

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner Student, by his next friends, Parent and Parent (hereinafter “Petitioner” or “Student”) brought a complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 *et seq.*, as amended, complaining of Garland Independent School District (hereinafter “District” or “Respondent”).

On December 8, 2003, Petitioner filed his Original Complaint, Notice and Request for a Due Process Hearing with the Texas Education Agency (“TEA”). The original Decision Due Date was January 23, 2004, as Petitioner had requested an expedited hearing.

The issues for hearing were as follows:

1. Whether the District properly conducted Petitioner’s manifestation determination. Petitioner disagreed with the determination by the Admission, Review and Dismissal Committee (“ARD”) that Petitioner’s conduct in bringing a gun to school in his backpack was not a manifestation of his learning disability. Since the precise date of Petitioner bringing the gun to school was unknown, Petitioner argues that the District could not have properly reviewed the appropriateness of his Individualized Education Program (“IEP”), placement, special education services, and supplementary aids and services, with relation to Petitioner’s behavior as of the date the gun was brought to school. Petitioner contends that the District did not review his IEP, placement, special education services, supplementary aids and services, and whether the behavior intervention strategies were provided consistent with his IEP. Finally, Petitioner contends that the District applied the incorrect standard in determining whether or not Petitioner’s disability impaired his ability to understand or control his behavior of bringing a gun to school.

2. Whether Respondent had a Behavior Intervention Plan (“BIP”) in effect at the time of the incident, and what effect the lack of such a plan would have had on the outcome of the ARD Committee’s manifestation determination. Petitioner contends that the District’s pre-printed forms used in this instance compelled a District decision that Petitioner’s behavior was a result of his learning disability.

For relief, the Petitioner sought the following:

1. The District maintain Petitioner in his regular classroom placement pending the completion of the due process hearing;
2. Set aside the manifestation determination conducted by the District on November 11, 2003;
3. Reverse the District’s expulsion of Petitioner and prohibit the District from placing him in the Juvenile Justice Alternative Education Program (“JJAEP”) for the proposed one-year term; and
4. Petitioner be returned to the Classical Center at *** School (“*** ”) no more than 45 calendar days after November 11, 2003.

Procedural History

Petitioner was represented in this matter by Ms. Elise Mitchell, Attorney at Law, Advocacy, Inc., Dallas, Texas. Respondent was represented by Mr. Randel Gibbs and Ms. Lorna Rankin, Attorneys at Law, Law Offices of Robert E. Luna, Dallas, Texas. On December 12, 2004, the Hearing Officer received the assignment of this matter from TEA. The parties thereafter agreed to a stay-put in Petitioner’s placement pending the issuance of this Decision. A telephonic pre-hearing conference was held on December 15, 2003. As originally scheduled, the hearing was conducted on January 6-7, 2004. The parties thereafter filed closing statements on January 14, 2004. By agreement of the parties, and for good cause shown, on January 21, 2004, the due date for this Decision was extended to January 27, 2004, and the Hearing Officer issued such on that date.

Based upon the evidence and argument of the parties, the Hearing Officer makes the findings of fact and conclusions of law set forth below.

Findings of Fact

1. Student is an ***-year-old student, who resides with his parents within the limits of Garland Independent School District. (*Tr. 18*). The District is a political subdivision of the State of Texas and is a duly incorporated independent school district. Student attends the *** grade at *** and receives special education and related services based upon an eligibility criterion of “other health impaired” (“OHI”) due to an attention deficit hyperactivity disorder (“ADHD”). (*Tr. 18*). Prior to the incident, Student was receiving special education for written language (composition, spelling, grammar/usage,

and handwriting), while he was otherwise in the mainstream of general education for the remainder of his subjects, with content mastery support, as needed, for those subjects. (*Tr. 19, 160-61, 249, 259*).

2. While he was in the *** grade at ***, Student was restless in class and not paying attention, among other things. (*Tr. 36-37*). As a result, his parents were asked by the District to have him tested at their expense. (*Tr. 37*). On November 28, 2000, Student was evaluated by Dr. ***, a clinical psychologist. He diagnosed Student with ADHD and recommended, among other things, that Student be referred to a primary physician or a child neurologist for medication. (*Petitioner's Ex. 8*) (“*** Report”). There was no recommendation in the *** Report that Student be placed in special education. (*Tr. 282*). The report was thereafter provided to the District by the parents, although the specific date was not established in the record. Student has never been determined to be emotionally disturbed. (*Tr. 235*).
3. A diagnosis of ADHD by a psychologist is, alone, not sufficient to qualify a student for special education. First of all, to obtain an OHI classification, a diagnosis of that condition by a physician is necessary. (*Tr. 284*). In Student’s case, this was not accomplished until March 23, 2002. (*Respondent's Ex. 7-1*).
4. But accomplishing that first step of obtaining a designation of OHI does not automatically qualify a student for special education; a student may have ADHD, yet still do well in school. (*Tr. 285*). In order for a student to be placed into special education, a special education assessment must first be done by a special committee after the above is accomplished. At ***, the group responsible for this process is known as the Student Support Team (“SST”). It is usually composed of a counselor, special education teacher, reading recovery teacher and an administrator. The parents are also involved in the process. (*Tr. 182-83, 282-85*).
5. After the OHI classification was established by the physician, a full and individual evaluation (“FIE”) of Student was completed on March 28, 2002. (*Respondent's Ex. 8*). Low grading reports and test scores brought about the recommendation for the evaluation. The FIE contained critical information needed by the SST to evaluate Student’s eligibility for special education. When this process was initiated, Student’s parents were provided with a copy of the Explanation of Rights and Procedural Safeguards of a Parent with a Child with Disabilities in School. (*Respondent's Ex. 8-2*) (“Parents Book”). They were also provided with copies of the Parents Book on a number of other subsequent occasions, although Parent admits that she never took the time to read them. (*Tr. 46, 281*).
6. On April 4, 2002, the District certified that Student’s ADHD was OHI and the ADHD could adversely affect his educational performance. (*Respondent's Ex. 9*).

7. As a consequence, the first ARD meeting concerning Student also occurred on that date. (*Respondent's Ex. 2*). At that meeting were the principal of *** (***), the counselor (***), the diagnostician (***), a special education teacher (***), a general education instructor (***) and Parent. The meeting lasted about 25 minutes. During that time, the SST reviewed assessment data and other information from the mother and other school personnel (*Respondent's Ex. 2-3*); prepared a report (*Respondent's Ex. 2-5 thru 2-9*); determined that Student at that time did not meet the eligibility for special education services, and, as a result of the above, his general education courses were supplemented with content mastery for 15 minutes a week. (*Respondent's Ex. 2-3, 2-12*); IEP goals and objectives involving study skills were established for him (*Respondent's Ex. 2-4*), and he was provided with some student support services that included the use of a multiplication chart, shortened assignments, immediate feedback and verbal praise. (*Respondent's Ex. 2-10*). Parent agreed with the committee's decision. (*Respondent's Ex. 2-15*).
8. On February 13, 2003, the District conducted a second ARD meeting for Student (*Respondent's Ex. 3*). His mother and many of the same members from the first ARD meeting were also present for this annual review. It is undisputed that Student was continuing to have problems. While his written language and behavior were not commensurate with that of his peers, (*Respondent's Ex. 3-7, 3-8, 3-15*), his behavior was not of such a character that it interfered with his learning or that of others. Accordingly, no Behavioral Intervention Plan ("BIP") was deemed necessary at that point in time. This was because the District believed that the in-place interventions and objectives were adequately working; he had not demonstrated any significant and severe behaviors (nor, for that matter, at any point prior to the incident); and, finally, he had not experienced a pattern of removals that would have caused a change in his placement. (*Tr. 126, 131, 170, 293*). With no BIP in place, Student was thus subject to ***'s regular student code of conduct, and Parent had no disagreement with this approach. (*Tr. 73, 294*).
9. While no BIP was felt to be necessary, the ARD committee felt that it had to modify his placement in several respects because of Student's learning and behavior problems. Specifically, they were concerned about his lack of progress in writing; there was a concern that the TEKS objectives exceeded his then level of educational performance; and, finally, he was demonstrating some instances of anger and defiance. (*Respondent's Ex. 3-7, 3-8, 3-10, 3-15*).
10. To address these problems, the ARD committee directed a placement for him in special education in English language arts in the areas of handwriting, spelling and grammar/composition. It also said that he would receive support services in the other general education areas, with 3.75 hours a week in the content mastery program. (*Respondent's Ex. 3-18*).

11. In addition to the study skills goals and objectives from his April 2002 ARD meeting, the ARD committee also added some English/language arts goals and objectives to his IEP that encompassed six areas. (*Respondent's Ex. 3-22*). The student support services remained essentially the same. (*Respondent's Ex. 3-16*).
12. As a result of his behavior problems, the ARD committee also added some social and emotional goals to his IEP. (*Tr. 125*). The goals encompassed making positive statements when asked about oneself or others; expressing anger with nonaggressive words rather than physical action or aggressive words; finding productive use of time while waiting for teacher assistance; completing assignments and placing them in designated areas; and describing one's own feelings or moods verbally. (*Respondent's Ex. 3-20*).
13. Student's mother was in agreement with all of the ARD committee's recommendations of February 13, 2003. (*Respondent's Ex. 3-14*).
14. Throughout the relevant period of time in this matter, Student was taking medications for his ADHD. The medicine sometimes made him nauseous, and, on occasion, caused him to miss school. Although he was supposed to take it each day, he forgot to do so from time to time. During the fall semester of 2003, the teachers noticed that he actually behaved better when he was off of his medication. When he was on the medication, he appeared to be less organized, had more difficulty in sustaining tasks, and was lethargic, sad and depressed. (*Petitioner's Ex. 1, 1-10*).
15. Information about Student's behavior - both on and off medication - was found on Vanderbilt Teacher Evaluation Scales ("Vanderbilt Forms"). The purpose of the forms was to provide information to Student's physician about how Student was responding to his medication while he was at school. Parent would obtain the forms from the physician and then provide them to Student's teachers to complete. While Parent believed that she had been submitting them to his teachers to complete almost monthly since the start of the fall 2003 semester, (*Tr. 20, 54*), the more credible evidence establishes that the forms were not given to any of Student's teachers until either just before the November 11, 2003 ARD meeting or within a day or two after the meeting. (*Tr. 126, 152, 202, 253, 263-64*). The Vanderbilt Forms were then completed by his special education teacher (Ms. ***), a math/science teacher (Ms. ***), and Student's homeroom teacher, Ms. ***. The latter saw Student at the start of school each morning while he prepared to go to his classes, between classes and at recess. It was during what is known as "unstructured time." Ms. *** said that her evaluation was looking back to his behavior during the first five weeks and that it was behavior that was not unusual for a new *** grade student adapting to an unstructured setting during the first part of the school year. In any event, by the time of the

November 11 ARD meeting, she did not consider his behavior in the unstructured setting to be a problem any longer. (*Tr. 143*).

16. While perhaps helpful to a physician in adjusting medication to Student, the Vanderbilt Forms are otherwise of marginal value to Student in this matter. First, the forms were not completed and the information published until after November 11, 2003. Secondly, the District's diagnostician, Ms. ***, stated that she reviewed the Vanderbilt Forms after the November 11 ARD meeting, and the information contained in them would not have changed her mind or that of the committee about their decision that Student's conduct of bringing a gun to school was *not* a manifestation of his ADHD condition. (*Tr. 203*).
17. In addition to the Vanderbilt Forms, Student relied on documents called "Buffalo Behavior" to attempt to show that the District failed to consider, among other things, the appropriateness of his IEPs and placement. (*Respondent's Ex. 12-1 thru 12-10*). These were forms prepared weekly by the teachers and were used as a motivational tool for good behavior by the students in the classroom. If a child did not receive any marks for undesirable behavior in a block for any of the classes for that day, the student would receive points that would ultimately translate into "Buffalo bucks" for the student to spend twice a year at a school auction. (*Tr. 118, 122, 132, 148*). The forms were not typically disseminated or used for any purpose beyond the classroom, except to occasionally send home to the parents. (*Tr. 118*).
18. The Buffalo Behavior forms in question for Student covered the first six weeks and several weeks into the second six weeks of instruction at ***. (*Tr. 118*). Student talked a lot, and he was occasionally off-task when doing his assignments. He occasionally played in class, called other students "names" and on one occasion, even made a derogatory gesture with his finger toward another student. (*Respondent's Ex. 12-6; Tr. 123*). When Student's manifestation determination meeting was conducted on November 11, 2003, although the committee apparently did not refer to these particular forms (*Tr. 95*), information representative of that found on the forms was presented to and reviewed by the committee. (*Tr. 121, 124*). His behavior that was reflected on the Buffalo Behavior form was fairly typical of a *** grader at ***, and he ranked about the middle of his classes in this regard. (*Tr. 123, 148-50*).
19. Student was a very responsible participant in the Buffalo Behavior program. He was made the "banker" for his class, which meant that he had the responsibility of keeping track of how many bucks each student had earned. (*Tr. 152*). Moreover, the same homeroom teacher who had prepared a Vanderbilt Form on her observations of him for the first five weeks of instruction considered him to be one of her best students by the time of the November 11 ARD meeting. (*Tr. 155*). When the BIP for Student was prepared on November 11, the Buffalo Behavior was listed as being one of the "Reinforcers."

(Respondent's Ex. 4-27; Tr. 122). Finally, there was nothing about Student's behavior recorded in the Buffalo Behaviors that would have remotely suggested that Student would ever bring a gun to the *** campus. *(Tr. 100, 133)*. I thus find that these behaviors did not impede Student's learning to the point where the ARD committee should have established a BIP prior to November 11, 2003.

20. Student also argues that the District scarcely reviewed, as well as failed to provide appropriate weight to: (i) the drop in some of his grades during the second six weeks period; (ii) a comment by one of the teachers that his behavior interfered with his learning. As a result of these two things, Student contends that an ARD meeting should have been called at the end of the second six weeks to address these problems. *(Petitioner's Ex. 6-1 thru 2; Tr. 92-94; Petitioner's Closing Argument and Brief)*. In this regard, Parent could have called for an ARD meeting at any point in time. Texas Administrative Code §89.1045 (a). While she feigned ignorance in knowing her rights in this regard *(Tr. 48)*, it is undisputed that she chose not to read any of the copies of the Parents Book containing such information given to she and her husband by the District. Notice of her rights in this regard is also reflected on the front sheet of the notices of ARD meetings that she had received on several occasions prior to the events in question. *(Respondent's Exs. 2-1, 3-1)*.
21. Student's grades in reading and social studies fell during the second six weeks period, the latter being a failing grade by one point. His grade in his special education class materially rose, perhaps due to the near one-on-one attention he was receiving in that class. *(Tr. 257-59)*. His other grades remained essentially the same. His overall performance in the area of work habits/social development also remained the same, where it stated that he "needs improvement." No evidence was presented by either Student or the District as to when the notation was made or specifically how it impacted his learning. In any event, it is reasonable to infer that no one at the school who was working with Student apparently believed that an ARD meeting was necessary because of this one comment alone, and looking to the totality of circumstances in this matter, I concur and I find that no ARD meeting was necessary at the end of the second six weeks period.
22. The second six weeks grades for Student were not unusual, particularly since the first six weeks of work involved a lot of review. *(Tr. 119)*. An ARD meeting concerning his grades and behavior was not initiated after the second six weeks period because they did not present a disturbing trend, and strategies and measures were being utilized by his teachers that they felt were adequate, including giving him specific instructions, having him come in for more help and giving him more responsibilities, including being the banker for the Buffalo Behavior program. *(Tr. 146-47, 152, 260)*.

23. No evidence was presented by Student that a drop in his reading and social studies grades was caused by his behaviors. In fact, his homeroom teacher's evaluation of his behavior going back to the first five weeks stated that the behavior was neither severe nor unusual, especially since her observations of Student were in an unstructured setting where that type of behavior was most likely to occur. *(Tr. 142-43)*.
24. Although Student contends that the ARD committee on November 11 did not consider: (i) Student's report card; (ii) that his falling grades in two courses showed that he had made no progress on the goals and objectives from his IEP developed at the February 13, 2003 ARD meeting; or (iii) that the committee failed to question their appropriateness for Student, I find the more credible and persuasive evidence strongly indicates otherwise. *(See generally Respondent's Ex. 4-5, 4-8, 4-26, 4-27, 4-28; Tr. 109, 124, 128, 131, 158-59, 164, 167, 173-74, 184, 198-99, 207, 254)*.
25. One evening during September 2003, Student discovered a handgun in his parents' closet. He put it in his backpack and took it to school the next day. He did not display the gun at school that day nor did he threaten anyone with it. Later that day, he showed the gun to some of his friends at an off-campus location. In November, two students told the *** principal about Student bringing the gun to school back in September, and she immediately initiated an investigation. The principal and the campus police officer took Student to his house, where he showed them the gun. *(Tr. 60, 74, 106, 128-29, 266)*.
26. The parents were promptly contacted and given notice of an ARD committee meeting to be held on November 11, 2003. They were notified that there would be a disciplinary hearing that day, as well. They were also notified that the ARD meeting would encompass a manifestation determination review. *(Respondent's Ex. 4-1 thru 4-2 Tr. 107)*.
27. The disciplinary hearing was conducted first that day. *(Tr.129- 30)*. The committee had little flexibility as to what to recommend as discipline for Student in this matter. Consistent with federal law, Texas Education Code §37.007 (a), (e), directs that a student possessing a firearm on campus *shall* be expelled for a period of at least one year. In this regard, he was be assigned to the Dallas County Juvenile Justice Alternative Education Program ("JJAEP"). Although it is undisputed that Student took a gun on campus, Parent did not agree with the assignment of Student to JJAEP and refused to sign the disciplinary conference form. *(Tr.129)*.
28. The ARD committee then convened to determine whether or not the behavior of Student in the bringing of the gun to school in September 2003 was a manifestation of his ADHD. Both parents were also in attendance at that hearing. Others at the meeting were the principal, a diagnostician, a counselor, two special education instructors, a general education instructor, a campus administrator and a community

liaison. (*Respondent's Ex. 4-33*). At the conclusion of the hearing, the committee determined that Student's ADHD did *not* impair his ability to understand the impact and consequences of his behavior of bringing a gun to school nor his ability to control that behavior. (*Respondent's Ex. 4-15 thru 4-16*). ("Manifestation Determination Form"). The parents disagreed with these findings, and such was noted on the form by the District personnel. (*Respondent's Ex. 4-16*). The parents also disagreed with other findings made by the District. (*Tr. 70, 173-74*). Yet, both parents checked on the signature page of the ARD committee report that they agreed with the committee's ultimate decision to remove Student to JJAEP. (*Respondent's Ex. 4-33*). To attempt to reconcile these conflicting positions, Parent claims that some member of the committee forged the form to incorrectly reflect their agreement to the committee's decision. (*Tr. 43-44, 65*). This forgery allegation was raised for the first time at the hearing. (*Tr. 45*). The more credible evidence, however, indicates that Parent and her husband did, indeed, check the form that they agreed with the committee's decision. (*Tr. 205, 271*); however, I find that the parents did not understand the impact of checking the form that they agreed with the committee's decision. The record is clear that they expressed their opinion to the ARD committee on November 11 that they disagreed with the committee's findings as to the matters that had to be considered under paragraphs VII and VIII of the District's Manifestation Determination Form. After making their findings, the committee determined that Student could be removed from his present educational placement at *** and placed in the JJAEP pursuant to the law and the student code of conduct of the District.

29. I find that the ARD committee at *** properly conducted a manifestation determination review on November 11, 2003 concerning Student relative to his behavior of bringing a gun to the campus that was the subject of the disciplinary action and used the appropriate criteria. In this regard, 34 CFR §300.523 (c) (the "Regulation") establishes the standards for the conduct of the manifestation determination review that the District must --and did --meet in this instance:

(c) *In carrying out a review described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was **not** a manifestation of the child's disability only if the IEP team and other qualified personnel –*

(1) *First consider, in terms of the behavior subject to the disciplinary action, all relevant information, including –*

- (i) *Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;*
- (ii) *Observations of the child; and*
- (iii) *The child's IEP and placement; and*

(2) *Then determine that –*

- (i) *In relationship to the behavior subject to the disciplinary action, the **child's IEP and placement were appropriate** and the special education services, supplementary aids and services, and behavior intervention strategies were provided **consistent with the child's IEP and placement**; and*
- (ii) *The child's disability did not **impair the ability** of the child to **understand the impact and consequences** of the behavior subject to disciplinary action; and*
- (iii) *The child's disability did not **impair the ability** of the child to **control** the behavior subject to disciplinary action.*

30. In order to facilitate the process, and to provide some guidelines for conducting a manifestation review in order that the review, at a minimum, would address the areas that are required under federal and state regulations, the District developed a form that incorporated the essential elements of 34 CFR §300.523 (c). (*Respondent's Ex.4-15 thru 4-16*). Interestingly, no form is required under state or federal law nor has an official one ever been promulgated by state or federal educational agencies. (*Tr. 219, 292*). In paragraph VII D), the instant Manifest Determination Form presumes the existence of a BIP at the time of a review, a situation that is not always the case, particularly where young elementary students may be involved. (*Tr. 219-20*).

31. With regard to paragraph (c) (1) of Regulation, the committee first reviewed all of Student's current and past evaluation and assessment data, including information supplied by Parent and Parent. (*Tr. 109, 124, 198*). This included the information listed at Respondent's Exhibit 4-5, which by its description, included his grade reports. After completing this initial phase of the process, the diagnostician and

committee determined that no new evaluation or assessment of Student was necessary. (*Tr. 109, 184*). No compelling grounds for a new assessment were presented by Student at either the manifestation determination review or at this hearing.

32. The committee then reviewed the student's disabling condition, ADHD.
33. With regard to (c) (2) (i) of the Regulation, and considering such in the context of the behavior of bringing a gun to school, the committee undertook the areas of inquiry found in paragraph VII A) - D) of the Manifest Determination Form. In the process, they reviewed, among other things, his previous ARDs, IEPs, social and emotional goals, objectives and behaviors. (*Tr. 109, 124, 158, 164*). In this regard, none of the teachers for Student expressed any problems with his classroom behaviors they observed over the semester. (*Tr. 128*). The committee determined that the IEPs for Student were appropriate, and although no one knew the exact date in September when Student brought the gun to the campus, the IEPs had been appropriately and consistently applied throughout the entire semester. (*Tr. 110-11, 207*). This included Student being subject to regular school disciplinary processes. (*Tr. 207*).
34. The committee then reviewed his current placement and determined that it was appropriate throughout the semester in relation to the behavior subject to the disciplinary action, which included the day in September when the incident occurred. (*Tr. 159*). Likewise, they reviewed his special education services and supplementary aids and services and determined that they were provided consistent with his IEPs and placement. (*Respondent's Ex. 3-15 thru 3-23; Tr. 78, 112, 160-61, 185, 187-88*).
35. In paragraph VII D) of the Manifestation Determination Form, it calls for a review of the student's BIP, again presuming that one was in existence before the review. The form also asked whether the behavior intervention strategies in connection with it were provided consistent with the student's IEP and placement. If no BIP was present, then the user was directed to develop one, which the committee ultimately did that day. (*Respondent's Ex. 4-26 thru 4-30*). Instead of being able to answer "yes" or "no" to the questions in that particular section of the form, the committee noted "n/a" and added comments that Student did have pre-existing social and emotional goals and objectives, a BIP was developed, and that current objectives were reviewed. (*Tr. 113*). The BIP was developed that day because of the seriousness of the offense of bringing the gun to school. (*Tr. 126*). At the bottom of that section, the form stated that if there was a "no" answer to any item in paragraph VII, then the behavior must be considered to be a manifestation of a student's disability. It is on this point that Student makes one of his principal arguments that will be addressed in the Discussion section.
36. With regard to (c) (2) (ii)-(iii) of the Regulation, the final step involved a review of the critical components found in paragraph VIII of the Manifestation Determination Form dealing with whether the

student's disability impaired his ability to understand the impact and consequence of the behavior and whether it also impaired his ability to control that behavior. Taking into account their review of all of the information they considered in relationship to the behavior of bringing the gun to school, the committee properly considered and determined in all respects that Student's ADHD did not impair his ability to either understand the impact and consequences of bringing the gun to school or his ability to control that behavior. (*Tr. 173-74, 176, 203*).

37. At the review, Student protested the committee's determinations of the items under paragraphs VII and VIII of the form. (*Tr. 68, 70, 82-84*). While Parent acknowledged that she believed that Student knew his behavior was wrong, she and her husband did not believe that he understood that he would be expelled for the behavior. (*Tr. 82, 97*). This belief is the basis for another one of Student's arguments that is addressed in the Discussion section below. As a result of the parents' protests, and to insure the thoroughness of their review, the committee repeated the entire process, again properly coming to the same conclusions. (*Tr. 173-76*). Accordingly, Student was assigned to the JJAEP.
38. Student promptly obtained representation by Ms. *** after the committee's decision. Immediately after Student filed his complaint with the TEA, a request was made by him for an ARD meeting, which was ultimately held on December 17, 2003. The parties agreed to a stay-put at *** pending the outcome of the instant hearing. (*Respondent's Ex. 5-15 thru 5-17*).
39. The parties also agreed to have another psychological assessment done on Student, which was done the next day by a District employee, ***, who is a licensed specialist in school psychology. (*Respondent's Ex. 10-1 thru 10-6*). She made various recommendations to the District, but in sum, concluded that while Student had some difficulties in attentiveness and distractibility, the modifications currently in place within his educational setting seem to be allowing Student to overcome the difficulties and learn. (*Respondent's Ex. 10-4 thru 10-5*). While noting information taken from Student's self-reporting part of the material that Student believed that he had a problem in telling the truth, advising people how he feels, and in getting his way, Ms. *** did not consider these to be unusual behaviors for children of his age, especially when they might lie to try to get out of trouble. (*Tr. 229-30*). More importantly, however, after reviewing everything in her evaluation (*Respondent's Ex. 10-1*), she opined that she found nothing that would indicate that Student's ADHD would impair his ability to understand the impact and consequences of his taking a gun to school or his ability to control his behavior, testimony which I found to be particularly reliable and persuasive. (*Tr. 242*). No contrary evidence of similar import was offered by Student.

Discussion

Student contends that the District's Manifest Determination Review Form, by its very language in paragraph VII D), required the District to find that Student's behavior of bringing a gun to school was a manifestation of his ADHD. He argues that since no behavior intervention strategies were in place at the time of the hearing, the "no" block had to be checked, which mandated a finding his behavior *was* a manifestation of his disability.

This argument elevates form over substance. The Manifestation Determination Form was developed to be used as guideline only. It presumed the existence of a BIP and the accompanying behavior intervention strategies. By having paragraph VII D) structured in this manner, it was to insure that the committee reviewed the BIP, if one was in place. (*Tr. 218*). There is no legal requirement that such a form even be used, and District ARD committees have been advised over the years that they should annotate or modify the form to fit the individual circumstances, which is not an infrequent occurrence. (*Tr. 219-20, 293*).

Since there was no BIP and intervention strategies in place at the time of the manifestation determination review, nor was there a need for such before then, that portion of the form is thus irrelevant, at least to the extent of the command of the form that a student's behavior must be considered a manifestation of his disability if any item in that paragraph is checked "no." In any event, if the correct legal standards were otherwise followed during the review, then the use or completion of an erroneous form is harmless error. *Student v. Socorro Independent School District: 262-SE-0402; 37 IDELR 50 (2002)*.

The correct legal standards were followed in Student's manifestation determination review. As previously noted in the Findings of Fact, and as found in paragraph VIII of the form, the legal standard that was properly utilized in this case was (i) whether Student's disability of ADHD impaired his *ability* to understand the impact and consequence of the behavior and (ii) whether that disability also impaired his *ability* to control that behavior.

As to the impairment of Student's ability to understand the impact and consequence of taking a gun to school, he argues that, while he knew it was wrong to take the gun to school, he did not know that a consequence of it would be the specific punishment of expulsion. (*Tr. 82, 97*). Sadly, he did not believe that his friends to whom he showed the gun would turn him in and get him in trouble. (*Tr. 266*). Stated another way, his ADHD did not impair his ability to understand that his actions were wrong, only his ability to know the exact nature of his punishment.

This "punishment – specific knowledge" argument fails. First, it attempts to create a very narrow standard, one which would be almost impossible to meet, absent a literal knowledge of the law by the child. Secondly, the correct inquiry is not whether the child *knew of* or *understood* the punishment that might result

from the behavior in question. Rather, the focus has to be on whether that disability impaired the child's *ability* to understand the consequences (i.e., punishment) that might result. Had he been told in advance that bringing a gun to the school campus would result in his automatic expulsion and a referral to JJAEP, based on the record in this case, his ADHD would not have clouded his ability to process and comprehend the consequences. His grades and other testing in school certainly bear out that point. In summary, the evidence by the District established that Student's ability in that regard was not impaired, while Student offered no controverting evidence utilizing the correct standard.

Student also attacks the second prong of the criteria – that his to ability control his behavior of bringing a gun to school was impaired by his ADHD. Specifically, he contends that his action was impulsive and, because impulsivity is a characteristic of persons with ADHD, his ability was impaired. For support, he relies on *Student. v. Klein Independent School District*: 060-SE-1000, 34 IDELR 140 (2000), where it was held that the student's ADHD impaired his ability to control his biting a fellow student. The *Klein ISD* matter is inapposite.

First, the student in that case had significant and frequent behavioral problems in school that caused major learning disruptions for that child and other students, factors which were not present here. Second, the child in that matter had not taken his Ritalin medication at school that morning just before the incident. That medicine would have moderated his impulsivity. Third, the event in question was his playfully and impulsively biting the wrist of a friend in response to a question by her. Under the facts of that case, the biting was a clearly spontaneous, impulsive event that was directly linked to his ADHD that might not have occurred but for his failure to take the Ritalin.

In this situation, however, Student found the gun at his home the night before; stowed it overnight in his backpack; took it to school the next day, but did not show it to anyone, arguably because he knew it was wrong to have it there in the first place; and then he finally showed it to friends after school. His actions were hardly impulsive; rather, they were deliberate, calculated, and unimpaired to any degree by his ADHD. These were steps taken with a full awareness that he could have halted them at any point in the process. It was hardly impulsive behavior that could reasonably be linked to his ADHD. Accordingly, his ability to control his behavior in this instance was not impaired or clouded by his ADHD. (*Tr. 134*).

Student argues that the manifestation determination was not properly conducted because the exact date when he brought the gun to school was not precisely known. He argues that the criteria under (c) (2) (i) of the Regulation cannot be properly completed unless the appropriateness and consistency of the application of IEPs, the placement, the special education services, and supplementary aids and services are assessed with reference

to a specific date. “In relationship to the behavior that is subject to disciplinary action....” is the language which he relies upon to support his argument.

Although the date of most occurrences is usually known, the regulations do not specify that the inquiry must be date specific. In any event, the District established that his IEPs, including social and emotional goals and objectives, study skills and objectives, special education support services, supplementary aids and services, and placement had been continually provided to Student since the February 13, 2003 ARD meeting and up through the date of the November 11, 2003 ARD meeting and that they were all appropriate and consistently applied and/or were provided consistent with Student’s IEPs and placement, as the case may be. This proof necessarily encompasses the date in September 2003 when Student took the gun to school, so the District properly established that Student’s IEP and placement were appropriate at the time of the event and that the services were provide consistent with his IEPs and placement. *34 CFR § 300.523 (c) (2) (i)*.

A BIP was prepared for Student on day the manifestation determination review, largely because of the nature of the offense he committed. He contends, however, that one should have been prepared well before this time and implied that such might have prevented the incident in question. I do not agree with either point.

First, a BIP is only required when there are severe and recurring behaviors that interfere with learning, or there is a series of removals, or when a manifestation is required. (*Tr. 170, 293*). His behaviors prior to the incident in question did not necessitate a BIP. They were fairly typical for those of a *** grader. In this regard, great discretion is allowed the ARD team to determine when a BIP is required. There are no specific standards as to when they must consider a BIP (other than a manifestation determination). This is to provide the team with the latitude to decide the unique needs of, and responsive services for, students with disabilities. *See 20 U.S.C.A. §1414 (d) (3) (B) (i); 34 CFR §300.346 (a) (2) (i); Washington School District: 28 IDELR 211 (SEA PA 1997); Kelseyville Unified School District: 25 IDELR 1115 (SEA CA 1997); Stroudsburg Area School District; 27 IDELR 975 (SEA PA 1997)*.

Student offered no specific evidence or testimony as to why he required a BIP. Moreover, he offered no evidence that not having a BIP either caused or contributed to his bringing the gun to school. Accordingly, Student’s argument is without merit.

Conclusions of Law

1. Student is a student eligible for special education and related services under the provisions of IDEA, **20 U.S.C. §1400 *et seq.***, and related statutes and regulations.
2. The Garland Independent School District is the local education agency responsible for providing Student's free appropriate public education.
3. The District has the burden of demonstrating that Student's behavior of bringing a gun to the school campus was not a manifestation of his disability, which in this case was ADHD. **34 CFR § 300.525 (b)**. The District established by a preponderance of the evidence that it properly considered Student's IEPs, and placement, and all other support and services, as well as his ability to understand the impact and consequences of his behavior and his ability to control his behavior, and that it properly determined that his ADHD did not impair either his ability to understand the impact and consequences of his behavior or to control his behaviors in question. **20 U.S.C. §1415 (k); 34 CFR §300.523 (c) – (d); Texas Education Code §§37.004**. Accordingly, the November 11, 2003 manifestation determination for Student was appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **Ordered** that Petitioner's requests for relief are **Denied**.

It is further **Ordered** that all relief not specifically granted is **Denied**.

SIGNED on this the 27th day of January, 2004.

original signed by Mr. Rickman
Jess C. Rickman III
Special Education Hearing Officer

DOCKET NO. 125-SE-1203

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

SYNOPSIS

ISSUE: Whether an ARD committee for Student made an appropriate manifestation determination concerning the relationship between Student’s disability and his behavior.

CFR CITATIONS: 34 CFR 300.523 and 34 CFR 300.524.

TEXAS CITATION: Texas Education Code § 37.004

HELD: For Respondent