personnel – in a classroom.⁸ Just at the beginning of October, 2009, the Petitioner *** at a classroom assistant.

In terms of other times, the Petitioner demonstrated the specific behavior in the past as noted in the FBA from 2007 as well as recently in terms of the early October, 2009 incidence of *** in a classroom.

In the October, 2009 *** incident, the Petitioner was clearly irritated by the confiscation of the ***. The Petitioner became “activated” and reasonably can be found to have sustained a negative mood and emotion as the assistant principal was interacting with the Petitioner.⁹ For instance, the assistant principal recalled that in the midst of their conversation the Petitioner “all of a sudden” uttered a verbal threat against the *** who confiscated the ***.¹⁰

In conducting the manifestation determination reviews, the Respondent focused only on whether the Petitioner was emotionally “out of control.” Neither the FBA, BIP nor IEP link irritability and physical aggression solely to conditions or impairments that cause the Petitioner to be out of control emotionally.

In sum, this Hearing Officer concludes that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. The Petitioner's *** while obviously unfortunate, must nonetheless be determined to be a manifestation of the Petitioner's disability per 34 C.F.R. § 300.530(e)(2). Consequently, the disciplinary removal of the Petitioner cannot and is not justified.¹¹

⁸ Further, the Petitioner has apparently *** in the home setting. Hr'g Tr. at vol. 2, p. 202.

⁹ Further, it is reasonable to find that the Petitioner could sustain a negative mood and emotion given the Petitioner's unmitigated disability – without the medication ***, which was suspended the day before, the Petitioner's propensity to be agitated increased. Hr'g Tr. at vol. 1, p. 154.

¹⁰ Hr'g Tr. at vol. 1, p. 39.

¹¹ Analysis of the second substantive prong in the manifestation review is not necessary given that a finding under prong one suffices for a manifestation determination.

Conclusions of Law

After due consideration of the foregoing findings of fact, this Hearing Officer makes the following conclusions of law:

1. The Respondent, North East Independent School District, inappropriately determined that the Petitioner's conduct was not a manifestation of the Petitioner's disability under 34 C.F.R. § 300.530(e).
2. The Respondent, North East Independent School District, inappropriately removed the Petitioner to an interim alternative educational setting under 34 C.F.R. § 300.530(c).

Order

Based upon the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

1. The relief sought by the Petitioner shall be and is **GRANTED**. To wit, the Respondent shall return the Petitioner from the alternative *** school to the Petitioner's home campus – *** School.
2. The Respondent shall timely implement this Final Decision within 10 school days in accordance with 19 Tex. Admin. Code § 89.1185(p) and 34 C.F.R. § 300.518. The Respondent must provide the following to the Division of Complaints Management at the Texas Education Agency and the Petitioner within 15 school days from the date of this Final Decision: (1) documentation demonstrating that the Final Decision has been implemented or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the Final Decision is longer than 10 school days, the Respondent's plan for implementing the Final Decision within the prescribed timeline and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 10th day of December, 2009.

/s/ Steven R Aleman _____
Steven R. Aleman
Special Education Hearing Officer

Notice

Any party aggrieved by the findings and decision of this Hearing Officer has the right to bring a civil action seeking review in a state or federal court of competent jurisdiction. The party bringing the civil action shall have no more than 90 days from the date of this Decision to file the civil action. 20 U.S.C. § 1415(i)(2), as amended.

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SYNOPSIS

ISSUE 1: Whether the Respondent appropriately determined the Petitioner’s conduct was or was not a manifestation of the Petitioner’s disability.

CITE: 34 C.F.R. § 300.530(e)

HELD: For the Petitioner. The Petitioner’s conduct – ***– was a manifestation of the Petitioner’s disability – emotional disturbance. The Petitioner has had acts of physical aggression toward adults, educators or authority figures in other settings and other times.

ISSUE 2: Whether the Respondent appropriately removed the Petitioner for a disciplinary change of placement.

CITE: 34 C.F.R. § 300.530(c)

HELD: For the Petitioner. The Petitioner’s conduct was a manifestation of the Petitioner’s disability and therefore, a disciplinary removal was not appropriate.