

DOCKET NO. 165-SE-0119

STUDENT B/N/F PARENT, Petitioners	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	
	§	HEARING OFFICER FOR
DENTON INDEPENDENT SCHOOL DISTRICT, Respondent	§	
	§	
	§	
	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

A. Overview

Petitioners, Student, b/n/f Parent, (collectively referred to as Petitioners), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1401 et. Seq. and implementing state and federal regulations. The Complaint was received by the Texas Education Agency (TEA or Agency) on the 31st day of January 2019, and Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on the 1st day of February, 2019. The Respondent to the Complaint is the Denton Independent School District (hereinafter District). The Agency assigned the matter to this Hearing Officer on the 1st of February 2019, who then issued the Initial Expedited Scheduling Order on February 1, 2019.

The issue for the decision in this expedited matter is whether the Student's conduct forming the basis for the District's disciplinary placement was a manifestation of the Student's disability or caused by or had a substantial relationship to the Student's disability. Because the District concluded that the Student's conduct was not a

manifestation of Student's disability, it originally imposed a disciplinary placement in the Disciplinary Alternative Education Program (DAEP) of forty-five days.

The hearing officer concludes that the District held a proper Manifestation Determination Review (MDR) and followed all procedures in finding that Student's conduct was not a manifestation of Student's disability, and therefore Student's disciplinary placement was proper.

B. Legal Representation

Student was represented throughout this litigation by Student's parent and next friend, ***. Respondent was represented throughout this litigation by Gigi Driscoll, of Walsh, Gallegos, Trevino, Russo & Kyle.

C. Resolution Session

The parties in this matter met in a Resolution Session on the 7th day of February, 2019, and no agreement was reached.

D. Preliminary Matters

The Initial Expedited Scheduling Order set the 14th of February, 2019 for the Prehearing Conference and Monday, February 25, 2019 as the date for the Due Process Hearing. At the time designated for the Prehearing Conference, the parties convened for a telephonic pre-hearing conference. Present at the pre-hearing conference were Petitioner ***, and Ms. ***, assisting the Petitioner; Ms. Gigi Driscoll, for the Respondent District; as well as the undersigned Hearing Officer. The Conference was recorded and transcribed by a duly certified court reporter, Gay Denton for Ann Berry.

II. DUE PROCESS HEARING

The Due Process Hearing was conducted on the 25th day of February, 2019 at *** in Denton, Texas. Petitioner continued to be represented by parent ***; Mr. *** was present as support and assistance for parent, and an advocate, Bee Black provided advice to Petitioner via telephone during the hearing.

The District was represented by Gigi Driscoll , assisted by Mallory Zea, paralegal. Present as the District Representatives were *** , Director of Special Education and *** , Executive Director of Special Education.

The hearing was recorded and transcribed by a certified court reporter. Both parties timely submitted written closing arguments, and the decision is due on Monday, March 11, 2019.

III. ISSUES

A. Petitioner's Issues

The issues presented were whether Student's conduct was a manifestation of Student's disability or caused by or had a substantial relationship to the Student's disability, and whether placement in the DAEP is a proper placement for the Student.

B. Respondent's Position

The District contends that Student's Admission, Review, and Dismissal (ARD) Committee held a MDR in accordance with the applicable law and correctly determined that Student's conduct was not a manifestation of Student's disability and was not caused by, or had a substantial relationship to the student's disability. The District further asserted that the Student will receive a free appropriate public education (FAPE) in the designated DAEP placement.

IV. FINDINGS OF FACT

Based upon the evidence submitted and the argument of the parties, the Hearing Officer makes the following Findings of Fact:

1. The Student resides with Student's parent in the Denton Independent School District, is currently in the *** grade, attending *** in the Denton Independent School District. Student qualified for special education and related services as a Student with Other Health Impairment (OHI) based upon a diagnosis of Attention Deficit and Hyperactivity Disorder (ADHD). R. 1:20; Tr. 64: 7-15; 118:3; 146:6-7; 186:4-7.
2. Student's 2017 evaluation by the District also showed cognitive abilities in the low average to average ranges. R.1:18; Tr.141:1-4. Student also performed just below or at grade level on assessments of academic achievement. R.1: 19 Tr. 83:11-17.
3. Student's first disciplinary referral to the DAEP was in October of 2017. R. 2:1; Tr.98:8-15. Initially, during this placement Student had difficulties and was eventually suspended. R.2:1; Tr.102: 3-15.
4. Thereafter, when Student returned to the DAEP November ***, 2017, Student proceeded to have "good days" and eventually earned sufficient points to permit return to Student's home campus. R.2:1; Tr.103:2-15. An exit survey completed by the Student at that time demonstrated that Student viewed the teachers, counselors and administrators as good, and that Student considered the placement as helpful with controlling Student's behavior. R. 3:1; Tr. 104:8-18.
5. Due to an incident that occurred on ***, 2018, an MDR was conducted in conjunction with the ARD committee for the Student on ***, 2018. R. 11:30; Tr. 61:15-24. At that time, a determination was made that the conduct in question, ***, was not a manifestation of the disability and that Student should attend DAEP. Tr. 64:16-25. It was also determined that the District had implemented the Student's IEP. R.11:22
6. The evidence showed that the committee, after a review of many factors, including evaluations, determined the *** to not be an impulsive act, as it appeared to be planned in advance and the Student had discussed it with other students. Tr. 55: 18-25; Tr.61:19-24; Tr.63:14-25; Tr.64:1-5. ***. Tr. 53: 3-9. ***. R. 8:1; R15:1; Tr. 50:18.

7. Student's parent did not agree with the disciplinary placement and requested another MDR that was convened on ***, 2018. R12:1; Tr. 67:5-20. At that time, the MDR ARD Committee considered all of the information again, and maintained that the DAEP placement, with supports, was appropriate. Tr.67:14-25. It was also established that the committee determined that additional services be provided to the Student at the DAEP that included one on one paraprofessional, implementation of Student's Behavioral Intervention Plan (BIP), psychological services, and classroom accommodations. Tr.65:1-25.

8. Student attended the assigned DAEP placement for one day, specifically the *** of ***, 2018. At that time, Student ***. Tr. 93:23-25; Tr. 94:2-5. ***. J.1. Student demonstrated no evidence of *** earlier in the morning of ***, 2018. Tr. 94:9-12. Later that day, when the teacher visited with the Student, things appeared to be better, and the Student apologized for Student's conduct and was in a good mood in the afternoon. Tr. 107:2-8; 108:15-20; 109:6-10; 129:7-13.

9. An investigation concluded that there had been no verbal abuse of the Student during attendance that day at the DAEP. Tr. 37:22-25; 38:1-9.

10. At parent's request, Student had been also assessed and evaluated in 2018 for a Special Education eligibility of Emotional Disturbance (ED), and after consideration and a Full and Individual Evaluation (FIE), a determination was made that ED was not apparent or present, and the student was not eligible. R.4:26-27;52; 56; Tr. 164:21-22; 181:9-14. Student, however, remained eligible for Special Education services as a student with OHI due to ADD/ADHD. R.4:52;56.

11. Student's parent also provided the District with several letters from health care providers, including physicians, social workers, and psychologists who had examined Student. The written recommendations and statements included opinions that the DAEP is not a proper placement for the Student. P: 1; Tr. 71: 13-15.

12. Those health care providers who made such statements failed inquire about any of the specific educational, behavioral, and other support services provided to the Student by the District. Tr. 38:22-25; 72:21-25; 73:1-5; 75:7-14.

13. The ARD was reconvened on January ***, 2019 to review the past, as well as additional recommendations. It was determined that the 30-day placement at the DAEP would remain. Tr. 70:13-21; 70:22-25; 71:12-21.

14. Another evaluation, the Independent Education Evaluation (IEE), was conducted by Dr. *** and was provided on the *** day of January 2019. That evaluation demonstrated some potential lower cognitive function, although the report also stated that the scores were likely due to sleepiness and difficulty staying awake, as well as not attending to the instructions. P.3:14; Tr.211:9-12. Further, no evidence of depression or suicidal ideation was evidenced in the report. R. 20:15. Tr.211:13-14.

15. The ARD Committee convened again on February ***, 2019, with a continuation to February ***, 2019, to consider the IEE of Dr. ***, and reconsider the placement in light of such report, as well as again review the previously submitted recommendation letters. R.21; Tr.31:12-25; At that time, a decision was made to modify the placement to one of 30 days with a scheduled review at 20 days. R.21:23; Tr. 216:8-16.

16. Additional recommendations for half-days at the DAEP were also made by the providers, and considered by the committee. R.21:35 Tr.33:8-19; 22-24; 81:5-7. The committee completely reviewed all of the submitted documents and determined that no need for half-days at school had been established, and thus did not recommend such. Tr.81:12-25.

17. Homebound services were also requested by the parent and letters from providers recommending homebound were submitted. P.1; Tr.73:7-18. The District, in review, however determined that Student did not qualify for homebound services, as no medical need was established, and such placement would not be consistent with the provision of education in the Least Restrictive Environment. Tr. 73:20-25; 74:1-3; 198:14-22; 214: 19-23.

18. Evidence demonstrated that the Student did not appear depressed or anxious in the school setting. Tr. 72:20-25; 74:10-12; 82:4-6; 108:24-25; 109:1-2; 125:10-11. Witness testimony also established that there was no evidence of suicide attempts or suicidal ideation present in the school setting. R.20:15; Tr. 88:15-19; 91:9-17; 109:3-10; 128:13-18.

V. DISCUSSION

A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49 (2005). This expedited case seeks to overturn Students MDR finding and disciplinary placement. The burden of proof is on Petitioner. Petitioner contends that the MDR was in error, urging that the conduct was caused by, or had a direct and substantial relationship to the Student's disability. Petitioner also contends that the placement is improper generally.

B. Disciplinary Removals Under IDEA

A change in placement to an alternative educational setting must afford the student certain procedural and substantive rights under the IDEA. In doing so, a school district can only impose discipline consistent with that imposed upon students without disabilities. When changing a student's placement for disciplinary purposes, the district must first determine if the alleged conduct was a manifestation of disability; and if the placement is made, provide educational services in the alternative placement.

C. Manifestation Determination Review

School districts may discipline students with disabilities, including removal to a disciplinary alternative educational setting (DAEP). The change in placement of a student with disability who receives special education services may only be made by an ARD Committee after conducting a manifestation determination review. Tex. Educ. Code § 37.004 (a)(b); 20 U.S.C. § 1415(k). The District was obligated to convene the MDR within ten school days, which it did.

After considering the information, the MDR ARD was required to address two issues: (1) was the 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's failure to implement the Student's IEP. The parent of a child with a disability may appeal a disciplinary placement and / or manifestation determination decision under IDEA through the due process hearing procedures. 34 C.F.R. §300.532.

1. Student's Recommended Disciplinary Placement

The MDR ARD was convened to consider the placement as the Student had allegedly ***, ***. During the MDR, the members of the committee were required to review all relevant information in Student's educational file, including the IEP, teacher observations, and any relevant information provided by parents. In this instance, the evidence demonstrated that a great deal of information was reviewed on several occasions.

All but the parent concluded that the conduct was not caused by or had a direct or substantial relationship to the disability, and all agreed that the District had properly implemented the IEP.

When the District found that Student's alleged conduct was not a manifestation of Student's disability, it could impose disciplinary consequences as it would to students without disabilities. 34 C.F.R. 300.530 (b).

2. Relationship Between Student's Disability and Alleged Conduct

The evidence demonstrated that the District's finding that Student's alleged conduct of *** was not caused by or had a direct and substantial relationship to Student's disability was correct. No evidence was submitted to support a direct or substantial connection between Student's conduct and Student's disability, and the evidence supports the MDR finding of the District.

3. Implementation of Student's IEP

The evidence was also unequivocal that the Student's conduct was not a result of the District's failure to implement Student's IEP.

4. Additional Considerations

Additional meetings and reviews were conducted by the District during its thorough review of all evidence and considerations in making its decisions, and concluding that Student will received FAPE in the DAEP. It is also clear that deference, based upon the expertise and exercise of judgment by school authorities, should be afforded the school District. *Andrew F. ex.rel. Joseph P. v. Douglas Cnty Sch. Dist. RE-1*, 137 S.Ct. 1001; (2017).

VI. CONCLUSIONS OF LAW

1. Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. § 1400, et. seq., 34 C.F.R. §300.301 and related statutes and regulations, and such is to be provided by the Denton Independent School District.
2. Respondent District complied with the requirements of IDEA when it imposed discipline in response to the Student's alleged ***. The District timely convened and conducted Student's MDR to determine if the alleged conduct was caused by or had a direct and substantial relationship to the Student's disability or was the result of the District's failure to implement Student's IEP in compliance with the relevant procedural and substantive requirements of the IDEA. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(a) – (f).
3. Petitioner did not meet Petitioner's burden. Petitioner failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005).

VII. ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that all relief sought by Petitioner, including the appeal of the manifestation determination and disciplinary placement, is DENIED and Petitioner's claims are DISMISSED with Prejudice.

SIGNED: March 11, 2019

Kimberlee Kovach
Special Education Hearing Officer
for the State of Texas

NOTICE TO THE 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 district court of the United States. 20 U.S.C. §§1415(i)(2) and (3)(A); 19 Tex. Admin. Code § 89.1185(n).