

DOCKET NO. 009-SE-0917

STUDENT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
RIESEL INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

EXPEDITED DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, Student (“Petitioner” or “Student”) brings this action against the Riesel Independent School District (“Respondent,” or “District”) under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 *et. seq.* (IDEA) and its implementing state and federal regulations.

After review of the evidence and the closing arguments of the Parties, the Hearing Officer determined that Petitioner did not meet Student’s burden of proof on the single contested hearing issue and denied the requested relief.

A. Legal Representatives

Student was represented by Student’s legal counsel Elizabeth Angelone and Idris Motiwala of Cuddy and Associates. The District was represented throughout this litigation by its legal counsel Gigi Driscoll and D. Craig Wood of Walsh, Gallegos, Trevino, Russo and Kyle.

B. Resolution Session and Mediation

On October 4, 2017, the Parties filed a written agreement to bypass the resolution session pursuant to 34 C.F.R. § 300.532(c)(3).

C. Continuances

There were no continuances or extensions of the decision due date.

D. Preliminary Motions

On October 9, 2017, the District's motion to dismiss non-IDEA claims for a lack of subject matter jurisdiction and to preclude the admission and/or consideration of previously litigated IDEA claims was granted for good cause.

II. DUE PROCESS HEARING

The due process hearing was conducted on October 17-18, 2017. Petitioner continued to be represented by Student's legal counsel Ms. Angelone and Mr. Motiwala. The District was represented throughout this litigation by its legal counsel Ms. Driscoll and Mr. Wood. In addition, Principal ***, ***, attended the closed hearing as a party representative. The hearing was recorded and transcribed by a certified court reporter.

There were no adjustments to the post-hearing schedule.

III. PRIOR DUE PROCESS HEARING

On May 1-2, 2017, the Parties were involved in another IDEA due process hearing. That case was assigned TEA Docket No. 092-SE-1216. The issues in that hearing involved the provision of a free, appropriate public education (FAPE), evaluations, notice, and least restrictive environment (LRE). The Hearing Officer issued

the final decision in 092-SE-1216 on July 6, 2017, found for the District on all issues, and denied Petitioner's requested relief. The Hearing Officer's decision is currently on appeal in the U.S. District Court, Western District of Texas.

IV. FACTUAL BACKGROUND

*** ***. This due process hearing involves an expedited appeal of a temporary disciplinary placement of *** school days at ***, Disciplinary Alternative Educational Placement (DAEP). 34 C.F.R. § 300.532(c). The DAEP placement resulted from Student's alleged ***, ***.’

Student has ***; *** Admissions, Review, and Dismissal Committee (ARDC) meeting is pending.

V. ISSUES

A. Petitioner's Issues

Petitioner submitted the following narrow issue:

Was Student's Manifestation Determination Review procedurally and substantively compliant with the requirements of 34 C.F.R. § 300.530?¹

B. Respondent's Legal Position and Additional Issues

The District's response, filed September 28, 2017, denies that Student's Manifestation Determination Review procedurally and substantively failed to comply with the requirements of 34 C.F.R. § 300.530.

¹ Order No. 2 at 2.

VI. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner requests the following items of requested relief:

- (1) An order that Student be returned to Student's general education placement;
- (2) An order directing the District to provide one day of compensatory education for each school day (7.5 hours = 1 school day) the District excluded Student after the ***-day removal period ending August ***, 2017, until Student is *** or until the conclusion of this due process hearing;
- (3) An order requiring the District to provide compensatory education by direct funding to a credible tutoring organization such as *** or by a certified teacher of Student's choosing;
- (4) An order directing the District to reimburse Parents for transportation costs to and from the DAEP; and,
- (5) Any other appropriate relief.

B. Respondent's Requested Relief

Respondent requests a denial of all of Petitioner's claims and requested relief.

VII. STIPULATED FINDINGS OF FACT

1. Student is enrolled in Riesel Independent School District (ISD) as a *** grade student.
2. Student has been identified as a student eligible for special education services as a

student with specific learning disability (SLD) for ***, ***, and ***, ***.²

3. In TEA Docket No. 092-SE-1216, the Parties participated in a due process hearing on May 1-2, 2017. In that case, the Hearing Officer issued the final decision on July 6, 2017, finding for the District on all contested issues.
4. The ARDC convened for Student on May ***, 2017, to conduct the annual review of Student's individual education program (IEP).
5. Principal *** determined Student had violated the Student Code of Conduct on ***.
6. The ARDC convened on August ***, 2017, to conduct a manifestation determination review (MDR) for Student. The ARDC reconvened on September ***, 2017.
7. On September ***, 2017, Student ***. The request *** is pending the approval of *** ARDC.

VIII. FINDINGS OF FACT

1. The decision from the May 2017 due process hearing (TEA Docket No. 092-SE-1216) considered the scope and the appropriateness of Student's prior Full Individual Evaluations (FIE's) and IDEA eligibility determinations. The Hearing Officer determined that the prior evaluations were appropriate, correctly identified Student's disability/eligibility, and ruled out other contested areas of eligibility.³
2. Principal *** and ***, *** teacher, found Student to be outgoing, social, interacts well with peers, and is a hard worker if interested. ***.⁴ *** has worked closely with Student ***. *** has had the opportunity, ***, to observe Student in academic and non-academic settings.⁵
3. Student's disciplinary history was reviewed by the prior Hearing Officer who found the 2016 FIE "did not indicate any significant emotional or behavioral problems warranting a psychological evaluation. Student did not present with any behaviors during testing which would be indicative of an emotional or behavioral disorder, nor did Student present any significant emotional or behavioral factors that adversely affected Student's learning process, nor did the information from

² J. Ex. 1 at 1, 3; J. Ex. 4 at 13.

³ R. Ex. 2, Findings of Fact (FOF) 14, 16-29, 40-61, Conclusions of Law (COL) 6, 9.

⁴ Tr. at 282-83.

⁵ Tr. at 283, 286, 292-93.

- classroom observations suggest the need for additional emotional and/or behavioral assessments.”⁶
4. Student’s disciplinary history for *** and *** grades was admitted into evidence during the present hearing. Student’s disciplinary record, while not unblemished, primarily consists of minor infractions ***.⁷ Aside from the *** incident, Student’s disciplinary record notes *** incidents of tardiness, and a *** incident between *** and Student involving Student ***.⁸
 5. During the *** incident in ***’s class, Student became visibly angry when Student was ***. ***’s classroom rule is *** when students violate that rule. For a few seconds, *** thought Student might have to restrain Student but a restraint was never necessary. Student refused to *** and received an office referral. As Student was ***. Student did not ***. *** described this as ***.” Student had calmed and composed ***self during the short time period it took for Student to walk from the classroom to the office. Student received a one-day in-school suspension for this conduct.⁹
 6. Principal *** conducted an investigation of Student’s alleged ***. The investigation consisted of reviewing ***, reviewing witness statements, interviewing witnesses, and soliciting Student’s version of events from Student’s Mother. The information provided by Mother was deemed Student’s “evidence of the account.” Principal *** determined that Student violated ***.
 7. On August ***, 2017, Principal *** issued a ***-day (school day) DAEP placement order. The duration of the DAEP placement was based upon: the seriousness of the offense; Student’s age and grade level; frequency of misconduct; attitude; and statutory requirements.¹⁰ Student’s DAEP placement was scheduled to end on ***, 2017.¹¹
 8. An MDR was convened on August ***, 2017. The MDR was attended by Mother, Principal ***, Ms. *** (Counselor), Mr. *** (Gen. Ed. Teacher); Ms. *** (Spec. Ed. Teacher), *** (***), and *** (Educational Diagnostician).¹²
 9. The MDR convened within ten school days from Principal ***’s decision to impose a ***-day disciplinary change of placement.¹³

⁶ R. Ex. 2 at 8, FOF 21.

⁷ Tr. at 290-91.

⁸ R. Ex. 3.

⁹ J. Ex. 3 at 1; Tr. at 286-88.

¹⁰ J. Ex. 4 at 6-7.

¹¹ J. Ex. 4 at 7; *see also* R. Ex. 25.

¹² J. Ex. 4 at 13.

¹³ *See* R. Ex. 25.

10. The MDR reviewed Student's current evaluations that included a 2016 FIE, additional assessment data obtained on March ***, 2017, a functional behavioral assessment (FBA) from March ***, 2017, and an IEE completed on April ***, 2017. The MDR determined that Student's assessments were current and Student continued to qualify for special education services as a student with a SLD.
11. Student's March 2017 FIE contained information derived from teacher observations that included sociological, emotional/behavioral, and adaptive behaviors.¹⁴ The MDR reviewed and considered this information.¹⁵
12. The MDR reviewed teacher comments obtained as part of the March ***, 2017 FBA. Those teacher comments were positive: "great student, very personable, doing well, good natured, always willing to participate in class activities, asks questions when Student doesn't understand something, easily motivated, and can meet set goals."¹⁶
13. Mr. *** stated during the MDR, as a teacher observation, that Student is motivated and has caused no problems in Student's class.¹⁷
14. The MDR conducted a review of existing evaluations and data (REED).¹⁸
15. The MDR considered Student's IEP, discussed whether there was a need to revise, and determined Student's current IEP goals and objectives were appropriate for implementation in various settings.¹⁹
16. During the MDR, Mother raised concerns that Student needed to be assessed for eligibility as a student with an Other Health Impairment (OHI) for ADHD, *** (***), a psychological evaluation, and another FBA. Mother believes Student suffers from ***, and has *** ***. Mother contends Student's alleged *** is a manifestation of those unidentified disabilities.²⁰
17. After considering Mother's concerns, the MDR ordered additional assessments for OHI, ***, a psychological evaluation, and another FBA. The assessments were ordered to be completed within 30 school days.²¹

¹⁴ J. Ex. 1 at 3-4.

¹⁵ Tr. at 83 ("We looked at the whole evaluation.").

¹⁶ J. Ex. 4 at 13.

¹⁷ J. Ex. 4 at 13.

¹⁸ J. Ex. 4 at 13.

¹⁹ J. Ex. 4 at 8-9; Tr. at 169-71.

²⁰ J. Ex. 4 at 13; Tr. at 80.

²¹ J. Ex. 4 at 13; Tr. at 164.

18. Principal *** was the District's representative at the MDR and Student instructed the MDR that to determine whether Student's conduct had a direct and substantial relationship to Student's SLD, or was a direct result of a failure to implement the IEP, Student's behavior over time and in various settings would indicate whether the behavior was a manifestation of the disability. In other words, if the *** behavior was a manifestation of the disability, it would not be an isolated incident but would reoccur, and reoccur in various settings.²²
19. On August ***, 2017, the MDR determined that Student's alleged ***, was not caused by, nor did it have a direct relationship to, Student's SLD.
20. On August ***, 2017, the MDR determined that Student's alleged ***, was not caused by, nor did it have a direct relationship to, a failure to implement Student's IEP.
21. The August ***, 2017 MDR recessed in non-consensus. The District members of the MDR voted Student's conduct was not a manifestation of Student's SLD and Mother voted the conduct was a manifestation.²³
22. The MDR reconvened on September ***, 2017. The District members of the MDR reaffirmed their decision that Student's conduct was not a manifestation of Student's SLD.²⁴
23. The MDR considered and determined that Student's IEP could be implemented, and necessary educational services could be provided, during the DAEP placement allowing Student to continue progressing toward meeting Student's IEP goals.²⁵
24. Student attended the reconvened MDR on September ***, 2017, and was accompanied by Mother. Petitioner reasserted their disagreement with the manifestation determination and requested ***.²⁶
25. On September ***, 2017, Student *** for additional eligibility evaluations.²⁷
26. Despite requesting the additional assessments that were approved by the MDR/ARDC, Student never showed up for or participated in the additional

²² Tr. at 171-72.

²³ J. Ex. 4 at 17-18; Tr. at 289-90.

²⁴ J. Ex. 4 at 14.

²⁵ J. Ex. 4 at 8-9; Tr. at 65.

²⁶ J. Ex. 4 at 17-20.

²⁷ J. Ex. 4 at 19; J. Ex. 5.

evaluations.²⁸

27. Petitioner requested permission to *** to and from the DAEP. That request was denied based upon DAEP policy applicable to all students – special education and non-special education alike.²⁹
28. On September ***, 2017, the MDR/ARDC approved Student’s request ***. The MDR/ARDC noted that at the start of the current 2017-2018 school year, Student only needed to complete ***.³⁰
29. Student only attended the DAEP for *** school days.³¹ In those *** days Student ***.³²
30. Student’s IEP contains a ***.³³
31. Student was provided timely written notices and copies of the Procedural Safeguards.³⁴

IX. DISCUSSION

A parent of a child with a disability may appeal a disciplinary placement and/or manifestation determination decision under IDEA through the due process hearing procedure. 34 C.F.R. § 300.532. The procedural protections afforded by the disciplinary appeal provisions of the IDEA may extend to a student who has not yet been determined to be eligible for special education and who has engaged in a violation of a code of student conduct only if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. § 300.534(a).

The District is deemed to have knowledge that the student is a student with a

²⁸ R. Ex. 29 at 1.

²⁹ R. Exs. 7-8; Tr. at 303.

³⁰ J. Ex. 4 at 19.

³¹ Tr. at 308.

³² R. Exs. 14-17.

³³ R. Ex. 2 at 10, 11 (FoF 32-34).

³⁴ J. Ex. 4 at 16-17, 19-20, 22, 27.

disability if:

- The parent expressed concern in writing to supervisory or administrative personnel or to a teacher that the student is in need of special education;
- The parent requested an evaluation for special education; or,
- A teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the school district's director of special education or other supervisory personnel. 34 C.F.R. § 300.534(b)(1)-(3).

However, a school district is *not* deemed to have the requisite knowledge if the parent has not allowed a special education evaluation or has refused special education services. 34 C.F.R. § 300.534(c). In that case, the student may be subject to the same disciplinary measures as applied to children without disabilities who engage in comparable behaviors. 34 C.F.R. § 300.534(d)(1).

Student's eligibility is still a concern for Petitioner but that issue was resolved at the prior hearing. The single issue for this case was whether Student's MDR was procedurally and substantively compliant with the requirements of 34 C.F.R. § 300.530. The preponderance of the evidence showed the MDR was convened and conducted appropriately; Student's temporary DAEP placement satisfied the IDEA's procedural and substantive requirements.

Pursuant to 34 C.F.R. § 300.530(c), when there is a proposed temporary disciplinary change of placement resulting from a violation of the student code of conduct, and the change of placement will exceed ten days, the District is required to make a determination as to whether the code of conduct violation was a manifestation of the student's disability. If the conduct was not a manifestation of a disability, then the student may be subject to the same discipline as a nondisabled student. 34 C.F.R. § 300.530(c).

Additionally, prior to implementing a DAEP placement exceeding ten days, the District is required to determine whether the student can continue to receive educational

services to enable the student to continue to participate in general education in the temporary setting. 34 C.F.R. § 300.530(d)(1)(i), (d)(5). The District is also required to conduct an FBA as part of the DAEP placement process. 34 C.F.R. § 300.530(d)(1)(ii). Both of these important procedural requirements were met.³⁵

When a student is subject to a temporary disciplinary placement, a school district is required to provide that student the same services it provides to non-disabled students who are similarly removed. The DAEP has a policy, based on a safety rationale, prohibiting *** the DAEP.³⁶ Student objected to this policy based on the needless hardship caused by the policy. While the policy's rationale may seem out dated and too broad, it is not for the Hearing Officer to replace Student's policy judgements with those of the professional educators who are owed deference. *Endrew F. ex rel. Joseph F. v. Dougals Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 992-93 (2017) (cautioning courts to avoid the temptation to substitute their own notions of sound educational policy for those of the school authorities which they review and emphasizing deference is based on the application of expertise and the exercise of judgment by school authorities.). DAEP students, regardless of their special education status or lack of such status, *** and the policy complies with the rule.

The District was obligated to convene the MDR within ten school days from the date Principal *** made the preliminary determination that Student violated the student code of conduct necessitating the temporary DAEP placement. 34 C.F.R. § 300.530(e). Student's MDR timely convened on August ***, 2017 – *** school days after the preliminary DAEP placement decision.³⁷

During the MDR, the members were required to review all relevant information in Student's educational file, including the IEP, teacher observations, and any relevant information provided by the parents. Again, this vital procedural requirement was satisfied.

³⁵ J. Ex. 4 at 8-9, 14.

³⁶ Tr. at 302-06.

³⁷ J. Ex. 4 at 1; R. Ex. 25.

The MDR considered Student's educational record including issues of potential additional eligibility that had been previously litigated. After listening to and considering Mother's concerns, the MDR/ARDC directed additional assessments for OHI, ***, a psychological evaluation, and another FBA. The IEP was reviewed and it was determined Student could continue progressing in Student's general education curriculum and receive the necessary special education services while temporarily attending the DAEP. Teacher observations were received and considered from *** (***), Mr. ***, and the teacher comments and observations contained in the FIEs. 34 C.F.R. § 300.530(e)(1).

After considering the information noted above, the MDR was required to reach two findings: (1) was Student's conduct caused by, or have a direct and substantial relationship to, Student's disability; or (2) was the conduct in question the direct result of the District failing to implement the IEP? All of the District members of the MDR voted negatively on both questions (*i.e.* the MDR found the conduct was not related to Student's SLD and implementation of the IEP was not a factor), but Mother voted affirmatively that the conduct was a manifestation of Student's unidentified disabilities.³⁸

The District satisfied all of the procedural and substantive requirements associated with a temporary disciplinary placement that exceeded ten days. The evidence showed that Student is sociable, well-liked by both Student's peers and teachers, has supportive parents, ***, and capable of impressive academic work when Student is motivated as exemplified by Student's ***. The evidence does not support a finding that the MDR was flawed; consequently, Petitioner's requested relief must be denied.

X. CONCLUSIONS OF LAW

1. The District is an local education agency (LEA) responsible for complying with the IDEA as a condition of the State of Texas' receipt of federal funding, and the District is required to provide each disabled child with a FAPE pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*


³⁸ J. Ex. 4 at 16-18.

2. Student, by next friend, Mother, (collectively, Petitioner) bears the burden of proof on all issues raised in Petitioner's complaint. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The District timely convened and conducted Student's MDR in compliance with the relevant procedural and substantive requirements of the IDEA. 20 U.S.C. § 1415(k)(1)(E)-(F); 34 C.F.R. § 300.530(a)-(e).

XI. ORDERS

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **DENIED**.

SIGNED October 30, 2017.



David A. Berger
Special Education Hearing Officer
For the State of Texas

XII. NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause 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); 19 Tex. Admin. Code § 89.1185(n).