

DOCKET NO. 126-SE-0114

STUDENT,	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENTS,	§	
Petitioner	§	
v.	§	HEARING OFFICER FOR
HURST-EULESS-BEDFORD	§	
INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner *** (Student), by next friends *** (Father) and *** (Mother) (collectively, Petitioner), requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Respondent to the complaint is the Hurst-Euleless-Bedford Independent School District (the District or the HEB District).

In the request for hearing, Petitioner alleges that the District denied Student a Free Appropriate Public Education (FAPE). The case centers, primarily, on an incident that occurred in *** 2013 in which Student *** (the *** incident).¹ Petitioner raises the following issues, all of which relate to whether the District provided Student a FAPE:

1. Whether the Manifestation Determination Review (MDR) process was mishandled:
 - a. by District error in concluding that Student’s behavior during the *** incident constituted a crime; or
 - b. by District error in determining that Student’s behavior during the *** incident was not a manifestation of student’s disabilities;

¹ The exact date of the *** incident remains unknown, but it is believed to have occurred sometime during the week of ***. Pet. Ex. 16 at 4, 16.

2. Whether, by assigning Student to a sixty-day transfer to the District's disciplinary alternative education program (DAEP) following the *** incident, the District failed to place Student in the least restrictive environment (LRE);
3. Whether the District failed to develop Student's Individualized Educational Plan (IEP) in a collaborative, and non-predetermined, manner;
4. Whether the IEP provided academic benefit to Student; and
5. Whether Student's IEP was commensurate with student's unique and individualized needs.²

For relief, Petitioner seeks the provision of a FAPE and reimbursement of costs.

I. PROCEDURAL HISTORY

Petitioner filed petitioner's request for a due process hearing on January 13, 2014. In the request, Petitioner alleged violations under IDEA, constitutional claims, and claims pursuant to other statutes. By order dated February 14, 2014, the Hearing Officer dismissed all of Petitioner's claims not arising under IDEA, and all claims relating to alleged acts or omissions occurring prior to January 13, 2013. Both parties requested a continuance of the hearing and extension of the decision due date to accommodate scheduling conflicts and to allow sufficient time for the parties to conduct adequate discovery. The hearing was held on March 19-20, 2014. Petitioner was represented by attorneys Martin Cirkiel and Daniel Garza, and special education advocate Deborah Liva. The District was represented by attorneys Nona Matthews and Jan Watson. At the conclusion of the hearing, both parties requested an opportunity to submit written closing arguments and proposed findings of fact and conclusions of law. At the request of the parties, the decision due date was extended to May 13, 2014, to allow the parties to submit written briefing.³ This Decision was timely rendered and forwarded to the parties on May 13, 2014.

² See Pet. 's Post-Hearing Brief at 22-31.

³ Tr. at 450.

II. FINDINGS OF FACT

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

1. Student resides within the geographical boundaries of the District. Student has been diagnosed with attention deficit hyperactivity disorder (ADHD) and suffers from visual tracking problems and a number of allergies.
2. In the fall of 2012, Student began *** grade at ***, which is a school in the District. Because student struggled academically and behaviorally at ***, Student's parents withdrew student from the school during the fall semester.
3. In *** 2012, Student's parents arranged to have student transferred into *** (also a school in the District). Student's first day in attendance at *** was ***, 2012.
4. At the time of student's arrival at ***, there was a 504 plan⁴ in effect for student that was intended to address Student's ADHD and student's difficulties with written expression.
5. At the time of student's arrival and in the ensuing weeks, the staff at *** made extensive efforts to accommodate Student's disabilities in an effort to ensure that student succeeded at the school, including holding numerous staff meetings and meetings with Student and student's parents.
6. Student's tenure at *** was not a successful one, with Student receiving low (often failing) grades and numerous disciplinary referrals for various misbehaviors such as being disruptive, ***, and insulting and being offensive to student's peers and teachers.
7. On ***, 2013, an initial Admissions, Review and Dismissal (ARD) Committee meeting was convened to discuss Student, with student's parents in attendance. At the parents' request, the ARD Committee decided to defer reaching a final decision on that date.
8. The ARD Committee next met on ***, 2013, at which time it found that Student was eligible for special education services as a student with a Specific Learning Disability in Written Expression and an Other Health Impairment due to ADHD and Allergies.
9. The ARD Committee (including Student's parents) approved an individualized educational program (IEP) that included instructional and behavioral accommodations for Student such as shortening writing assignments; minimizing distractions; providing student with copies of class notes, frequent reminders of rules, positive reinforcement, and frequent breaks; allowing the use of ***; extra tutoring; assistance from a special education teacher

⁴ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

- during English, math, and social studies classes; overlooking minor infractions; and providing multiple weekly sessions with a behavioral interventionist.
10. The IEP was implemented by the District on ***, 2013. The school administration held multiple meetings with staff to ensure that the IEP was successfully implemented.
 11. As called for in the IEP, the District's behavioral interventionist began meeting twice weekly with Student on ***, 2013. Student and the behavioral interventionist had only four sessions together before Student withdrew from school. However, Student was deriving benefits from their sessions and was generally cooperative with the behavioral interventionist.
 12. At some time during the week of ***, 2013, an incident occurred that triggered this proceeding (the *** incident). In the *** incident, Student was ***.
 13. Without *** consent, Student ***. Student did so for the purpose of ***.
 14. The school's administration learned of the *** incident on ***, 2013. It immediately investigated the incident and determined that Student had engaged in conduct punishable as a felony (***), in violation of the school's Student Code of Conduct, thereby mandating a sixty-day referral to the District's disciplinary alternative education program (DAEP), at which students attend school at an offsite location.
 15. On that same day, Student's parents withdrew student from ***.
 16. Since ***, 2013, Student has never returned to *** or any other school in the District, and student has never served any of student's sixty-day transfer to DAEP.
 17. Following the *** incident, *** pressed criminal charges against Student.
 18. On ***, 2013, the ARD Committee met to conduct a manifestation determination review (MDR). The Committee determined that Student's behavior during the *** incident: (a) was not caused by or substantially related to student's disabilities; and (b) was not caused by the District's failure to implement student's IED.
 19. On ***, the juvenile justice authorities decided not to pursue criminal charges against Student.
 20. The ARD Committee met again on April 11, 2013, to consider a request from Student's parents that student receive homebound services. The Committee considered all relevant evidence, including information obtained from Student's physician, and concluded that Student did not qualify for homebound services.
 21. The ARD Committee met again on *** and ***, 2013, to consider an independent education evaluation (IEE) of Student that had been prepared by Dr. *** at the request of

- Student's parents. The Committee found the IEE to be helpful and incorporated many, but not all, of Dr. *** recommendations into the IEP.
22. Student's parents were invited to all of the ARD Committee meetings and they participated in most of the meetings. Their input was fairly considered by the other members of the Committee.
 23. Petitioner failed to prove that, when the school determined that Student's behavior during the *** incident constituted conduct punishable as a felony, it made a manifestly incorrect disciplinary decision in order to justify Student's removal from ***.
 24. Petitioner failed to prove that the ARD Committee erred when, in the MDR, it concluded that Student's behavior during the *** incident was not caused by or substantially related to student's disabilities.
 25. The District was not obligated to reverse Student's referral to DAEP when it learned that the criminal charges against student had been dropped.
 26. The preponderance of the evidence demonstrates that the IEP developed for Student was individualized on the basis of Student's assessment and performance.
 27. The preponderance of the evidence demonstrates that the school staff did not predetermine the outcome of the ARD Committee's work.
 28. The preponderance of the evidence demonstrates that the IEP developed for Student was administered in the least restrictive environment.
 29. The preponderance of the evidence demonstrates that the services called for in the IEP were provided in a coordinated and collaborative manner by the key stakeholders.
 30. The preponderance of the evidence demonstrates that Student derived positive academic and non-academic benefits from the IEP.
 31. Less than three weeks passed between the day the IEP was implemented and the day Student withdrew from the school, leaving very little time to be able to fully assess whether Student was benefitting from the IEP.
 32. Petitioner failed to prove that the ARD Committee was obligated to meet and revise the IEP after the school learned that the criminal charges against Student had been dropped.
 33. The evidence does not establish that members of the staff at *** or the District were in any way hostile to Student.

III. DISCUSSION

A. Applicable Law

As a local educational agency responsible for complying with IDEA as a condition of the state of Texas's receipt of federal education funding, the District is required to provide each disabled child in its jurisdiction with a FAPE,⁵ and ensure that such education is offered, to the greatest extent appropriate, in the educational "mainstream," or side-by-side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs.⁶ The FAPE provided to a disabled student must be tailored to student's particular needs via an IEP, a written statement prepared at a meeting attended by a number of specified participants, such as a qualified representative of the District, a teacher, and the child's parents.⁷ In Texas, the team charged with preparing an IEP is known as an ARD Committee.⁸

The FAPE tailored by the ARD Committee, as expressed in the IEP:

need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child. . . . Nevertheless, the educational benefit . . . to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'⁹

⁵ 20 U.S.C. §§ 1400(c) and 1412(a)(1).

⁶ 20 U.S.C. § 1412(a)(1), (5); *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997)(hereinafter, *Michael F.*).

⁷ 34 C.F.R. § 300.321.

⁸ *Michael F.*, 118 F.3d at 247.

⁹ *Michael F.*, 118 F.3d at 247-48 (citations and footnotes omitted).

IDEA creates a presumption in favor of the education plan proposed by the District and places the burden of proof on the party challenging the plan.¹⁰ Petitioner must, therefore, overcome the presumption in favor of the District's education plan and establish that the district failed to provide Petitioner with a FAPE, by establishing that: (i) the District failed to comply with the procedures set forth in IDEA; or (ii) the IEP developed by the District through the IDEA's procedures was not reasonably calculated to enable Petitioner to receive educational benefit.¹¹

Pursuant to IDEA, a district may, under certain circumstances, change the placement of a student with a disability (such as by assigning student to attend school at an off-site, disciplinary location) if that student violates the district's code of student conduct.¹² However, for a change of placement lasting more than ten school days, within ten days of the school's decision to change the placement of the student, the ARD Committee must meet to conduct an MDR. The two questions to be asked in an MDR are:

- (1) whether the conduct for which the student is being disciplined "was caused by, or had a direct and substantial relationship to, the child's disability"; and
- (2) whether the conduct for which the student is being disciplined "was the direct result of the [District's] failure to implement the IEP."¹³

If the ARD Committee answers both questions in the negative, then the District may proceed with the discipline against the disabled student in the same manner that it would be applied to a student without a disability.¹⁴ If either question is answered in the affirmative, then the disabled student generally must be returned to student's normal school placement.¹⁵

¹⁰ *Shaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-537 (2005); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2010).

¹¹ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206-208 (1982).

¹² 34 C.F.R. § 300.530(b).

¹³ 34 C.F.R. § 300.530(e).

¹⁴ 34 C.F.R. § 300.530(c)(the disabled student must, however, continue to receive the educational services specified in his IEP while at the alternative placement).

¹⁵ 34 C.F.R. § 300.530(f).

B. Evidence Presented**1. Student's Testimony**

Student testified at the hearing. Regarding the *** incident, Student explained that student and two other students, ***,¹⁶ had been together ***. ***. ***. Student testified that *** wanted Student to ***. Student also claimed that *** urged student to ***. Student admitted using student's ***. According to Student, ***. ***. Student claimed that, at one point, ***. Student asserted that *** also *** by having ***. Student stated that ***. At *** urging, Student started to ***. However, student testified student had a change of heart and never ***. Student testified that student has never spoken to *** about the incident.¹⁷

*** pressed criminal charges against Student for the incident.¹⁸ The criminal charges were ultimately not prosecuted.¹⁹ On ***, 2013, Student signed a typewritten, two-page statement about the incident that is consistent with student's testimony.²⁰

Student also testified about other incidents at the school that, Petitioners contend, paint a picture of a school that was hostile to Student. In one instance, as Student was attempting to exit student's *** class, as *** teacher, *** "kept trying to get in front of me and get in my way." Student claimed to have no idea why *** had done so. On a second occasion, Student was in a class taught by ***. Student had asked for a pencil from ***, who told student to get one from another student. According to Student, *** (who was *** classroom at the time) persistently blocked student's path, thereby preventing student from asking others if student could borrow a pencil. Student testified that, in the process, student "just walked forward" and student and ***. Afterwards, *** claimed that Student ***.²¹

¹⁶ For the sake of their privacy, the names of the other students are withheld in this Decision.

¹⁷ Tr. at 56-59, 62-64.

¹⁸ Pet. Ex. 16 at 4.

¹⁹ Tr. at 69.

²⁰ Pet. Ex. 16 at 16-17. It is unclear whether this statement was provided to the District or law enforcement personnel.

²¹ Tr. at 65-69.

Sometime after the *** incident, Student testified, there was an incident when student was tapping a pen against a wall at the school. Student claimed that a teacher told student student was destroying school property.²²

2. Mother's Testimony

Student's mother (Mother) also testified at the hearing. She explained that Student has been diagnosed with ADHD since student was a young ***. Student suffers from difficulty sleeping, visual tracking problems, and a number of allergies. Student has, at times, been given medication to treat the ADHD, but the medication was discontinued in early 2012 due to side effects.²³

In the HEB District, ***. In the fall of 2012, Student began *** grade at *** School (which is also in the HEB District). Mother acknowledged that Student struggled academically and behaviorally at ***. She also acknowledged that some of student's behavioral problems included talking incessantly and out of turn, being disrespectful, difficulty interacting with other students, and needing to be redirected. Mother testified that she was hopeful the District could help get Student redirected through the use of positive reinforcements.²⁴

In *** in 2012, Student's parents had student transferred to ***. According to Mother, Student's tenure at *** was not successful. For example, student was failing all of student's classes in *** 2013. She maintained that the school was doing nothing to help Student bring student's grades up, other than having the school counselor tell student, "You need to bring your grades up."²⁵ According to Student's student records, as of ***, 2013, Student had a grade of 100 in ***, 83 in ***, and grades in the 40's and 50's for all other classes.²⁶

²² Tr. at 60-62.

²³ Tr. at 73-75.

²⁴ Tr. at 75-81, 84.

²⁵ Tr. at 95.

²⁶ Pet. Ex. 17 at 1.

Mother complained of several instances in which she felt the District was treating Student in a manner that was not helpful in dealing with student's special needs. She recalled an incident when student complained that, in student's *** class, student's desk had been ***. She also complained about another incident in which Student's *** teacher had changed student's seating assignment. She also testified that there had been one or more occasions when, because student had not been doing student's school work, Student had been forced to sit *** during lunchtime. According to Mother, Student felt humiliated and distressed by these incidents. Mother did not specify when these incidents occurred, nor did she clarify whether they occurred at *** or ***.²⁷

In *** 2013, Student complained to Mother that student was being followed by various school personnel throughout the day. Student had also been distressed because student had seen the principal of *** peeking at student through the classroom window as student was ***.²⁸

After the *** incident, the school referred Student to law enforcement for possible criminal prosecution. Mother complained that the process of taking Student to the juvenile justice center to be fingerprinted was very upsetting to Student and student's parents. On ***, the juvenile justice authorities dropped the case against Student.²⁹

As to the *** incident, Mother opined that no one had been victimized by Student's behavior.³⁰ Following the *** incident, Student was assigned a sixty-day transfer to the District's disciplinary alternative education program (DAEP), at which students attend school at an off-site location. At that point, on ***, 2013, Mother withdrew Student from the District. Student never attended DAEP and student has never attended any school in the District since that date.³¹

²⁷ Tr. at 86-87.

²⁸ Tr. at 88-89.

²⁹ Tr. at 91-92.

³⁰ Tr. at 120-121.

³¹ Tr. at 121-122.

Since that time, Student’s parents have been providing student with educational services through private providers. For example, student meets twice a week with a tutor, for math and writing. Mother offered receipts showing that she has paid the tutor \$1,150.³² Mother also provided documentation showing she has paid \$1,310.61 for *** for Student. The records indicate that those monthly payments began in July 2012, and continued through April 2014.³³ Mother also provided documentation showing she has paid: \$147 for an arts program for Student; \$400 to Student’s therapist; \$212 for textbooks and \$350 for an on-line school course presented by ***; \$160 to a writing tutor for Student; \$175 to Music & Arts for *** for Student; and \$350 to *** for *** for Student.³⁴ As to the ***, Mother conceded that the *** payments were no different than they had been when Student was still enrolled in the District.³⁵

In the record are a number of records documenting dates on which Student was given disciplinary referrals (or “referrals”) for misbehaving during school while at ***. Those records are summarized in relevant part as follows:³⁶

Date of Incident	Alleged Misbehavior
***, 2012	“throwing stuff off desk” and “slamming into door”
***, 2012	“continual disruption,” “refused to do work”
***, 2012	“consistent talking”
***, 2012	“continuous disruption,” “refusal to participate”
***, 2012	“not doing anything in class”
***, 2012	“out of seat numerous times, making fun of others, mocking people, talking without permission”
***, 2012	“grabbed another student ***, causing him to fall down”
***, 2012	“saying ***”
***, 2012	tardy
***, 2012	tardy
, 2012	“poking another student with pencil,” “told the teacher, ‘’”

³² Pet. Ex. 20 at 1-3.

³³ Pet. Ex. 20 at 4-6.

³⁴ Pet. Ex. 20 at 8-23.

³⁵ Tr. at 124-126.

³⁶ Dist. Ex. 26 at 1-7.

After student's transfer to ***, Student continued to experience behavioral problems, as evidenced by additional disciplinary referrals that are summarized in relevant part as follows:³⁷

Date of Incident	Alleged Misbehavior
***, 2012	"telling jokes about ethnicity of fellow student"
***, 2012	tardy to a class for the fifth time
***, 2012	sixth tardy
***, 2012	seventh tardy
***, 2012	"being a distraction to others"
***, 2012	eighth tardy
***, 2012	"[Student] purposely bumped into *** while she tried to block student from *** in *** classroom"
***, 2012	"During *** detention hall, [Student] refused to work and stay quiet." After ***.
***, 2012	"continued to talk, make noises, distracting other students," "sits and does not work"
***, 2012	"taking, making noises, not working"
***, 2013	disturbing and interrupting class
***, 2013	"continually disruptive, ridiculing fellow students"
***, 2013	disruptive in class
***, 2013	"left classroom without permission"
***, 2013	"classroom disruptions, refusing to work, out of seat"
***, 2013	"leaving *** without permission"
***, 2013	"[Student] picked up *** and flung it at me [a teacher] as I was walking"
***, 2013	during a test, "[Student] twice ***"
***, 2013	during a test, "[Student] walked around the room and *** ³⁸ or made sounds *** while student was standing next to me [the teacher] and while standing next to the other students, one after the other"
***, 2013	"left class without permission"
***, 2013	"made fun of another student talking across the room about the other student's ***"
, 2013	" directly in my [a teacher's] face while I was sitting next to student," "****"

As to the incidents in which Student was cited for ***, Mother explained that student had been taking medications ***.³⁹

³⁷ Dist. Ex. 26 at 8-41.

³⁸ The ALJ assumes that *** was the word intended.

³⁹ See, e.g., Pet. Ex. 13 at 13; Pet. Ex. 14 at 9.

3. Father's Testimony

Student's father (Father) testified at the hearing. He testified that, in the early days after Student's transfer to ***, he felt good about the steps that the school was putting in place to accommodate student's needs.⁴⁰ Eventually, however, he was distressed to learn that the disciplinary referrals against student were piling up. He and his wife were getting frequent phone calls and emails from the school about Student.⁴¹ He expressed doubt as to whether, by *** 2012 and *** 2013, Student was deriving a benefit from the education plan at the school, pointing out that Student was failing many classes.⁴² He expressed exasperation with the school staff for issuing so many disciplinary referrals against student. He felt like the referrals were not helpful for student.⁴³

At roughly 12:30 p.m. on ***, 2013, Father was called by the school and informed about the *** incident. When he and his wife arrived at the school, they were shocked to learn that school officials were saying that Student had committed a felony. They were also angered to learn that Student had been sitting in the front office since roughly 9:00 a.m. The parents refused to meet with school officials at that time and, instead, left the school with Student.⁴⁴

Father and Ms. Liva (Student's special education advocate) attended the ***, 2013 ARD Committee meeting at which the MDR was made.⁴⁵ He described the meeting as "pretty heated." He and Ms. Liva had expressed a desire to have *** in attendance because she had written a number of the disciplinary referrals against Student. They were disappointed to see that *** did not attend the meeting. He was also surprised to learn that *** had been assigned as Student's mentor. Father noted that, in *** 2013, two criminal citations were issued against Student for "assault by contact" based on complaints made by *** that Student had assaulted her

⁴⁰ Tr. at 395-96.

⁴¹ Tr. at 398-99.

⁴² Tr. at 399-400.

⁴³ Tr. at 438.

⁴⁴ Tr. at 400-02.

⁴⁵ Pet. Ex. 7 at 20.

on ***, 2013. Father pointed out that it was distressing to learn that the person assigned to be student's mentor was filing criminal complaints against student. He was concerned because the criminal complaints were "not helpful" to Student.⁴⁶

At the ARD Committee meeting, Father did not feel like an "equal partner" in the proceeding, but he did feel that his input was considered by the others in attendance. He disagreed with the finding of the committee that Student's behavior during the *** incident was not caused by, or substantially related to, student's disabilities.⁴⁷ He agreed that *** was not involved in any way with the *** incident.⁴⁸ When asked whether Student received FAPE at ***, Father answered as follows: "Not really. . . . I mean, yeah, there's yeahs and noes to it."⁴⁹

Father testified that Student is currently spending the weekdays at *** home in ***, Texas, and weekends at home with student's parents. In ***, student receives private tutoring.⁵⁰ Father stated that he is receptive to the idea of Student returning to school in the HEB District, but only at a *** other than ***.⁵¹

4. Vice Principal's Testimony

The Vice Principal at *** testified at the hearing. He is, among other things, the primary overseer of disciplinary matters at the school. The Vice Principal testified about the rather extensive efforts made by the staff at *** to accommodate Student's disabilities. A staff meeting was held on ***, 2012, to prepare for Student's arrival in order to ensure that student's transfer would be successful.⁵² The school's Principal, Vice Principal, the District's director of special education, the District's psychologist, and ten other staff members, including Student's teachers, were in attendance. Written materials were provided regarding Student. Those materials list a

⁴⁶ Tr. at 404-07.

⁴⁷ Tr.at 418-19.

⁴⁸ Tr. at 432.

⁴⁹ Tr. at 426.

⁵⁰ Tr. at 428-29.

⁵¹ Tr. at 435.

⁵² Tr. at 408-13; Pet. Ex. 34.

number of steps that were to be instituted regarding Student, such as: providing student with tutoring twice weekly; preparing a Full Individual Evaluation (FIE) of student; assigning the Vice Principal as a liaison/point of contact for Student's parents; assigning *** to serve as Student's mentor for the school year; and implementing the 504 plan.⁵³

The Vice Principal first met Student on ***, 2012, when student was in the process of transferring to ***. On that date, the Vice Principal and the Principal met with Student and student's mother. During early November, the Vice Principal had a number of meetings with Student and the school's counselor. The Vice Principal feels these various meetings were productive, that he had developed a good rapport with Student, and that he understood Student's wants and needs.⁵⁴

According to the Vice Principal, at the time of Student's transfer to ***, there was a 504 plan in effect that addressed concerns with ADHD and written expression.⁵⁵ The 504 plan, which was drafted at *** in *** 2012, was still in effect at the time of Student's transfer.⁵⁶ The Vice Principal's extensive notes from his meetings with various District personnel regarding Student are included in the record. They show that between ***, 2012, and ***, 2013, the Vice Principal participated in no fewer than thirty-two meetings with Student or others concerning Student.⁵⁷

Student's first day enrolled at *** was on ***, 2012. On that day, the Vice Principal and Principal again met with Student and student's mother to discuss the school's policies and to orient Student. They reviewed student's schedule and provided student a tour of the school. The goal of the meeting was to promote Student's academic and behavioral success at the school.

⁵³ Dist. Ex. 4.

⁵⁴ Tr. at 156.

⁵⁵ Tr. at 179.

⁵⁶ Dist. Ex. 1.

⁵⁷ Dist. Ex. 32 at 1-3.

The Vice Principal felt it was a very positive meeting, and he even received a complimentary note from Mother the next day, thanking him and saying that “y’all have a great school.”⁵⁸

On ***, 2012, the Vice Principal arranged a meeting with Student’s parents to discuss student’s progress thus far at the school. He again felt it was a positive and productive meeting.⁵⁹ The Vice Principal’s meeting notes were admitted in the record. The notes indicate that Student was receiving math tutoring.⁶⁰

On ***, 2012, the school’s educational diagnostician prepared and distributed to Student’s teachers a form to be used by the teachers in keeping track of Student’s behavior on a weekly basis.⁶¹ The Vice Principal explained that the purpose of this was to try to ensure Student’s academic and behavioral success.⁶²

The Vice Principal testified that, beginning in late *** 2012, and continuing to the date Student withdrew from school in *** 2013, Student regularly behaved in an inappropriate manner. On ***, 2012, the Vice Principal spoke with Mother and informed her that Student was receiving an excessive number of tardies. Mother expressed concern that the tutoring Student was receiving was not sufficient in quantity and structure. In response, the school increased the level of Student’s tutoring by hiring a professional English teacher to assist student.⁶³

Sometime in mid-***, the Vice Principal participated in a meeting with the school’s counselor, Student, and Mother. The meeting was held because Student was failing a number of classes. Student was generally uncooperative during the meeting.⁶⁴

⁵⁸ Tr. at 183-84; Dist. Ex. 32 at 5.

⁵⁹ Tr. at 185-87.

⁶⁰ Dist. Ex. 4 at 1-2.

⁶¹ Dist. Ex. 32 at 8-9.

⁶² Tr. at 193-94.

⁶³ Tr. at 195-96.

⁶⁴ Tr. at 199-201; Dist. Ex. 29 at 1-2.

The Vice Principal held another meeting with Student's parents on ***, 2012. He provided them with a chart summarizing student's (mostly poor) behavior over the preceding month.⁶⁵ The Vice Principal again felt it was a positive and productive meeting.⁶⁶ Later that day, he received an email from Mother in which she thanked him and "the team you have together at *** to help [Student]." She added, "We . . . are very grateful to the staff in helping student find the assistance student needs to make student's school successful."⁶⁷

The Vice Principal testified that, on ***, 2012, Student was serving *** detention at the school, but was so disruptive that student was ***. ***. Student also ***. ***. However, the Principal, in consultation with Student's father, recommended against it and ***.⁶⁸

The Vice Principal testified that Student was occasionally given *** when student had missed a class or failed to work during a class. He explained that students given *** get to ***, but then must ***. They are required to do school work while ***.⁶⁹

At some point in *** 2013, Student explained to the Vice Principal that student was persistently misbehaving because student hated *** and wanted to return to ***. Student said student wanted to *** and *** offered programs that *** did not, such as *** and *** classes. The Vice Principal testified that Student said student was going to use any means necessary to get back to ***.⁷⁰

On ***, 2013, the Vice Principal met with Student and the counselor to discuss how they could work together for Student's success in the new semester. They all signed a document entitled, "A Pledge for Success," which outlined Student's goals and steps that would be implemented to help achieve them.⁷¹

⁶⁵ Dist. Ex. 32 at 18-22.

⁶⁶ Tr. at 204-06.

⁶⁷ Dist. Ex. 32 at 23.

⁶⁸ Tr. at 207-10; Dist. Ex. 26 at 15.

⁶⁹ Tr. at 220-21.

⁷⁰ Tr. at 222-24.

⁷¹ Dist. Ex. 32 at 25.

On ***, 2013, the initial ARD Committee meeting was held for Student. The committee's work was not completed on that date because Ms. Liva, the special education advocate hired by Student's parents, asked that the meeting be tabled so that she could review materials provided by the District.⁷² The meeting was continued until ***, and was completed on that date. The outcome of the ARD Committee meeting was that Student was found to be eligible for special education services as a student with a Specific Learning Disability in Written Expression and an Other Health Impairment due to a medical diagnosis of ADHD and Allergies. The Vice Principal explained that, at the ARD Committee meeting, Student's representative, Ms. Liva, suggested a measure to address Student's excessive tardiness. Ms. Liva's suggestion was that the fourth time Student was tardy during a semester, student would be assigned an adult who would escort student for the entire next day of school; for student's fifth tardy, student would be escorted by an adult for the next two days; and so on. The other ARD Committee members agreed with this suggestion and it was implemented as a part of IEP.⁷³

The Vice Principal held three training sessions with Student's teachers and others involved in Student's education, on *** and ***, to inform them about the ARD Committee's findings and to ensure implementation of the IEP adopted by the committee. Handouts were prepared and given to the teachers.⁷⁴ On ***, 2013, the Vice Principal sent an email to Student's teachers in preparation for the *** meeting. The tone of that email is similar to the tone of most of the documents generated by the District pertaining to Student. The email reads, in relevant part, as follows:

It has been brought to my attention that everyone understands the plan; however, most are very timid about the 'how to' regarding academics, behaviors, and discipline. Therefore, I would like for all of us to meet this Thursday afternoon *** at 3:20 p.m. . . . to discuss the intimate details of each section as follows:

⁷² Tr. at 214-15.

⁷³ Tr. at 233-35.

⁷⁴ Tr. at 235-37; Dist. Exs 13; 32 at 26-39

- Academically, the student receives the same opportunities as all students in the classroom with additional positive behavioral supports to aid in student's successful function throughout the school day.
- Behaviorally, the student remains under the over-arching umbrella of the District's Student Code of Conduct with 3 more defined umbrellas and a B.I.P. [behavioral intervention plan] to promote student's academic success as charged on page 3 of the plan.
- Finally, the student should experience all the positives listed in the 'Manage Behavior' portion of the plan to promote positive behavioral intervention . . .

I will share more in depth details from the ARD [P]lease feel free to bring your questions, thoughts, and passion as we continue our path of success for this student⁷⁵

On ***, 2013, at the Vice Principal's request, a behavioral interventionist employed by the District developed a proposed list of thirty-five additional services that educators could implement when working with Student. The behavioral interventionist and the Vice Principal worked together to winnow the thirty-five items down to thirteen measures that were distributed to Student's teachers and implemented. The purpose of this list was to implement additional services consistent with Student's IEP.⁷⁶

The Vice Principal testified that he first learned of the *** incident on ***, 2013, a few days after it occurred. A student told the Vice Principal that he had seen ***. The Vice Principal initiated an investigation. The paperwork from the investigation is in the record of this case. The Vice Principal interviewed a number of other students and Student and confirmed that the incident had taken place. Student claimed to have ***, and the Vice Principal observed ***. According to the Vice Principal, ***, looking upset, and ***⁷⁷ The Vice Principal confiscated ***, where it remains ***. In his notes, *** reports that ***.⁷⁸ Written statements provided by *** and other students who witnessed the incident indicate that *** and that Student ***.⁷⁹

⁷⁵ Pet. Ex. 13 at 22.

⁷⁶ Tr. at 241-43; Dist. Ex. 32 at 44-45.

⁷⁷ Tr. at 248-51.

⁷⁸ Pet. Ex. 16 at 5.

⁷⁹ Dist. Ex. 17 at 36-44.

The Vice Principal concluded that Student had committed a possible felony offense and violated the school's Student Code of Conduct. According to the standards of the Student Code of Conduct, this type of violation mandates a long-term referral to DAEP. The Vice Principal told Student's parents that student was suspended and would be referred to DAEP for sixty days.⁸⁰ On ***, 2013, the Principal confirmed the decision to send Student to DAEP.⁸¹ The Vice Principal testified that Student left the school with student's parents on ***, 2013, and never returned to the school.

On ***, 2013, the Vice Principal participated in an ARD Committee meeting in order to conduct an MDR. The purpose of the MDR was to determine whether Student's behavior during the *** incident: (1) was caused by or substantially related to student's disabilities, or (2) was caused by the District's failure to implement student's IEP. The Vice Principal testified that Student's representative, Ms. Liva, acted unprofessionally at that meeting, engaging in name-calling, bullying, and badgering. Ultimately, the ARD Committee concluded that Student's behavior during the *** incident: (1) was not caused by or substantially related to student's disabilities, and (2) was not caused by the District's failure to implement student's IEP.⁸²

In a ***, 2013 letter, the District notified Student's parents that student was being referred to DAEP. As indicated in the letter, the District found that Student had engaged in the *** at a school, in violation of Texas Education Code § *** and Texas Penal Code § ***.⁸³ The parents timely appealed that disciplinary decision. A due process hearing was held on ***, 2013. Ms. Liva appeared and represented Student. The appeal was denied, meaning that the decision to refer Student to DAEP for sixty days was upheld.⁸⁴

⁸⁰ Tr. at 254-55; Dist. Ex. 17 at 49-51.

⁸¹ Dist. Ex. 17 at 48.

⁸² Tr. at 255-57.

⁸³ Dist. Ex. 15.

⁸⁴ Dist. Ex. 17.

On ***, 2013, the Vice Principal conducted a follow-up investigation into the *** incident in response to additional information that had been provided to him by Student's family. He did not change his earlier conclusion.⁸⁵

The Vice Principal disputed the notion that there was an effort at the school to treat Student more harshly than other students. Throughout his testimony, he offered numerous examples of instances in which he opted to: (1) discipline Student for incidents of misbehavior in ways that were less punitive than would normally be called for under the school's disciplinary guidelines, or (2) forego disciplining Student altogether for misbehavior that would normally not go unpunished.⁸⁶ The Vice Principal also denied any implication that the school created an environment that was hostile to Student. Rather, he maintained that the faculty and staff did everything they could to provide a successful instructional environment, both academically and behaviorally, for Student.⁸⁷

5. The Director of Special Education's Testimony

The District's Director of Special Education (DSE) testified at the hearing. She first became aware of Student in *** 2012, just before student's transfer to ***. She learned from Student's mother that student had a 504 plan in place. The DSE offered to have an FIE prepared for Student, but Mother declined at the time. She also met with Student's parents at the time of the transfer to ***,⁸⁸

The DSE attended the ARD Committee meetings in *** 2013. She explained that the IEP developed in those meetings included a requirement that Student have "inclusion support" in student's math, social studies, and English/language arts classes. This means that, in addition to the general education teacher in each of those classes, there would also be a special education teacher present to assist Student. The District also assigned a behavioral specialist to meet twice

⁸⁵ Dist. Ex. 17 at 52-53, 259-60.

⁸⁶ *See, e.g.*, Tr. at 216-18.

⁸⁷ Tr. at 260.

⁸⁸ Tr. at 339-41.

weekly with Student. In Student's IEP, the ARD Committee included a behavior intervention plan (BIP) that was implemented by all of Student's teachers. The ARD Committee also agreed to adopt a measure whereby minor infractions by Student, such as making noises or tapping a pencil, would be ignored. The District immediately implemented these requirements.⁸⁹

In early ***, the school staff became concerned because Student was frequently failing to show up at ***. So, the staff drafted and printed reminder slips that Student's seventh period teacher was to hand student at the end of the day. Copies of the slips are in the record. They include a smiley face and say: "Student - Don't Forget! ***." ⁹⁰

The DSE attended the ***, 2013 ARD Committee at which the MDR was conducted. She explained that there was a lengthy discussion about whether Student's behavior in the *** incident was caused by or was substantially related to student's disability. She agreed with the Committee's conclusion that it was not.⁹¹ The DSE is aware that, ultimately, the juvenile justice authorities decided not to criminally prosecute Student for the *** incident.⁹²

The DSE also participated in an ***, 2013 ARD Committee meeting at which a request from Student's parents for homebound services was discussed. She explained that homebound services are only available for a student who is confined to the home for up to four weeks because of medical reasons and not for emotional reasons. Prior to the ARD Committee meeting, and after obtaining the consent of Student's parents to do so, the DSE spoke on the phone with Student's physician, ***. *** stated that Student did not meet the criteria for homebound services. In light of this, the ARD Committee concluded that homebound services were not appropriate for Student.⁹³

⁸⁹ Tr. at 284-85, 345-48.

⁹⁰ Dist. Ex. 31 at 28.

⁹¹ Tr. at 349-352.

⁹² Tr. at 419.

⁹³ Tr. at 352-55.

On ***, the DSE received a copy of an independent educational evaluation (IEE) completed, at the behest of Student's parents, by Dr. ***. The DSE and the District's psychologist reviewed the IEE. They both concluded that Dr. *** findings were similar to the findings the District's psychologist had made in her own evaluation of Student. They both found *** report to be helpful. The ARD Committee met again on ***, 2013, to review the IEE. According to the DSE, the Committee considered all of Dr. *** recommendations, and adopted "quite a few of them" by adding them to the IEP.⁹⁴

The DSE offered Student's parents the option of having student attend another *** school in the District after student finished student's sixty days in the DAEP, but they declined.⁹⁵ The DSE also testified about the plan whereby an adult would escort Student throughout the school day after student received student's third tardy. The DSE was doubtful about the idea, because she thought it was "pretty invasive." Nevertheless, she testified that the technique proved to be "very effective" because Student ceased being tardy.⁹⁶

6. The Educational Diagnostician's Testimony

The District's Educational Diagnostician (ED) testified at the hearing. She has personally conducted more than 100 full and individual evaluations (FIEs) on students. After Student's transfer to ***, the ED was asked to prepare an FIE of student. She participated in a meeting with Student's parents on ***, 2012, during which they reviewed the results of the FIE thus far. The ED learned that, at one point in the semester, Student had been sent to In-School Suspension (ISS) for disciplinary reasons. While at ISS, student did not complete student's work. When informed that student could not leave ISS and return to student's regular classes until student completed student's work, Student worked rapidly and successfully completed student's assignments. This indicated to the ED that the school work was not too challenging for Student; rather, student lacked sufficient motivation to do the work.⁹⁷

⁹⁴ Tr. at 356-60.

⁹⁵ Tr. at 433-435.

⁹⁶ Tr. 294-95.

⁹⁷ Tr. at 454-56; Dist. Ex. 8 at 1.

As part of the FIE, the ED arranged to have Student examined by a physician. The physician identified Student's difficulty with attention and dysgraphia (problems with writing).⁹⁸ The FIE is a part of the record.⁹⁹ It was prepared in response to parental concerns regarding Student's abilities in math and writing, and student's behavior. Student generally tested in the average range on the various standardized tests that were administered to student as a part of the FIE. However, student tested on the lower range of average for such things as processing speed, visual/spatial processing, and writing fluency. Student has a history of passing the standardized Texas Assessment of Knowledge and Skills (TAKS) testing throughout student's years in school, which indicated to the ED that student is generally working at the same level as student's grade peers. The ED's conclusion was that Student's challenges with processing speed and visual/spatial processing appeared to impact student's academic achievement in the area of writing. Based on student's testing scores, the ED would expect Student to struggle with writing assignments and taking notes, but not much else. The recommendation from the FIE was that Student be considered eligible as a student with a specific learning disability in written expression, and that student receive assistance from an occupational therapist, be provided with a hard copy of class notes, and be given access to technology that would help student write lengthy written assignments.¹⁰⁰

The ED participated in the initial ARD Committee meeting, which took place over the course of two days, *** and ***, 2013. At that meeting, the committee concluded that Student was eligible for special education services as a student with a Specific Learning Disability in Written Expression and an Other Health Impairment due to a medical diagnosis of ADHD and Allergies, but that student did not qualify as having an emotional disturbance. The Committee decided to place student in a general education English class, with a special education teacher in the same class to provide student with additional support. Student was also to be given social

⁹⁸ Tr. at 456.

⁹⁹ Dist. Ex. 10.

¹⁰⁰ Tr. at 459-478; Dist. Ex. 10.

skills instruction with a behavioral specialist for 30 minutes, twice a week. The IEP went into implementation on *** 2013.¹⁰¹

On ***, 2013, the ED coordinated a meeting of numerous teachers and other school staff to discuss Student's progress and compare notes as to the accommodations and modifications that had been put into place for student. She provided the attendees with a four-page document titled, "Plan of Action: Success Plan for [Student]," which outlined the accommodations and modifications.¹⁰²

The ED participated in the ARD Committee meeting that was held on ***, 2013, to conduct the MDR as a result of the *** incident. She testified that she was unpleasantly surprised by unprofessional conduct by Student's special education advocate, Ms. Liva. According to the ED, Ms. Liva was rude and contemptuous of others participating in the meeting. For example, she asked the Principal what kind of drugs he was on and whether she could have some. Ms. Liva also repeatedly interrupted others at the meeting. The ED testified that Ms. Liva behaved bizarrely at the end of the meeting, snatching up the signature page for those who had attended the meeting and stating, in an agitated voice, that she was taking it. Ms. Liva acted in such an agitated manner that the ED was in fear for her physical safety.¹⁰³

Ultimately, the ARD Committee concluded that Student's behavior during the *** incident was not caused by, or substantially related to, student's disabilities. The ED continues to believe this was the correct conclusion. She explained that Student's disability in written expression and student's health impairments of ADHD and allergies did not cause student to ***, because she did not believe student's actions to be based on impulsiveness. Rather, they were calculated and ongoing over a period of time. For example, student kept *** for many days. She also continues to agree with the ARD Committee's conclusion that Student's behavior in the *** incident was not caused by the District's failure to implement student's IEP. According to the ED, all components of the IED were implemented prior to the *** incident.

¹⁰¹ Tr. at 478-83.

¹⁰² Tr. at 484-85; Dist. Ex. 13.

¹⁰³ Tr. at 485-88.

She pointed out, for example, that the District's behavioral interventionist had initiated one-on-one social skills instruction sessions with Student.¹⁰⁴

The ED participated in another ARD Committee meeting held on ***, 2013. The meeting was held to discuss a request by Student's parents that student be provided with homebound services. Despite having been sent notices of the meeting, Student's parents were not in attendance. The parents had requested homebound services because of their belief that student was experiencing anxiety about school. Because student's classroom teachers described Student as being confident, social, outgoing, independent, and lacking any signs of anxiety, the ARD Committee concluded that Student did not meet the eligibility requirements for homebound services. However, the Committee recommended providing Student with thirty minutes per week of counseling for any anxiety student might have. They also modified student's IEP to add goals for social skills and counseling.¹⁰⁵

The ED participated in the next ARD Committee meeting on ***, 2013. The purpose of that meeting was to review the results of an IEE prepared by Dr. ***. The Committee reviewed the recommendations proposed by Dr. *** and devised a list of possible additional accommodations for Student. Because the parents declined to either agree or disagree with the accommodations, the Committee agreed to reconvene on ***, 2013.¹⁰⁶

The ED participated in the meeting on ***. Despite having been sent notices of the meeting, Student's parents were not in attendance. The Committee adopted the recommendations discussed at the prior meeting. The ED offered her professional opinion that the IEP adopted in this case is individually tailored for Student and is the best system of support for student.¹⁰⁷

¹⁰⁴ Tr.at 489-92.

¹⁰⁵ Tr. at 492-94.

¹⁰⁶ Tr. at 494-95; Dist. Ex. 21.

¹⁰⁷ Tr. at 496.

7. The Behavioral Interventionist's Testimony

The behavioral interventionist employed by the District testified at the hearing. He provides behavioral support for students who are having emotional and behavioral difficulties. He was assigned to work with Student on social skills. He began working with Student in *** 2013, and was scheduled to meet with student twice weekly. They planned to work through a course known as "Second Step," which the behavioral interventionist described as a curriculum "where we look at different risk factors that lead to negative behaviors in schools and also more positive, more pro-social behaviors that were to alleviate some of those risk factors and help with positive school behaviors."¹⁰⁸

The behavioral interventionist met with Student a total of four times, first on ***, then again on *** and ***. Student missed the scheduled session on *** because student was out sick. Their last session was on ***, because the next day Student withdrew from the school. The behavioral interventionist opined that, at the time of Student's withdrawal from the school, he and Student were just at the beginning of the process of working through the Second Step curriculum. He believes Student was deriving benefits from the curriculum and would have continued to benefit from it if student had remained at the school. According to the behavioral interventionist, Student was generally, though not completely, cooperative and participatory in their sessions. The behavioral interventionist participated in the ***, 2013 staff meeting to discuss the strategies for Student. He believed, and continues to believe, that the strategies were appropriate.¹⁰⁹

C. Analysis

1. Issues 1(a) and 1(b): Concerning the MDR

Petitioner's primary argument in this case is that the MDR was mishandled by the District, in that the District incorrectly concluded Student's behavior during the *** incident was

¹⁰⁸ Tr. at 522-24.

¹⁰⁹ Tr. at 525-33, 538-39, 541-42; Dist. Ex. 33.

not a manifestation of student's disabilities. Pursuant to IDEA, a district may generally change the placement of a student with a disability if that student violates the district's code of student conduct.¹¹⁰ However, for a change of placement lasting more than ten school days, the ARD Committee must meet to conduct a MDR. The two questions to be asked in an MDR are:

- (1) whether the conduct for which the student is being disciplined "was caused by, or had a direct and substantial relationship to, the child's disability;" and
- (2) whether the conduct for which the student is being disciplined "was the direct result of the [District's] failure to implement the IEP."¹¹¹

If the ARD Committee answers both questions in the negative, then the District may proceed with the discipline against the disabled student in the same manner that it would be applied to a student without a disability.¹¹² If either question is answered in the affirmative, then the disabled student must, except in a few exceptions that do not apply here, be returned to student's normal school placement.¹¹³

a. Issue 1(a). The District did not err in concluding that Student's behavior during the * incident constituted conduct punishable as a felony in violation of the Student Code of Conduct.**

As a threshold matter, Petitioner argues that the issue of whether the ARD Committee answered the two MDR questions correctly need not be reached because the District incorrectly decided to refer Student to DAEP in the first place. That is, Petitioner argues that the District made a "manifestly incorrect" decision that Student had committed a felony by student's actions in the *** incident.¹¹⁴ From Petitioner's briefing, it is unclear whether, in this proceeding, Petitioner is asking for an order overturning the District's disciplinary finding as to Student.¹¹⁵

¹¹⁰ 34 C.F.R. § 300.530(a).

¹¹¹ 34 C.F.R. § 300.530(e).

¹¹² 34 C.F.R. § 300.530(c), (e) (the disabled student must, however, continue to receive the educational services specified in his IEP while at the alternative placement).

¹¹³ 34 C.F.R. § 300.530(f).

¹¹⁴ Pet.'s Post Hearing Brief at 25.

¹¹⁵ It is similarly unclear whether the Hearing Officer has the authority to issue such an order.

The District argues that the propriety of its disciplinary decision is beyond the scope of this proceeding. The District points out that its disciplinary proceedings are separate and distinct from IDEA, and that Petitioner fully participated in that proceeding, including filing and losing an appeal.¹¹⁶

Petitioner disagrees, contending that IDEA Hearing Officers have the jurisdiction to “rectify an obvious wrong.”¹¹⁷ Petitioner relies on cases in which the schools in question appear to have, in disciplinary proceedings, distorted the import of disabled students’ actions in order to justify the students’ removals from the schools. For example, in *South Lyon Community Schools*, 50 IDELR 237 (Mich. St. Educ. Agency, 2012) a mentally disabled student wrote a note that she had two pills on her person while on campus (although she did not) and, from that, the district made a finding that she had an “intent to sell” drugs on campus, thus triggering her removal. *See also Scituate Public Schools*, 47 IDELR 113 (Mass. St. Educ. Agency, 2007) (school justifies removal of student who pulled on principal’s necktie by defining the necktie as a “dangerous weapon”).

Based on these authorities, the Hearing Officer finds that it is within his jurisdiction to examine whether the District made a manifestly incorrect disciplinary decision in order to justify Student’s removal from ***. The relevant legal provisions relied on by the District in its disciplinary decision read as follows:

Sec. 37.006. REMOVAL FOR CERTAIN CONDUCT. (a) A student shall be removed from class and placed in a [DAEP] . . . if the student:

...

(2) Commits the following on or within 300 feet of school property. . .

(A) engages in conduct punishable as a felony.¹¹⁸

Sec. ***.

...

¹¹⁶ Tr. at 146-151; Dist.’s Closing Argument at 13.

¹¹⁷ Pet.’s Post Hearing Brief at 23.

¹¹⁸ Tex. Educ. Code § 37.006.

***¹¹⁹

In addition, the District has adopted a Student Code of Conduct that reads, in relevant part, as follows:

MANDATORY PLACEMENT IN DAEP	A student shall be removed from class and placed in a DAEP if the student engages in conduct described in Education Code 37.006 that requires placement. Education Code 37.006
SCHOOL-RELATED MISCONDUCT	A student shall also be removed from class and placed in a DAEP if the student commits the following on or within 300 feet of school property . . . : 1. Engages in conduct punishable as a felony. ¹²⁰

As noted above, Petitioner argues the District's conclusion that Student committed a felony is manifestly incorrect. Petitioner contends that *** had *** and consented to ***.¹²¹

The evidence, however, does not support Petitioner's argument. *** appears to have consented to ***. The evidence, however, does not support the conclusion that *** consented to ***. Student testified that ***. This claim is not credible in light of the fact that the Vice Principal testified that ***. *** description of the photographs was consistent with the Vice Principal's. In a statement *** provided after the incident, *** stated that *** wanted Student to be punished for *** and that *** begged Student not to ***.¹²² Other witnesses reported that: *** was "mad" that ***; Student told *** student was going to ***; Student told others ***; and Student ***.¹²³ In light of these facts, the Hearing Officer finds that the evidence was plainly sufficient for the District to legitimately conclude that Student had engaged in conduct punishable as a felony, thereby justifying a sixty-day referral to DAEP. Stated differently, the Hearing Officer finds that the District correctly concluded that Student: (a) ***, (b) without *** consent, and (c) with the intent to ***.

¹¹⁹ Tex. Penal Code §***.

¹²⁰ Dist. Ex. 17 at 19.

¹²¹ Pet. Post Hearing Brief at 25-26.

¹²² Dist. Ex. 17 at 36-37.

¹²³ Dist. Ex. 17 at 39-44.

b. Issue 1(b). The ARD Committee did not err in concluding that Student's behavior during the * incident was not a manifestation of student's disabilities.**

As explained above, in an MDR, the ARD Committee is to consider whether the conduct for which the student is being disciplined was caused by, or had a direct and substantial relationship to, the child's disabilities.¹²⁴ Student has been diagnosed with a specific learning disability in written expression and an other health impairment due to medical diagnoses of ADHD and allergies. Petitioner contends that Student's action in the *** incident was an act of impulsivity similar to the many other impulsive and harmful acts student committed throughout the school year, such as *** in an offensive manner, bothering and insulting student's peers and teachers, and being inconsiderate of others.¹²⁵

Petitioner points out that the District's psychologist, ***, had found Student to be impulsive and disrespectful toward student's peers. Petitioner relies most heavily on the report by Dr. ***. In that report, Dr. *** notes, among other things, that Student experiences difficulty with attention, impulse control, and "executive functioning skills."¹²⁶ Dr. *** describes executive functioning skills as "a set of cognitive abilities that control and regulate other abilities and behaviors," that "are necessary for goal-directed behavior," "influence more basic abilities like attention, memory and motor skills," and "allow people to initiate and complete tasks and to persevere in the face of challenges."¹²⁷ According to Dr. ***, "[e]xecutive functions also enable people to inhibit inappropriate behaviors. People with poor executive functions often have

¹²⁴ The ARD Committee must also ask whether the conduct for which the student is being disciplined was the direct result of the District's failure to implement the IEP. The District concluded that Student's conduct was not the result of a failure to implement the IEP. Instead, the District contends that it properly implemented the IEP. In Petitioner's Post Hearing Brief, the following appears on page 27: "III. The Conduct was a Direct Result of the District's Failure to Implement the IEP." Following that heading, however, there is no discussion of the issue, and the Brief proceeds to a different topic. Because the Roman numeral III is out of place in the outline of the Brief, and because there is no text following the heading, the Hearing Officer suspects that this is likely an artifact from an imprecise "cut and paste" from another brief prepared by Petitioner's counsel. For this reason, the Hearing Officer concludes that Petitioner is not challenging the District's finding that Student's conduct was not the result of a failure to implement the IEP.

¹²⁵ Pet.'s Post Hearing Brief at 26-27.

¹²⁶ Dist. Ex. 20 at 10-12.

¹²⁷ Dist. Ex. 20 at 12-13.

problems interacting with other people since they may say or do things that are bizarre or offensive to others.”¹²⁸ Dr. *** concludes that the behaviors and difficulties “with which Student presents” were “a manifestation of student’s disability due to the AD/HD, first and foremost, in combination with student’s executive functioning deficits and dysgraphia/disorder of written expression.”¹²⁹ Based on this, Petitioner argues that Student’s behavior in the *** incident was “clearly and substantially a manifestation of student’s disability.”¹³⁰

The Hearing Officer discounts the import of Dr. *** report for multiple reasons. First, the report did not exist at the time the ARD Committee convened to conduct the MDR. The MDR was conducted on ***, 2013, whereas Dr. *** was still in the process of drafting her report on ***, 2013, and the report was not provided to the District until ***, 2013.¹³¹

Second, it is critical to determine exactly *what conduct* Dr. ** concluded was a manifestation of Student’s disability. In her report, Dr. *** stated that the “behaviors and difficulties . . . *with which [Student] presents*” were “a manifestation of student’s disability.”¹³² Student was brought to Dr. *** with “presenting complaints” of “educational concerns particularly in math, auditory and visual processing, dysgraphia, memory, and attention deficits.”¹³³ Student’s mother described student to Dr. *** as being “friendly and outgoing,” getting in trouble at school for “talking too much or clowning around,” and being “happy and great to be around.”¹³⁴ In other words, it appears that Dr. *** was not asked to opine on whether Student’s behavior in the *** incident was a manifestation of student’s disability. Rather, she was asked to opine whether student’s generalized academic and behavioral problems were a manifestation of student’s disability. Because Dr. *** was not called as a witness at the hearing, the ambiguity regarding her report and whether it relates to Student’s conduct in the *** incident cannot be clarified in this proceeding.

¹²⁸ Dist. Ex. 20 at 13.

¹²⁹ Dist. Ex. 20 at 13.

¹³⁰ Pet.’s Post Hearing Brief at 27.

¹³¹ See Dist. Ex. 20 at 1.

¹³² Dist. Ex. 20 at 13 (emphasis added).

¹³³ Dist. Ex. 20 at 1.

¹³⁴ Dist. Ex. 20 at 4.

Not surprisingly, the District argues that the ARD Committee correctly decided Student's behavior in the *** incident was not caused by, or directly and substantially related to, Student's disability. It points out, correctly, that the ARD committee reviewed all relevant information from the student's file, including teacher observations and relevant information provided by the parents. The ARD committee, including Petitioner's parents, addressed the question of whether the *** was caused by, or had a direct and substantial relationship to, Student's ADHD and allergies or student's learning disability in written expression. Student's parents contended the behavior was a manifestation, while the remaining members of the Committee believed it was not because, during the incident and afterward, Student demonstrated intent rather than impulsivity.

The MDR meeting was made more difficult by misbehavior by Ms. Liva. Nevertheless, according to the DSE, a lengthy discussion was held regarding the manifestation issue. No fewer than nine educational professionals were in attendance at the MDR on behalf of the District, including two Educational Diagnosticians, a Behavioral Interventionist, the Director of Special Education, a Special Education Teacher, and the School Psychologist.¹³⁵ Notably, at the time, *** was already familiar with Student's disabilities, having prepared an in-depth psychological report on Student.¹³⁶ Without exception, all of these experts agreed that Student's behavior in the *** incident was not caused by or directly and substantially related to student's disability.¹³⁷ Also notably, at the meeting Student's advocate, Ms. Liva, neither agreed nor disagreed, and she argued that the ARD Committee lacked sufficient information to make the decision, speculating that Student might have anxiety issues that caused student's conduct.¹³⁸

At the hearing, a number of experts on the District's side continued to believe that the decision reached in the MDR was the correct one. The Vice Principal, the DSE, and the

¹³⁵ Dist. Ex. 14 at 17-18.

¹³⁶ Dist. Ex. 5.

¹³⁷ Dist. Ex. 14 at 19.

¹³⁸ Dist. Ex. 14 at 19.

District's educational diagnostician all continue to agree with the decision. As pointed out by The ED, in deciding to ***, Student acted in an intentional, rather than impulsive, manner.

In summary, the District presented a compelling case, including the opinions of multiple professionals in the field, as to why Student's actions were not caused by student's disabilities. Petitioner, on the other hand, presented no evidence based on professional opinion as to why Student's actions in the *** incident were caused by student's disabilities. Petitioner failed to prove, by a preponderance of the evidence, that error was committed by the District in the MDR.

2. Issue 2. The District did not fail to place Student in the least restrictive environment (LRE) by assigning student to a sixty-day transfer to DAEP.

The District is required to provide a disabled student with a FAPE in the LRE consistent with the disabled student's needs.¹³⁹ Petitioners have two theories as to why the District failed to provide Student a FAPE in an LRE. First, according to Petitioner, the "District erred when putting [Student] in the DAEP in the first instance" because DAEP is not an LRE.¹⁴⁰ This argument fails. As explained above, because Student's behavior during the *** incident was determined at the MDR to not be a manifestation of student's disabilities and not the direct result of a District failure to implement the IEP, the rules implementing IDEA make it clear that the District may proceed with referring Student to DAEP just as it would discipline any other student without a disability, but student must continue receiving the benefits of student's IEP while at DAEP.¹⁴¹ Thus, in the context of IDEA, DAEP can, in circumstances such as are present here, constitute an LRE.

Second, Petitioner argues that the District should have rescinded the referral to DAEP when: (1) it learned that the criminal charges against Student for the *** incident had been dropped by the juvenile justice authorities on ***, 2013, or (2) it obtained Dr. *** report on ***, 2013, because either of these events should have informed the District that Student had been

¹³⁹ 20 U.S.C. § 1412(a)(1), (5); *see also, Michael F.*, 118 F.3d at 247.

¹⁴⁰ Pet.'s Post Hearing Brief at 28.

¹⁴¹ *See* 34 C.F.R. § 300.530(c), (e).

referred to DAEP based on erroneous assumptions.¹⁴² This argument may likewise be easily disposed of. As explained above, the Hearing Officer does not find Dr. *** report to be dispositive on the question of whether Student’s conduct was a manifestation of student’s disabilities.

Moreover, Petitioner misconstrues the legal significance of the decision by the juvenile justice authorities to drop the criminal charges against Student. The fact that the authorities opted not to criminally prosecute Student does not overturn the District’s finding that Student had engaged in conduct punishable as a felony. As cited above, Texas Education Code § 37.006(a) obligates the District to assign a student to DAEP if that student “engages in conduct *punishable* as a felony” on school property.¹⁴³ The wording of the statute is significant. It makes it clear that the Legislature is not placing the District in the shoes of a criminal prosecutor. Stated differently, the District’s job is not to make a conclusive determination under the Penal Code that a felony has been committed, but to make a determination under the Education Code that a student has engaged in conduct that could be punishable as a felony.¹⁴⁴ Having reasonably made that determination, the District was not obligated to “unmake” it when it learned that Student would not be prosecuted.

3. Issue 3. The District did not fail to develop Student’s IEP in a collaborative, and not predetermined, manner.

Petitioner contends that Student’s IED must have been “developed by team members, which includes the parents, in a collaborative manner at the ARD Committee meeting.”¹⁴⁵ Petitioner contends that the collaborative process was undermined because school staff had predetermined the desired outcome regarding Student before the ARD Committee met. In support of this theory, Petitioner cites the fact that the school did not rescind Student’s placement

¹⁴² Pet.’s Post Hearing Brief at 22-23, 28.

¹⁴³ Emphasis added.

¹⁴⁴ The Texas Code of Criminal Procedure further confirms that it is within a school district’s purview to make its own determination as to whether a student’s actions constitute conduct punishable as a felony. If a law enforcement agency arrests a student for a felony offense, the agency must notify the student’s school district and provide “sufficient details of the arrest . . . and the acts allegedly committed by the student *to enable the superintendent or the superintendent’s designee to determine whether there is a reasonable belief that the student had engaged in conduct defined as a felony offense by the Penal Code.*” Tex. Code Crim. Pro. § *** (emphasis added).

¹⁴⁵ Pet.’s Post Hearing Brief at 28 (citing *Michael F.*, 118 F.3d at 253).

at DAEP when: (1) it learned that the juvenile justice authorities had dropped the case against Student, or (2) a copy of Dr. *** report was provided to the school. In addition, Petitioner cites another fact as evidence of predetermination:

Yet no where [sic] is the aspect of *predetermination* more overt than in the District's use of the word 'intent' to describe [Student's] behavior, meaning it was not impulsive or related to student's ADHD. In addition, the District's insistence that . . . the *** was a new behavior, and thus not something student's IEP could have considered.¹⁴⁶

The court in *Michael F.* identified four elements to determine whether a district provided a FAPE to a disabled student:

- 1) whether the program is individualized on the basis of the student's assessment and performance;
- 2) whether the program is administered in the least restrictive environment;
- 3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
- 4) whether positive academic and non-academic benefits are demonstrated.¹⁴⁷

The Hearing Officer notes that Petitioner appears to be conflating the first and third elements. Pursuant to the third element, services must be *provided* to a disabled student in a coordinated and collaborative manner whereas, pursuant to the first element, the IEP must be *developed* in an individualized manner, on the basis of the student's assessment and performance. In petitioner's brief, Petitioner argues that the IEP must have been developed in a collaborative manner.

Nevertheless, the Hearing Officer finds the evidence Petitioner relies on to prove that the process was uncollaborative and predetermined to be unpersuasive. As discussed above, the Hearing Officer has already determined that the District had no obligation to rescind Student's placement at DAEP when it learned that the juvenile justice authorities had dropped the case

¹⁴⁶ Pet.'s Post Hearing Brief at 28-29 (emphasis in original).

¹⁴⁷ *Michael F.*, 118 F.3d at 253.

against student, or when it obtained a copy of Dr. *** report. Likewise, the fact that the ADR Committee described Student's actions during the *** incident as intentional and new behavior does not constitute evidence of a predetermined outcome. Rather, it is merely evidence of the Committee's reasonable evaluation of the incident.

Moreover, as required by the third element, the evidence establishes that Student's IED was implemented in a coordinated and collaborative manner by the stakeholders. School staff met on multiple occasions to ensure complete understanding of Student's educational programming. School staff met, and communicated by e-mail, with Student's parents on multiple occasions to ensure they were informed about student's progress and challenges. Student participated in student-led conferences with school staff and student's parents. The campus Principal hired *** to address parental concerns about Student's participation in ***. Student's mother e-mailed her thanks to the campus for the efforts they were making on student's behalf. Student's father testified that the meetings with the school were generally positive, and he had no issues with the school until the school disciplined Petitioner for ***.

The DSE offered Petitioner's parents the option of having Petitioner attend another *** school in the District after student finished student's sixty days in the DAEP. When it received the report from Dr. ***, the ARD Committee found the report to be helpful and added a number of Dr. *** recommendations to Student's IED. These acts, along with many others, evidence the overall collaborative attitude of District staff and their efforts to ensure that Student's IEP was implemented in a coordinated and collaborative manner by key stakeholders.

4. Issue 4. Student was provided with positive academic and non-academic benefits.

The fourth element of the test set out in *Michael F.* requires a finding that the disabled student was provided with "positive academic and non-academic benefits" by the District.¹⁴⁸ Petitioner points out that, on ***, 2103, Student was failing five classes: English, math, history,

¹⁴⁸ *Michael F.*, 118 F.3d at 253.

keyboarding, and band. Petitioner argues that this proves Student received no academic benefit from student's IEP.¹⁴⁹

Again, the Hearing Officer finds this argument to be unpersuasive. Admittedly, the record of benefits demonstrated by Student is not impressive. Nevertheless, there are a few indications that student benefitted from the District's efforts. For example, the behavioral interventionist stated that he and Student were beginning to develop a rapport. According to the behavioral interventionist, Student was deriving benefits from the curriculum, and would have continued to benefit from it if student had remained at the school. Student was also generally cooperative and participatory in the sessions with the behavioral interventionist. Likewise, the DSE testified that the measures the school had put into place to remedy Student's tardies had been quite successful. Finally, there were some glimmers of academic success on Student's part. For example, the district produced evidence documenting that, between the week ending ***, 2013 and the week ending ***, 2013, Student had doubled the frequency with which student was turning in work on time.¹⁵⁰

Moreover, it is unrealistic to assume that Student's difficulties could be remediated overnight. It is simply a fact that insufficient time passed for the District to be able to fully assess whether Petitioner was experiencing academic benefit from student's special education services. The ARD Committee adopted the IEP on ***, 2013; it began implementing it the next day; and Student stopped attending school in the District on ***, 2013. Thus, there were less than three weeks for Student to begin exhibiting benefits from the IED. Moreover, to some extent, Student's poor grades were negatively impacted by zeroes caused by student's absences prior to being withdrawn. In summary, the available evidence demonstrates that Student's IEP was reasonably calculated to provide, and resulted in, positive academic and nonacademic benefits.

¹⁴⁹ Pet.'s Post Hearing Br. at 29.

¹⁵⁰ Dist. Ex. 28.

5. Issue 5. Student's IEP was individualized on the basis of student's assessment and performance.

The first element of the test set out in *Michael F.* requires a finding that the disabled student's IEP "is individualized on the basis of the student's assessment and performance."¹⁵¹ As to this element, Petitioner does not challenge the IEP as initially adopted for Student. Rather, Petitioner claims that the IEP should have been changed to reflect the new circumstances when: (a) the decision had been made by the juvenile justice authorities to drop the criminal charges against Student; and (b) the District received Dr. *** report.

Petitioner cites *Humble Indep. Sch. Dist.*, 45 IDELR 58 (June 27, 2005)(hereinafter, *Humble*), for the proposition that the District was legally obligated to change Student's placement after it learned that the criminal charges against student were being dropped. The Hearing Officer does not agree.¹⁵² In *Humble*, the school district placed a disabled student in DAEP when it learned student had been criminally charged for a felony offense for discharging a gun at home. Shortly thereafter, the charges were reduced to a misdemeanor. In response, the District removed the student from DAEP and returned student to the normal classroom. The school district in *Humble* did what Petitioner believes should have been done here. However, there is nothing in the *Humble* opinion to suggest that a district is *legally obligated* to change its disciplinary decision in light of information it receives from juvenile justice authorities.

Petitioner also argues that, pursuant to 34 Code of Federal Regulations § 300.324(b)(1)(ii)(C), (D), and (E), the District was obligated to reconvene Student's ARD Committee and remove student from DAEP when it learned of the decision to drop the criminal charges.¹⁵³ Again, the Hearing Officer disagrees. By federal regulation, an ARD Committee must review its IEP "periodically, but not less than annually."¹⁵⁴ Pursuant to the three subparts cited by Petitioner, the Committee must revise the IEP "as appropriate" to address:

¹⁵¹ *Michael F.*, 118 F.3d at 253.

¹⁵² Pet.'s Post Hearing Brief at 30.

¹⁵³ Pet.'s Post Hearing Brief at 30.

¹⁵⁴ 34 C.F.R. §300.324(b)(i).

- § 300.324(b)(1)(ii)(C) - “information about the child provided to, or by, the parents, as described under §300.305(a)(2);”
- § 300.324(b)(1)(ii)(D) - “the child’s anticipated needs;” and
- § 300.324(b)(1)(ii)(E) - “other matters.”

Subsection (C) is not dispositive. It merely provides that an ARD Committee must, “as appropriate,” revise its IEP in response to “information about the child provided to, or by, the parents, as described under § 300.305(a)(2).” Rather circularly, § 300.502(a)(2), in turn, states that the ARD Committee should review existing data, evaluations, classroom observations, and teacher observations about a student in order to identify what additional data “if any” is needed to determine whether the child continues to have a disability, whether the child continues to need special education services, and whether any additions or modifications are needed for the IEP. Nothing in this language suggests that the ARD Committee was required to meet and revise the IEP upon learning that the criminal charges had been dropped.

Subsections (D) and (E) are also not dispositive. Subsection (D) merely provides that an ARD Committee must meet, “as appropriate,” to revise the IEP to address “the child’s anticipated needs.” Subsection (E) rather unhelpfully provides that an ARD Committee must meet, “as appropriate,” to revise its IEP to address “other matters.” Again, nothing in this language suggests that the ARD Committee was required to meet and revise the IEP upon learning that the criminal charges had been dropped.

Finally, Petitioner argues that, pursuant to 34 Code of Federal Regulations § 300.324(b)(1)(ii)(B), the District was obligated to reconvene Student’s ARD Committee and remove student from DAEP when it obtained Dr. *** report.¹⁵⁵ Again, the Hearing Officer disagrees. Pursuant to Subsection B, the ARD Committee should, “as appropriate,” revise its IEP “to address . . . the result of any reevaluation conducted under § 300.303.” Dr. *** report constitutes a reevaluation conducted under § 300.303. However, the record reflects that the ARD Committee expressly complied with the requirements of Subsection B: the ARD Committee members met on ***, 2013 to discuss and consider Dr. *** report, and they revised

¹⁵⁵ Pet.’s Post Hearing Brief at 31.

the IEP as they deemed appropriate to incorporate a number of Dr. *** suggestions. The fact that the Committee did not rescind the referral to DAEP as Petitioner wishes does not indicate a failure to comply with Subsection B.

IV. CONCLUSIONS OF LAW

1. The District is local educational agency responsible for complying with IDEA as a condition of the state of Texas's receipt of federal education funding, and the District is required to provide each disabled child in its jurisdiction with a "free appropriate public education" (FAPE), pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq.*
2. Student resides within the boundaries of the District and is eligible for special education services as a student with a Specific Learning Disability in Written Expression and an Other Health Impairment due to ADHD and Allergies.
3. Petitioner bears the burden of proof on all issues raised in this proceeding. *Schaffer v. Weast*, 546 U.S. 49 (2005).
4. Petitioner failed to prove that the District failed to provide Student with a FAPE. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDER

After due consideration of the record, and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby **ORDERS** as follows:

All of Petitioner's requested relief is denied.

SIGNED on May 13, 2014.

/s/Hunter Burkhalter

NOTICE TO THE PARTIES

This Decision of Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Texas Administrative Code §89.1185(n).

DOCKET NO. 126-SE-0114

STUDENT,	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENTS,	§	
Petitioner	§	
v.	§	HEARING OFFICER FOR
HURST-EULESS-BEDFORD	§	
INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

SYNOPSIS

Issue 1(a): Whether the Manifestation Determination Review (MDR) process was mishandled by District error in concluding that Student’s behavior during an incident that occurred *** (the *** incident) constituted a crime.

Held: For the District By statute, the District was obligated to assign Student to disciplinary alternative education (DAEP) if it determined that the student engaged in conduct on school property that was punishable as a felony . In this case, the preponderance of the evidence demonstrates that the District decided reasonably and in good faith when it determined that Student committed conduct punishable as the felony *** by: (a) ***; (b) without the other student’s consent; and (c) with the intent to ***.

Citation: Tex. Educ. Code §37.006; Tex. Penal Code §***

Issue 1(b): Whether, during the Manifestation Determination Review (MDR) process, the Admissions, Review and Dismissal (ARD) Committee erred in concluding that Student’s behavior during the *** incident was not a manifestation of student’s disabilities.

Held: For the District The preponderance of credible evidence demonstrated that Student’s behavior during the *** incident was not caused by or substantially related to student’s disabilities.

Citation: 34 C.F.R. § 300.530(e)

Issue 2: Whether, by assigning Student to a sixty-day transfer to DAEP following the *** incident, the District failed to place Student in the least restrictive environment (LRE).

Held: For the District Having correctly concluded that Student’s behavior during the *** incident was not caused by or substantially related to student’s disabilities, and was not the direct result of the District’s failure to implement Student’s Individualized Educational Plan (IEP), the District acted appropriately in disciplining Student in the same manner that it would have disciplined a student without a disability. Moreover, the

District had no legal obligation to revise the discipline given to Student when: (1) it learned that the criminal charges pending against Student arising from the *** incident had been dropped by the juvenile justice authorities; or (2) it was provided with a new IEE regarding Student.

Citation: 20 U.S.C. § 1412(a)(1), (5); 34 C.F.R. § 300.530(c), (e)

Issue 3: Whether the District failed to develop Student's IEP in a collaborative, and not predetermined, manner.

Held: For the District The preponderance of credible evidence demonstrated that Student's IED was developed and implemented in a collaborative and not predetermined manner.

Citation: *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

Issue 4: Whether the IEP provided academic benefit to Student.

Held: For the District Insufficient time elapsed between the date the IEP was implemented and the date Student withdrew from the school to enable the District to fully assess the benefits accrued to Student by the IEP. Nevertheless, the preponderance of credible evidence demonstrated that Student's IED was reasonably calculated to provide, and resulted in, positive academic and nonacademic benefits to Student.

Citation: *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

Issue 5: Whether Student's IEP was commensurate with student's unique and individualized needs.

Held: For the District The preponderance of credible evidence demonstrated that Student's IED was individualized on the basis of Student's assessment and performance. Moreover, the ARD Committee had no legal obligation to revise the IED when it learned that the criminal charges pending against Student arising from the *** incident had been dropped by the juvenile justice authorities. When it was provided with a new IEE regarding Student, the ARD Committee appropriately met and considered the IEE and incorporated a number of the suggestions made in the IEE into the IEP.

Citation: 34 C.F.R. §§ 300.305(a)(2), 300.324(b)(1)(ii)(B), (C), (D), and (E); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997)