

**SOAH DOCKET NO. 701-21-2562.IDEA  
TEA DOCKET NO. 204-SE-0621**

**STUDENT, B/N/F PARENT,  
Petitioner**

**v.**

**KLEIN INDEPENDENT SCHOOL  
DISTRICT,  
Respondent**

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**BEFORE A SPECIAL EDUCATION**

**HEARING OFFICER FOR**

**THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

Student by next friend Parent (collectively, Petitioner or Student), filed a request for an expedited due process hearing against the Klein Independent School District (Respondent or the District) on June 7, 2021, alleging claims under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482 (IDEA), and its implementing state and federal regulations.

The issues presented in the case concern whether Student's initial placement in a behavioral program and subsequent placement in a Disciplinary Alternative Education Program (DAEP) for \*\*\* comported with the IDEA, and whether the District was obligated to transmit Student's records to the appropriate authorities following Student's \*\*\* on campus.

The hearing officer concludes the District complied with the IDEA when disciplining Student. The hearing officer further concludes the District failed to transmit Student's special education and disciplinary records to the appropriate authorities as required under the IDEA.

**A. Legal Representatives**

Petitioner was represented throughout this litigation by Petitioner's mother, \*\*\* Respondent was represented throughout this litigation by its legal counsel, Erik Nichols and Melissa Goins with the firm Karczewski, Bradshaw, and Spalding.

**II. DUE PROCESS HEARING**

The due process hearing was held on August 20, 2021, via the Zoom videoconference platform. Petitioner continued to be represented by Petitioner's parent, \*\*\*. Respondent continued to be represented by its legal counsel, Erik Nichols and Melissa Goins. In addition, \*\*\*, Director of Special Education for the District, attended the hearing as the party representative. The hearing was recorded and transcribed by a certified court reporter. The hearing officer's decision is due on September 3, 2021.

**III. ISSUES**

**A. Petitioner's Claims and Relief Sought**

Petitioner raised the following legal issues for decision:

1. Whether Student was appropriately placed in the \*\*\* Program from April \*\*\*, 2021 to May \*\*\*, 2021, following the April \*\*\*, 2021 Manifestation Determination Review (MDR) hearings.
2. Whether Student's change of placement to a DAEP comported with the IDEA, including whether the District appropriately applied the special circumstances provisions.
3. Whether the District violated Student's procedural rights by failing to transmit Student's special education and disciplinary records to law enforcement.

Petitioner seeks the following relief:

Any and all relief deemed appropriate by the hearing officer.

## **B. The District's Legal Position**

The District generally denied the allegations and maintained it properly conducted the MDR hearing(s) and any change in placement comported with the IDEA. The District seeks an order denying Petitioner any relief.

## **IV. FINDINGS OF FACT**

1. Student is \*\*\* years old and attended \*\*\* grade at \*\*\* after enrolling in the District on September \*\*\*, 2020. Student is eligible for special education and related services as a student with an Emotional Disturbance and an Other Health Impairment for Attention Deficit Hyperactivity Disorder.<sup>1</sup>
2. The District held a transfer Admission, Review, and Dismissal (ARD) Committee meeting on September \*\*\*, 2020. The ARD Committee agreed to accept and implement Student's prior Individualized Education Program (IEP) with services beginning on September \*\*\*, 2020. Student's prior IEP specified Student attend all classes in the special education setting and transfer to general education classes on a "time" basis beginning in the 2020-21 school year. Under the interim services agreement, Student began classes in the District's \*\*\* Program and would gradually transition to the general education setting in phases.<sup>2</sup>
3. The District provides behavioral supports to certain students through the \*\*\* Program. The \*\*\* Program is a comprehensive, multi-level program that incorporates positive behavior supports, scientifically-based research practices and interventions, and placement in mainstream settings to further access to the general curriculum and highly qualified teachers. The program involves four levels of implementation – preplacement, orientation, inclusion and maintenance, and aftercare. Students progress through the phases, beginning with a brief period of self-contained instruction in pro-social replacement behaviors and advancing to full inclusion with individually determined levels of monitoring and support from \*\*\* Program staff. The length of time a student remains in each phase is determined

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<sup>1</sup> Joint Exhibit (JE) 1.

<sup>2</sup> JE 1; JE 2 at 1-2.

- by progress as he or she participates in \*\*\* activities. The \*\*\* Program is not a disciplinary placement.<sup>3</sup>
4. Student's ARD Committee convened for a 30-day review and Student's annual meeting on October \*\*\*, 2020. Student continued to require behavior interventions from the \*\*\* Program to support behavioral and academic progress and had a Behavior Intervention Plan (BIP) to address three target behaviors – non-compliance, work avoidance, and verbal aggression.<sup>4</sup>
  5. Student's October 2020 IEP included three Behavior/\*\*\* goals – demonstrating compliant behavior in school, using coping techniques to refrain from use of verbal aggression towards peers or adults, and identifying at least two positive coping strategies for dealing with negative emotions such as anger, stress, anxiety, and sadness. The IEP also included a counseling goal aimed at decreasing maladaptive behaviors while using positive coping strategies for anger management and expressing emotions appropriately.<sup>5</sup>
  6. The October 2020 ARD Committee recommended Student receive all or part of Student's instruction in a special education setting. Student's Schedule of Services for October \*\*\*, 2020 – October \*\*\*, 2021 called for 45 minutes per day of pull out services in the \*\*\* Program classroom for behavioral/social/emotional instruction. Student would also receive 120 minutes per week of in-class support and behavioral/social/emotional monitoring from \*\*\* Program staff.<sup>6</sup>
  7. Student's IEP also had an Alternate Schedule of Services that allowed for Student's instruction in the general education classroom to vary depending upon Student's social-emotional and/or behavioral stability. To match Student's needs on any given day, \*\*\* Program staff may provide increased behavior and emotional support through in-class support in the general education setting and/or pull-out to the \*\*\* Program classroom.<sup>7</sup>
  8. The \*\*\* Program has a dedicated, self-contained classroom where program orientation and re-orientation, as necessary, occur.<sup>8</sup>
  9. The \*\*\* Program anticipates that students with behavioral challenges may experience setbacks calling for re-orientation, a phase three activity occurring in the \*\*\* classroom and entailing additional or supplemental \*\*\* training, reinforcement activities, and crisis de-escalation. Students return to the \*\*\* classroom for short periods to regroup and receive

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<sup>3</sup> JE 14 at 9, 46.

<sup>4</sup> JE 1; JE 3; JE 3 at 3-4.

<sup>5</sup> JE 3 at 6-8.

<sup>6</sup> JE 3 at 12, 15.

<sup>7</sup> JE 3 at 15.

<sup>8</sup> JE 14 at 37, 112.

further instruction and practice individualized replacement behaviors. \*\*\* Program staff may recommend re-orientation based on monitoring data and identifying a need for more intensive behavior education in one or all of the target behaviors identified in the student's behavior plan. As with orientation, there may be a minimal amount of academic work completed by the student during this time. The focus and majority of student time is spent on behavior education. The goal is to teach replacement behaviors and facilitate a quick turnaround for the student's re-engagement in mainstream classes.<sup>9</sup>

10. \*\*\* Program re-orientation does not occur for a set number of days, and may occur for part of the school day or all of it. The length of time a student spends in re-orientation considers the frequency, duration, and intensity of behaviors and varies according to the student's academic and behavioral needs and how the student responds. Placements range anywhere from half a day to two weeks.<sup>10</sup>
11. Student participated in re-orientation several times during the 2020-21 school year, including \*\*\* times during the \*\*\*grading period and \*\*\* times during the \*\*\*grading period.<sup>11</sup>
12. Prior to April \*\*\*, 2021, Student generally received instruction in Student's general education classes with \*\*\* Program staff periodically checking on Student to ensure Student stayed on task and Student's behavior was appropriate.<sup>12</sup>
13. On April \*\*\*, 2021, Student refused to work on an assignment and was instead \*\*\*. When the teacher attempted to \*\*\*, Student allegedly \*\*\*. A disciplinary referral was made that day.<sup>13</sup>
14. The teacher wanted to pursue \*\*\* charges against Student for \*\*\*. A police officer employed by the District prepared an offense report after speaking with the teacher. The officer also contacted the Harris County Juvenile District's Attorney's office to report the offense and advised an Assistant District Attorney that Student was eligible for special education as a student with an Emotional Disturbance. The Assistant District Attorney agreed to accept the charge of \*\*\*. She did not request Student's special education or disciplinary records. The District police officer \*\*\*.<sup>14</sup>

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<sup>9</sup> JE 14 at 37, 96, 112-113.

<sup>10</sup> Tr. at 62, 81-82, 132, 165-67, 179.

<sup>11</sup> JE 16 at 1-2; JE 28; Tr. at 63.

<sup>12</sup> Tr. at 61.

<sup>13</sup> JE 6 at 1; JE 8 at 1-2; JE 9.

<sup>14</sup> Respondent's Exhibit (RE) 1 at 1-2; RE 2; Tr. at 146, 148-49.

15. On April \*\*\*, 2021, the Assistant Principal received two reports that Student had \*\*\*. The District conducted a search of Student and Student's possessions and found \*\*\*.<sup>15</sup>
16. Student reported Student \*\*\*. Student did not intend to \*\*\* at school.<sup>16</sup>
17. Student's parent spoke with the \*\*\*officer on April \*\*\*, 2021, and asked if Student's records had been given to the District Attorney. Student's parent also contacted the Assistant Principal on April \*\*\*, 2021, to inquire whether the District had provided Student's IEP and BIP to the District Attorney and, if not, requested that this information be provided. The Assistant Principal indicated she would "forward [the] request on to the police officer" to address. In another communication with the Assistant Principal the same day, Student's parent asked whether Student's IEP and BIP were sent with the offense report to the District Attorney. The Assistant Principal responded that there had not been a request for Student's IEP or BIP. The District did not send the parent a release.<sup>17</sup>
18. The District did not provide Student's records to the \*\*\*attorney or the police department.<sup>18</sup>
19. On April \*\*\*, 2021, the District convened an MDR to consider whether the \*\*\* allegation was a manifestation of Student's disability. ARD Committee participants included Student's parent, the Assistant Principal, a general education teacher, a special education teacher (Student's \*\*\* Program teacher), a diagnostician, and a Licensed Specialist in School Psychology.<sup>19</sup>
20. The ARD Committee considered evaluation and diagnostic results, including Student's March 2019 Full and Individual Evaluation; information provided by Student's parent, including concerns Student's BIP was not properly implemented at the time of the incident and concerns about \*\*\*; Student's disciplinary history for the 2020-21 school year, which included \*\*\* prior referrals; and Student's IEP and placement, including Student's BIP. The District also considered several witness statements and Student's statement about the incident.<sup>20</sup>
21. Student's ARD Committee determined the \*\*\* was caused by, or had a direct and substantial relationship to, Student's disability. The ARD Committee further determined the \*\*\* was a direct result of the District's failure to implement Student's IEP because

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<sup>15</sup> JE 7 at 14-16; Tr. at 120-21, 174-75.

<sup>16</sup> JE 7 at 1; Tr. at 152.

<sup>17</sup> Petitioner's Exhibit (PE) 2 at 1, 3; Tr. at 152-53.

<sup>18</sup> Tr. at 89, 92, 102-03, 152, 184.

<sup>19</sup> JE 6; JE 6 at 16-17.

<sup>20</sup> JE 6 at 1-15.

- there were additional steps in Student's BIP that were not implemented. The ARD Committee did not propose a disciplinary consequence for this behavior.<sup>21</sup>
22. The District convened a second MDR on April \*\*\*, 2021, to consider the allegation Student was in \*\*\*. ARD Committee participants included Student's parent, the Assistant Principal, a general education teacher, a special education teacher (Student's \*\*\* Program teacher), a diagnostician, and a Licensed Specialist in School Psychology.<sup>22</sup>
  23. The ARD Committee considered evaluation and diagnostic results, including Student's March 2019 Full and Individual Evaluation; information provided by Student's parent, including recent concerns about \*\*\*; Student's disciplinary history for the 2020-21 school year; and Student's IEP and placement, including Student's BIP. The ARD Committee also considered witness statements from the Assistant Principal and Principal and a \*\*\*.<sup>23</sup>
  24. Student's ARD Committee determined Student's \*\*\* was caused by, or had a direct and substantial relationship to, Student's disability. The ARD Committee further determined the conduct was a direct result of the District's failure to implement Student's IEP.<sup>24</sup>
  25. Under the District's Student Code of Conduct, \*\*\* is a Level \*\*\* offense. Authorized consequences for a Level \*\*\* offense include DAEP placement. Disciplinary consequences for a Level \*\*\* offense cannot be appealed beyond the Executive Director of Campus Safety and Support.<sup>25</sup>
  26. Following the MDR, campus administration recommended a 30-day DAEP placement for Student under the IDEA's special circumstances provision. The Assistant Principal held a disciplinary conference with Student and Student's parent on April \*\*\*, 2021, regarding Student's violation of the Student Code of Conduct for \*\*\* at school. Student's parent was provided Notice of Procedural Safeguards. The Assistant Principal recommended a 30-day DAEP placement. Student's parent appealed this decision.<sup>26</sup>
  27. The Principal issued a DAEP referral form on April \*\*\*, 2021. Student's parent and the Principal had a campus-level conference on April \*\*\*, 2021.<sup>27</sup>
  28. A communication from the Executive Director of Campus Safety and Support dated April \*\*\*, 2021 confirmed receipt of Student's parent's appeal of the 30-day DAEP

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<sup>21</sup> JE 6 at 14-15.

<sup>22</sup> JE 7; JE 7 at 1, 17.

<sup>23</sup> JE 7 at 1-16.

<sup>24</sup> JE 7 at 13.

<sup>25</sup> JE 29 at 15-16.

<sup>26</sup> JE 1; JE 4 at 2; JE 19 at 1-26; Tr. at 105, 177-78.

<sup>27</sup> JE 1; JE 22; Tr. at 185.

- placement recommendation for violating the Student Code of Conduct for \*\*\*. A hearing was scheduled for April \*\*\*, 2021.<sup>28</sup>
29. Student returned to school on April \*\*\*, 2021, following \*\*\*. Decisions about a student's return to the \*\*\* classroom for re-orientation are typically made by the \*\*\* Program team, but campus administration determined Student would go through \*\*\* Program re-orientation. District protocol allows for \*\*\* Program re-orientation after a student is \*\*\*.<sup>29</sup>
  30. Student was in \*\*\* Program re-orientation from approximately April \*\*\*, 2021, until Student went to the DAEP on May \*\*\*, 2021. During that time, Student did not go to Student's general education classes or go to lunch, but continued to receive academic instruction via Zoom with the assistance of \*\*\* Program staff.<sup>30</sup>
  31. On April \*\*\*, 2021, Student received out-of-school suspension for allegedly "\*\*\*\*".<sup>31</sup>
  32. Students whose proposed disciplinary placement is pending during the appeals process are generally placed in in-school suspension. The District determined in-school suspension was not an appropriate placement for Student, so Student remained in the \*\*\* Program pending a decision on the proposed change of placement to the DAEP.<sup>32</sup>
  33. The teacher who Student \*\*\* advised the Principal she did not want Student to return to her class and requested a placement review committee meeting to consider this request. The District did not move forward with the placement review because the Assistant Principal decided to place Student in a different \*\*\* class. Student's placement in \*\*\* Program re-orientation was not related to the teacher's request.<sup>33</sup>
  34. On May \*\*\*, 2021, the Principal provided a Notice of DAEP Placement for 30 days for Student beginning the next day for \*\*\*. On May \*\*\*, 2021, the Executive Director of Campus Safety and Support upheld the recommendation of a 30-day DAEP placement. Student was eligible to return to Student's home campus on May \*\*\*, 2021.<sup>34</sup>
  35. After the District and parent completed the appeals process, the District convened a change of placement ARD Committee meeting on May \*\*\*, 2021.<sup>35</sup>

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<sup>28</sup> JE 24.

<sup>29</sup> JE 1; JE 14 at 46; Tr. at 62, 66, 117, 178-79.

<sup>30</sup> JE 1; Tr. at 63-64, 72-73.

<sup>31</sup> JE 11 at 1.

<sup>32</sup> JE 4 at 3; Tr. at 118.

<sup>33</sup> Tr. at 186-88.

<sup>34</sup> JE 25; JE 26.

<sup>35</sup> JE 1; JE 4; Tr. at 126.



36. The District did not make a determination to change Student's placement until the change of placement ARD Committee meeting. With the exception of Student's parent, the ARD Committee agreed with the DAEP placement recommendation.<sup>36</sup>
37. The May \*\*\*, 2021 ARD Committee revised Student's Schedule of Services to be implemented in the DAEP to include direct and indirect in class support for \*\*\*. Student would continue to receive counseling as specified in Student's IEP. The ARD Committee also proposed conducting an updated Functional Behavior Assessment and updating Student's BIP.<sup>37</sup>
38. Student was in the DAEP from May \*\*\*, 2021 to May \*\*\*, 2021. The 30-day DAEP placement was shorter relative to placement of other students for similar conduct. Student's DAEP schedule called for instruction in academic classes and \*\*\* and Student continued to have a dedicated period for \*\*\* instruction by \*\*\* Program staff.<sup>38</sup>
39. An IEP Amendment on July \*\*\*, 2021, modified Student's IEP to include Extended School Year (ESY) services. As a result of the resolution session held on June 16, 2021, the District provided Student compensatory services in the form of ESY services for \*\*\* days in July. These services entailed \*\*\* instruction for \*\*\* hours a day.<sup>39</sup>

## V. DISCUSSION

Petitioner challenges the District's actions as to Student's educational placement pending completion of the disciplinary removal process, and Student's change of placement to the DAEP for \*\*\*, including whether the District appropriately applied the IDEA's special circumstances provisions.

### A. Burden of Proof

There is no distinction between the burden of proof in an administrative hearing and judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 292 n. 4 (5th Cir. 2009). The burden of proof in a due process hearing is on the party challenging the IEP and placement.

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<sup>36</sup> JE 4 at 3; Tr. at 74-75, 115-16.

<sup>37</sup> JE 4 at 2, 9.

<sup>38</sup> JE 1; JE 12; Tr. at 177.

<sup>39</sup> JE 5 at 1-2; JE 27 at 1-2.

*Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1291 (5th Cir. 1991). Here, the burden of proof is on Petitioner.

## **B. Disciplinary Removals Under the IDEA**

Under the IDEA, school districts have the authority to discipline students with disabilities. However, when exercising this authority, a school district must:

- Follow its Code of Student Conduct;
- Only impose discipline that is consistent with discipline imposed upon students without disabilities;
- When planning to change the student's placement as part of the discipline, determine whether the behavior that violated the Code of Student Conduct was a manifestation of the student's disability; and
- Provide educational services during disciplinary removals that constitute a change in placement. 34 C.F.R. § 300.530.

### **1. Manifestation Determination Reviews**

Before disciplining a student for a violation of the Student Code of Conduct that would result in change of placement, the student's ARD Committee must determine whether the behavior was a manifestation of his or her disability. 34 C.F.R. §300.530(e); Tex. Educ. Code § 37.004(b).

The IDEA requires a school district to convene an MDR ARD Committee meeting within 10 school days of any decision to change the placement of a child with a disability due to a violation of a Student Code of Conduct. 34 C.F.R. § 300.530(e)(1). In determining whether conduct is a manifestation of a student's disability, the school district, the parent, and relevant members of the ARD Committee (as determined by the parent and the school district) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent to determine whether the conduct was caused by, or had a direct and substantial relationship to, the student's disability, or was a direct result of the

school district's failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(1)(i-ii). The composition of the MDR ARD Committee is limited to "relevant members" and may include a subset of the student's ARD Committee. *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F. Supp. 2d 543, 552-553 (E.D. Va. 2008); 34 C.F.R. § 300.530(e)(1).

**a. MDR Related to Assault**

The evidence showed the District complied with the IDEA's requirements as to the MDR to consider Student's disciplinary referral for \*\*\* Student's teacher. Student was appropriately not disciplined for this conduct based on the outcome of the MDR.

In this case, Student allegedly \*\*\* a teacher on April \*\*\*, 2021. The District convened an MDR ARD Committee meeting on April \*\*\*, 2021, within 10 school days as required. The MDR ARD Committee included relevant members of Student's ARD Committee, including Student's parent, the Assistant Principal acting as an administrator, a general education teacher, a special education teacher (Student's \*\*\* Program teacher), a diagnostician, and a Licensed Specialist in School Psychology. Members reviewed all relevant information in Student's file, including teacher observations in the form of witness statements, and considered the parent's concerns before concluding the alleged conduct was a manifestation of student's disability.

If the MDR ARD Committee determines either that the conduct was caused by, or had a direct and substantial relationship to the student's disability, or that the conduct was directly related to a failure to implement the student's IEP, then the behavior is considered a manifestation of the student's disability. 34 C.F.R. § 300.530(e)(2). Absent special circumstances not applicable to the \*\*\* referral, once the behavior is determined to be a manifestation of the student's disability, the school district must return the student from Student's disciplinary placement to his or her prior educational placement. 34 C.F.R. § 300.530(f)(2). Here, the evidence showed Student was not in a disciplinary placement prior to or after the April \*\*\*, 2021 MDR ARD related to this incident. Consistent with the MDR ARD Committee's finding the behavior was a manifestation of Student's disability, Student was not disciplined as a result of the \*\*\*.

**b. MDR Related to \*\*\* at School**

Student was found in \*\*\* at school on April \*\*\*, 2021, and the District convened an MDR ARD Committee on April \*\*\*, 2021. The District therefore held an MDR ARD Committee meeting within 10 school days as required.

In this case, the District convened a second MDR on April \*\*\*, 2021, to consider the allegation Student was \*\*\* on campus. ARD Committee participants once again included relevant members of Student's ARD Committee, including Student's parent, the Assistant Principal acting as an administrator, a general education teacher, a special education teacher (Student's \*\*\* Program teacher), a diagnostician, and a Licensed Specialist in School Psychology. The ARD Committee considered evaluation and diagnostic results, including Student's March 2019 Full and Individual Evaluation; information provided by Student's parent, which included concerns about recent \*\*\*; Student's disciplinary history for the 2020-21 school year; and Student's IEP and placement, including Student's BIP. The ARD Committee also considered witness statements from the Assistant Principal and Principal and a \*\*\*. The ARD Committee concluded the conduct was a manifestation of Student's disability.

Here, after concluding the conduct was a manifestation of Student's disability, the MDR ARD Committee did not also propose a change of placement. Instead, the District held a disciplinary conference on April \*\*\*, 2021, and proposed a disciplinary removal to the DAEP for 30 days under the IDEA's special circumstances provision related to \*\*\* discussed below.

**C. Student's Placement in the \*\*\* Program**

The evidence showed Student's placement in the \*\*\* Program between April \*\*\*, 2021 and May \*\*\*, 2021, was consistent with Student's IEP and was not disciplinary in nature or a disciplinary change of placement that must be determined by Student's ARD Committee.

Student participated in the \*\*\* Program throughout the 2020-21 school year as directed in Student's October 2020 IEP and, apart from several brief periods of re-orientation, received in-class support in academic classes and a dedicated period in the \*\*\* classroom for \*\*\* training. Importantly, Student's Alternate Schedule of Services contemplated Student's time in the general education setting may vary and to include additional \*\*\* Program services depending upon Student's social-emotional and/or behavioral stability.

Student had been out of school and \*\*\*. Student's placement was consistent with District protocol calling for \*\*\* Program re-orientation following an extended absence. In addition, prior to Student's \*\*\*, Student had a significant behavioral event at school \*\*\*. To the extent the District considered these events as indicators re-orientation was appropriate, these considerations do not render the placement disciplinary in nature. Recent events supported Student's need for more intensive behavioral support at school at that time. In addition, while Student was participating in re-orientation, Student continued to experience behavioral challenges, including allegedly \*\*\* resulting in out of school suspension. Finally, Student continued to work with dedicated \*\*\* Program staff and participated in academic classes via Zoom. The hearing officer concludes the District's provision of more intensive behavioral support in the \*\*\* classroom was contemplated by Student's IEP and consistent with Student's recent circumstances.

Excluding the time Student had out-of-school suspension for an unrelated event, Student spent approximately \*\*\* school days in \*\*\* Program re-orientation. Though at the outer edge of the typical timeframe, it was not inconsistent with the District's use of re-orientation with other students. The evidence further showed Student's tenure in re-orientation was based on the District's determination that in-school suspension was not an appropriate placement for Student pending the outcome of the general education appeals process. While the IDEA does not require the District to delay implementing a disciplinary placement recommendation after convening an MDR while the general education appeals process moves forward, the District deferred a final placement decision while the parent availed herself of the entire appeals process. The District appropriately modified Student's \*\*\* Program time in light of Student's increased behavioral needs at the time. The District did not violate the IDEA by providing more intensive services in

the \*\*\* classroom, as was contemplated by Student's October 2020 IEP, pending completion of the disciplinary removal process.

Because Student's continued participation in the \*\*\* Program was not a change of placement from Student's current educational placement for disciplinary purposes, it did not need to be determined by Student's ARD Committee. 34 C.F.R §§ 300.531, 300.536.

**D. Change of Placement ARD Committee Meeting**

When a school district proposes a change of placement to a disciplinary setting, the student's ARD Committee is responsible for determining the student's interim alternative educational setting, including the location and the services the student receives during the placement. 34 C.F.R § 300.531.

In this case, the District completed the removal process after Petitioner exhausted the avenues to appeal the proposed placement by convening an ARD Committee meeting on May \*\*\*, 2021, to consider whether to change Student's placement to the DAEP. After District members of the ARD Committee agreed the placement was appropriate, the May \*\*\*, 2021 ARD Committee modified Student's IEP to ensure continued provision of the services and supports specified in Student's IEP, including continued \*\*\* Program support. The District thus complied with the IDEA in its obligation to effectuate a disciplinary placement and specify the services the student will receive in the placement at the direction of a student's ARD Committee. 34 C.F.R. § 300.531.

While an MDR ARD Committee meeting must be held within a certain amount of time, the IDEA does not specify when the student must begin the disciplinary placement. In this case, although the District applied the disciplinary process guaranteed to students with disabilities in a somewhat disjointed manner by holding the disciplinary conference after the MDR and then affording Petitioner a complete opportunity to appeal the DAEP placement recommendation before convening an ARD Committee meeting to consider the change of placement, the process complied with the IDEA.

**E. Student's DAEP Placement for \*\*\* Under the Special Circumstances Provision**

The evidence showed Student's disciplinary change of placement to the DAEP was consistent with the Student Code of Conduct and the IDEA's special circumstances provision related to \*\*\* at school.

The District's Student Code of Conduct specifically prohibits students from \*\*\* at school. Under the Student Code of Conduct, \*\*\* is considered a Level \*\*\* offense, with potential consequences including DAEP placement.

When a student's MDR ARD Committee determines, as it did in this case, that a student's behavior was a manifestation of his or her disability, the IDEA generally requires school districts to return the student to the placement from which he or she was removed. 34 C.F.R. § 300.530(f)(2). However, under the special circumstances provision, school personnel may remove a student for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability if the student:

- carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function;
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or
- has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function. 34 C.F.R. § 300.530(g)(1)-(3).

\*\*\*.

Here, Student's DAEP placement was based on \*\*\* at school – \*\*\*. Notably, while the evidence did not show Student intended to \*\*\*, \*\*\* is sufficient under both the District's Student Code of Conduct and the IDEA to support a disciplinary consequence. 34 C.F.R. § 300.530(g)(1); *Pittsburgh Sch. Dist.*, 115 LRP 17342 (SEA PA 03/21/15).

In addition, based on the documentary evidence provided and the credible testimony of District personnel who described the \*\*\* met the applicable definition of \*\*\*. As such, school personnel were authorized to remove Student to a disciplinary setting under the special circumstances provision, an exception to the general rule prohibiting disciplinary removal of a student whose conduct is found to be a manifestation of his or her disability. Student's DAEP placement was therefore appropriate under the IDEA.

#### **F. Conclusion Regarding Placement**

In this case, though the conduct was a manifestation of Student's disability, the District was authorized to discipline Student under the IDEA special circumstances provision related to \*\*\*. When it did so, the District followed its Student Code of Conduct, did not impose a discriminatory punishment, and conducted an MDR before imposing the punishment handed down through the disciplinary process. The school District also provided educational services consistent with Student's IEP between the April \*\*\*, 2021 MDR ARD Committee meeting and the time it completed the removal process on May \*\*\*, 2021, when Student's ARD Committee determined the disciplinary placement and revised Student's IEP to ensure continued receipt of the services and supports in Student's IEP while in the DAEP. As such, the hearing officer concludes the weight of the credible evidence showed the disciplinary process followed by the District was consistent with the IDEA.

#### **G. Transmission of Records**

Petitioner challenges the District's failure to transmit Student's records to the appropriate authorities following Student's \*\*\* on April \*\*\*, 2021. The IDEA establishes certain guidelines regarding the transmission of records when a school district reports a student with a disability to law enforcement. An agency reporting a crime committed by a child with a disability must ensure that copies of the student's special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom it reports the crime. 34 C.F.R. §



300.535(b)(1). The school district, however, may release the records only to the extent that the Family Educational Rights and Privacy Act (FERPA) allows the transmission. 34 C.F.R. § 300.535(b)(2).

The United States Department of Education specified that Section 300.535(b) "... must be read consistent with the disclosures permitted under FERPA for the education records of all children. Under FERPA, personally identifiable information (such as the child's status as a special education child) can only be released with parental consent, except in certain very limited circumstances. Therefore, the transmission of a child's special education and disciplinary records under (b)(2) of this section without parental consent is permissible only to the extent that such transmission is permitted under FERPA." Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46728 (August 14, 2006).

First, the District argues it did not have an obligation to transmit student's records because the teacher who \*\*\* acted on her own behalf in reporting the crime to authorities. However, the evidence showed a District police officer prepared an offense report and then reported the offense to the Harris County Juvenile District Attorney's office, going so far as to contact the prosecutor's office regarding Student, at which time the Assistant District Attorney agreed to charge student with \*\*\*. Here, the teacher did not pursue charges by independently filing a complaint with the Juvenile District Attorney's office. Instead, a District police officer reported the crime by facilitating a complaint on behalf of the teacher and \*\*\* Student after the prosecuting attorney agreed to accept charges. On these facts, the District was not relieved of its obligation under the IDEA to transmit Student's records to the appropriate authorities.

The District further argues that, even if it was obligated to transmit student's records, Student's parent did not provide consent to do so. Consistent with FERPA, a school district must obtain prior written consent from a parent to disclose a student's education records unless an exception applies. 34 C.F.R. § 99.30.

The United States Department of Education Office of Special Education Programs has clarified that the IDEA requirement to transmit student records when reporting a crime does not constitute an exception to the FERPA requirement for parental consent prior to disclosure of records. Analysis of Comments and Changes, 64 Fed. Reg. 12406, 12631 (March 12, 1999). Notably, the 2004 reauthorization of the IDEA made no changes to the language of this regulation. *See also Westminster Pub. Schs.*, 118 LRP 50551 (SEA CO 11/14/18).

The District argues that the IDEA requirement to transmit student records when reporting a crime does not constitute an exception to the FERPA requirement to obtain prior written parental consent before disclosing educational records. Petitioner argues an exception to FERPA's consent requirement applies, specifically disclosure to state and local officials to whom the information is specifically allowed to be reported pursuant to state statute, "If reporting or disclosure allowed by state statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under 34 C.F.R. § 99.31(a)(5)(i)(B)." 34 C.F.R. § 99.38(a).

Texas has adopted a statute governing interagency sharing of information contained in a student's educational record with a juvenile service provider. Tex. Educ. Code § 37.084. However, the required information sharing under this provision specifically applies to requests made by the juvenile service provider to a school district. Tex. Fam. Code § 58.0051(b). This case does not involve such a request. Moreover, the statute does not require or authorize release of student-level information except in conformity with FERPA. Tex. Educ. Code § 37.084(c).

Having concluded the juvenile justice system exception to FERPA does not apply, and because the transmission of records under 34 C.F.R. § 300.535(b)(1) is not an exception to FERPA, the District may only disclose the records in a manner permitted by FERPA. 34 C.F.R. § 300.535(b)(2). Parental consent is required prior to disclosure. 34 C.F.R. § 99.30.

Student's parent attempted to facilitate the transfer of records through inquiries to District personnel and ultimately in a due process hearing. However, the IDEA does not place the burden

on a parent to ensure records potentially relevant to a criminal proceedings involving the student are provided – it is the District’s obligation to do so. While it may release the records only to the extent FERPA allows and parental consent is required, the District made no apparent effort to obtain parental consent. Because the District *must ensure* a student’s records are transmitted for consideration to the appropriate authorities, it needed to take appropriate steps to do so, including seeking parental consent. 34 C.F.R. § 300.535(b)(1) (emphasis added); *Menominee Area Pub. Schs.*, 114 LRP 34039 (SEA MI 06/18/14).

Here, the District did not comply with the statutory requirements relating to transmission of records. Liability for a procedural violation generally only arises if the procedural deficiency: (i) impeded the student’s right to a free, appropriate public education (FAPE); (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (iii) or caused a deprivation of educational benefits. *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F. 3d 804, 812 (5th Cir. 2003). None of these circumstances occurred here. However, the IDEA does not preclude a hearing officer from ordering a school district to comply with statutory procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(iii); *See Dawn G. v. Mabank Indep. Sch. Dist.*, 2014 WL 1356084, at \*5-6, \*8 (N.D. Tex. Apr. 7, 2014) (a hearing officer may find procedural defects yet not find a denial of FAPE).

## VI. CONCLUSIONS OF LAW

1. The District complied with the IDEA’s procedural disciplinary requirements by convening two separate MDRs – one related to \*\*\* and another related to \*\*\* on campus – to consider whether Student’s conduct in either instance was a manifestation of Student’s disability. 34 C.F.R. § 300.530(e).
2. Student’s continued placement in the \*\*\* Program from April \*\*\*, 2021 to May \*\*\*, 2021 was consistent with Student’s IEP and was not a disciplinary change of placement under the IDEA. 34. C.F.R. § 300.536.
3. The \*\*\* met the definition of \*\*\* under the IDEA. 34 C.F.R. § 300.530(i)(4) (incorporating 18 U.S.C. § 930(g)(2) by reference).

4. The District appropriately applied the IDEA's special circumstances provision related to \*\*\* in disciplining Student. 34 C.F.R. § 300.530(g)(1).
5. The District failed to comply with the IDEA when it did not transmit Student's special education and disciplinary records for consideration by appropriate authorities to whom the District reported a crime. 34 C.F.R. § 300.535(b)(1).

### ORDERS


Based upon the foregoing findings of fact and conclusions of law, Petitioner's request for relief is **GRANTED IN PART** and **DENIED IN PART**.

The District is **ORDERED** to seek parental consent under FERPA to release Student's special education and disciplinary records within five business days of receipt of the hearing officer's decision.

The District is further **ORDERED** to transmit Student's special education and disciplinary records to the Juvenile Division of the Harris County District Attorney's Office within five business days of receipt of parental consent. The District is further **ORDERED** to provide Student's parent with a copy of the records provided on the day the records are transmitted.

All other relief not specifically stated herein is **DENIED**.

**SIGNED September 3, 2020.**

  
\_\_\_\_\_  
**Kathryn Lewis**  
**Special Education Hearing Officer**  
**For the State of Texas**

## VII. NOTICE TO PARTIES

The Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decisions 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. 20. U.S.C. § 1415(i)(2); 34 C.F.R. 300.516(a); 19 TEX. ADMIN. CODE § 89.1185(n).