

DOCKET NO. 224-SE-0517

STUDENT, B/N/F *** and ***,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	
	§	HEARING OFFICER FOR
SMITHVILLE INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	
	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Student, b/n/f *** and *** (“Petitioner/Counter-Respondent” or “Student”) brought an expedited action against the Smithville Independent School District (“Respondent” or “District”) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482 (IDEA) and its implementing state and federal regulations.

Student filed Student’s Request for an Expedited Due Process Hearing on May 18, 2017, received and docketed by the Texas Education Agency (TEA) as Docket No. 224-SE-0517. The District also filed an expedited action against Student under the IDEA on May 24, 2017, assigned Docket No. 233-SE-0517 by TEA, seeking to place Student in a Juvenile Justice Alternative Education Program (JJAEP) for up to forty-five school days under the IDEA’s “Special Circumstances” provisions.

The main issue in the case filed by the Student is whether the Student’s conduct that formed the basis for the District’s disciplinary decision to change Student’s placement to an interim alternative educational program was a manifestation of Student’s disability, and whether Student’s conduct was a result of the District’s failure to properly implement Student’s Individualized Education Plan (IEP).

The hearing officer concludes Student's conduct was a manifestation of Student's disability, making the District's change in placement improper. The hearing officer also concludes maintaining Student's current placement is substantially likely to result in harm to Student or others and that District may place Student in an appropriate interim alternative educational placement for up to forty-five school days.

A. Legal Representatives

Student has been represented throughout this litigation by Student's legal counsel Idris Motiwala and Devin Fletcher of the Cuddy Law Firm. The District has been represented throughout this litigation by its legal counsel Cynthia Buechler with the law firm of Buechler & Associates.

B. Resolution Session and Mediation

The parties met in a resolution session on May 25, 2017, but it was not successful. The parties also attempted mediation on July 25, 2017, which was also not successful.

C. Consolidation and Reassignment

The disciplinary cases were consolidated on May 26, 2017, because both cases involved the same parties and the same disciplinary issues. On June 12, 2017, Student filed another request for a due process hearing under the IDEA alleging the District failed to provide Student with a Free Appropriate Public Education (FAPE). The new case was assigned Docket No. 251-SE-0617 by TEA. On June 13, 2017, the consolidated disciplinary case was reassigned to Hearing Officer Steve Elliot, who issued Order No. 4 on June 15, 2017, consolidating the disciplinary case with the FAPE case. The procedural schedule for the FAPE case under Docket No. 251-SE-0617 was adopted for the consolidated cases, setting a prehearing conference for June 28, 2017, and scheduling the due process hearing for July 18-20, 2017, with a decision due date of August 27, 2017.

D. Continuances, Extensions of Time, and Bifurcation

On June 19, 2017, the District filed a Motion for Continuance and Extension of the Decision Due Date, stating the District's counsel would be out of the country on the scheduled date of the Prehearing Conference of June 28, 2017. Order No. 5 was issued setting another prehearing conference for June 21, 2017, to discuss the District's motion. At the prehearing, Student requested the FAPE case under Docket No. 251-SE-0617, be bifurcated from the two disciplinary cases.

Order No. 6 was issued on June 26, 2017, bifurcating the FAPE case from the disciplinary cases and revising the procedural schedule for the disciplinary cases. The expedited due process hearing was rescheduled for July 26, 2017, and the decision due date was set for August 21, 2017.

In its post-hearing brief, Petitioner, for the first time, challenges the legal sufficiency of the School District's expulsion proceedings that led to the placement of Student in the JJAEP. This hearing officer does not have jurisdiction to review the expulsion decision of Respondent's School Board. Jurisdiction for Petitioner's claims related to the expulsion hearing are with the state district courts. Tex. Ed. Code Sec. 37.009(f).

II. DUE PROCESS HEARING

The due process hearing was conducted on July 26, 2017. Petitioner continued to be represented by Student's legal counsel Idris Motiwala and Devin Fletcher. In addition, Student's *** and *** attended the due process hearing. Respondent continued to be represented by its legal counsel Cynthia Buechler. In addition, ***, the Director of Special Education for the school district, and Dr. ***, District Superintendent, attended the hearing as the party representatives. Also present for the entire hearing was the hearing officer's legal assistant, Michael Martinez, and for the morning portion of the hearing was Special Education Hearing Officer Annie Lockwood. The hearing was recorded and transcribed by a certified court reporter.

III. ISSUES

A. Petitioner's Issues

Petitioner confirmed the following IDEA issues for decision in this case:

1. Manifestation Determination. Whether Student's conduct, which formed the basis for the school district's disciplinary decision to expel Student from school, was a manifestation of Student's disability; and
2. Implementation. Whether Student's conduct was the direct result of the school district's failure to properly implement Student's IEP.

B. Respondent's Issues

The school district raises the following issue: Whether the District's decision to place Student in a JJAEP should be affirmed by the hearing officer because maintaining Student in Student's school district is substantially likely to result in injury to ***self or others.

IV. REQUESTED RELIEF

A. Petitioner's Requested Relief

Petitioner confirmed the following items of requested relief:

1. Reverse the District's disciplinary decision to place Student in a JJAEP and return Student to the educational placement in effect at the time the disciplinary incident at issue arose, i.e., in a self-contained special education setting staffed by a teacher and a paraprofessional with a 1:1 ratio and a *** shortened school day; and
2. Provide Student with compensatory educational services for the loss of educational services during Student's expulsion in the form of tutoring and/or summer school in core academics.

B. Respondent's Requested Relief

1. Affirm the school district's disciplinary placement of Student in a JJAEP.

V. FINDINGS OF FACT**Student's Disability and Behavior**

1. Student is a ***-year-old *** grade student who resides in the boundaries of the District. At the time of this hearing, Student ***. Prior to Student's ***, and at all times relevant to this hearing, Student attended ***.
2. Student is eligible for special education services as a student with an emotional disturbance.¹ Student is unable to build or maintain satisfactory interpersonal relationships with peers and teachers, displays inappropriate types of behavior and feelings under normal circumstances, and has ***.²
3. ***. Student has been diagnosed with ***.³ ***.⁴ Student also has difficulty ***.⁵
4. Student receives Student's educational services in a self-contained classroom *** with instruction and support delivered by a special education teacher and a paraprofessional aid.⁶ Student requires intensive, specialized instruction for behavior, which cannot be provided in a general education classroom.⁷ As of ***, 2017, Student attended school for ***.
5. While in school, Student engages in *** towards others on a daily basis.⁸ During the 2016-17 school year, Student's behaviors at school included ***.⁹

¹ Joint Exhibit (J.Ex.) 5, p. 1.

² J.Ex. 5, p. 12; J.Ex. 6, p. 7; Transcript (TR) at 212.

³ Petitioner's Exhibit (P.Ex.) 16, p. 1.

⁴ J.Ex. 6, p. 7.

⁵ P.Ex. 16, p. 1.

⁶ J.Ex. 2, p. 1.

⁷ J. Ex. 5, p. 31.

⁸ J.Ex. 1, p. 5.

⁹ J.Ex. 1, p. 2; J.Ex. 6, p. 4; P.Ex. 11, p. 20; TR at 83-84 and 247.

6. Between ***, 2016 and ***, 2017, Student was restrained *** when Student posed a risk of harm to ***self or others at school. The restraints were prompted when Student ***.¹⁰
7. Student's behavior rapidly deteriorated from *** 2017 to *** 2017. At ***, Student was having very few behavioral incidents at school, but by ***, Student was engaging in inappropriate behavior ***.¹¹
8. Student has a behavior intervention plan (BIP) to guide District staff in responding to Student's inappropriate behavior and to assist Student with engaging in more appropriate behavior at school.¹² Student's BIP identifies that Student engages in *** behavior at school, including ***.¹³ As evidenced by Student's *** and escalating behavior, by *** of 2017, Student's BIP ceased to be effective.

ARD Committee Meetings for Student

9. On ***, 2016, Student's ARD committee met to discuss changing Student's placement. Student's placement was changed to place Student full-time in a self-contained special education classroom with specialized behavior support and instruction, and to remove Student from any general education classes.¹⁴
10. On ***, 2017, Student's ARD committee met to consider reducing Student's school day from a full day to a *** day. The instructional time reduction was proposed over concern about Student's behavior escalations and increased ***, as well as questions about Student's ability to tolerate a full school day. This meeting recessed without the committee reaching consensus.¹⁵ On ***, 2017, Student's ARD committee reconvened to consider the *** shortened school day for Student. During this meeting it was noted that Student continues to pose a substantial risk of harm to ***self and others, that Student's level of *** has escalated, that incidents of *** have intensified, and that a *** as the result of Student's behavior. This meeting also ended without consensus. It was agreed the ARD committee would reconvene on ***, 2017.
11. On ***, 2017, Student's ARD committee met to make changes to Student's IEP and program. The committee modified Student's IEP goals, revised Student's BIP, and determined a functional behavioral assessment (FBA) still needed to be completed. In addition, the ARD committee shortened Student's instructional day from a full day to a

¹⁰ P.Ex. 14, p. 1-74.

¹¹ Respondent's Exhibit (R.Ex.) 12, p.9, 27, 42 and 52; TR at 257-260.

¹² J. Ex. 3, p. 11.

¹³ J.Ex. 3, p. 12.

¹⁴ P.Ex. 9, p. 16-17.

¹⁵ J.Ex. 4, p. 2; TR at 222.

- *** day. The ARD committee arrived at a *** shortened day after deliberations that began with the District again proposing a *** shortened day for Student.¹⁶
12. Following this ARD meeting, the District began to gather data for Student's FBA. The District has gathered data and observed Student for the FBA, but has not completed the analysis or written an assessment report.¹⁷
 13. At the ***, 2017 meeting, the committee noted that Student's behaviors had become increasingly ***.¹⁸
 14. On ***, 2017, behavioral specialists from the District and an outside behavioral consultant came to the *** to review behavioral data for Student, to observe Student and to draft a functional behavioral assessment.¹⁹ At this point, the District recognized Student's behavior was out of control, that they needed outside consultative services, and that Student's program needed to be changed.
 15. Student's IEP, BIP, and placement do not meet Student's needs. Student's behavior at school is out of control and Student is receiving little instruction as a result of the near constant behavior interventions.

The Events of ***, 2017

16. While at school on ***, Student was ***.²⁰ ***. ***. ***. ***. ***. ***. ***.²¹
17. As a result of the incident *** on ***, 2017, ***. ***. ***. ***. ***.²²
18. As a result of ***. ***. ***. ***.²³ ***.
19. ***. ***.

¹⁶ J.Ex. 3, p. 2.

¹⁷ J.Ex. 1

¹⁸ J.Ex. 3, p. 8.

¹⁹ J.Ex. 1

²⁰ TR 96-98.

²¹ J.Ex. 2, p. 2; R.Ex. 9, p. 1-16.

²² P.Ex. 18, p. 2; TR at 81 and 101-102.

²³ P.Ex. 18, p. 1.

Discipline of Student after *, 2017 Incident**

20. District policy *** of a Student who *** at school.²⁴ The District recommended that Student *** based on Student's actions on ***, 2017 of ***.²⁵
21. On ***, 2017, the District *** to determine whether ***. ***, the District determined that Student would ***. The District assigned Student to *** to receive Student's educational services until ***.²⁶
22. On ***, 2017, a manifestation determination review was conducted for the ***, 2017 incident. The ARD committee determined that the incident was not directly and substantially caused by the Student's disability, because the District staff believed the Student acted intentionally during the incident. The ARD committee also determined that Student's IEP and BIP were being appropriately implemented at the time of the incident. The ARD committee concluded that the incident was not a manifestation of the Student's disability.²⁷
23. The ***, 2017 incident had a direct and substantial relationship to Student's disability. The behaviors Student displayed during this incident, ***, are consistent with behaviors Student had displayed on a regular and frequent basis during the 2016-17 school year. These behaviors were enumerated in Student's BIP, recorded in data gathered for Student's FBA and a byproduct of Student's emotional disturbance.
24. Student's *** disagreed with the conclusions of the ARD committee at the manifestation determination review. Specifically, *** asserted that Student's IEP and BIP were not being appropriately implemented and that District staff lacked proper training for addressing Student's disability.²⁸
25. At the time of the ***, 2017 incident, the District was implementing Student's IEP. The staff working with Student understood Student's IEP and BIP, received training on implementing behavior strategies for Student, and followed the IEP and BIP while working with Student. District staff monitored the implementation of Student's IEP and BIP on a regular basis and sent Student's *** IEP and BIP implementation data on a weekly basis.²⁹

²⁴ P.Ex. 12, p. 2.

²⁵ R.Ex. 6, p. 1.

²⁶ P.Ex. 11, p. 1.

²⁷ J.Ex. 2, p. 2 and p. 7; TR at 104.

²⁸ J.Ex. 2, p. 2.

²⁹ TR at 105-106 and 233.

26. At the ***, 2017 meeting, the ARD committee also concluded that Student's IEP could be implemented at ***, aka District's JJAEP and that placement at the JJAEP was appropriate for Student.³⁰
27. The JJAEP has trained special education personnel to serve Student. The JJAEP is a safe and structured environment.³¹ Student's IEP can be implemented at the JJAEP.
28. At the manifestation determination review meeting, the ARD committee also concluded that, in Student's current placement at ***, Student posed a substantial risk of harm to ***self and others.³²
29. Maintaining Student in Student's current placement poses a substantial risk of harm to ***self or others.³³ While at school, Student was engaging in *** behavior on a daily basis and was continuing to ***, making Student's current placement unsafe.

VI. DISCUSSION

A. Disciplinary Removals

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

- Follow its Student Code of 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 CFR §300.530.*

³⁰ J.Ex. 2, p. 2.

³¹ TR at 148 and 237.

³² J.Ex. 2, p. 2.

³³ TR at 107.

In this case, the District had the authority to impose discipline on Student. When it did so, the District followed its Student Code of Conduct, did not impose a discriminatory punishment, conducted a manifestation determination review before imposing the punishment handed down through the disciplinary process, and offered Student services ***. As such, the disciplinary process followed by the District in this case was consistent with the IDEA.

As discipline for a violation of the Student Code of Conduct, a school district may remove a student with a disability from Student's current educational placement for more than ten days for behavior that is not a manifestation of the student's disability. *34 CFR §300.530(c)*. In this case, when the District determined that Student's conduct on ***, 2017 was not a manifestation of Student's disability, it had the authority to ***. However, as detailed below, the District's manifestation determination is not supported by the evidence, and, thus, it must set aside the expulsion.

B. Manifestation Determination ARD

The IDEA requires an ARD must convene 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. The ARD must review all relevant information in the student's file, including the child's IEP, teacher observations, and any relevant information provided by the parent. The ARD must then determine whether the conduct at issue was caused by or had a direct and substantial relationship to the child's disability. The ARD must also determine if the conduct at issue was a direct result of the school district's failure to implement the child's IEP. *34 C.F.R. § 300.530 (e)(1); Tex. Educ. Code § 37.004(b)*. A student who disagrees with an ARD committee's manifestation determination may file a due process hearing request to challenge this determination. *34 C.F.R. § 300.532(a)*.

1. District's Decision To Change Student's Placement

On ***, 2017, the District held a disciplinary hearing and determined that Student violated the District's Student Code of Conduct when Student ***. For this violation, the District ***. Within two days of this determination to change student's placement, the District convened a

manifestation determination ARD. The District complied with the IDEA's procedural MDR requirements when it convened the MDR ARD two days after ***.

2. Relationship Between Student's Disability and *, 2017 Conduct**

The District erred when it determined Student's conduct on ***, 2017, was not caused by or did not have a direct and substantial relationship to Student's disability. On multiple occasions during the 2016-17 school year, Student engaged in the very same behavior that was the subject of the MDR. ***. As the result of Student's disability, ***, just as Student did on ***, 2017. In fact, Student's behavior had deteriorated so significantly and the District's interventions had become so ineffective that Student was engaging in these types of behaviors *** 2017. District identified and targeted these very same behaviors in Student's BIP and charted them in data gathering for a FBA. The evidence demonstrated that Student's conduct on ***, 2017 had a direct and substantial relationship to Student's disability.

3. Implementation of Student's IEP

District staff made a concerted effort to implement student's IEP. District behavior specialists trained Student's teacher and paraprofessional on implementing the IEP and BIP and supported their implementation. In addition, District staff tracked and reviewed Student's behavioral data and shared the same with Student's ***. Thus, the MDR ARD correctly concluded the ***, 2017 incident was not a direct result of the District's failure to implement the IEP.

4. Manifestation Determination Conclusion

If the 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)*. 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 Student's prior educational placement. *34 C.F.R. § 300.530 (f)(2)*.

Since Student's conduct on ***, 2017, has a direct and substantial relationship to Student's disability, the conduct is considered a manifestation of Student's disability. As such, the District ***,

5. Student's Functional Behavior Assessment

If a student's conduct is determined to be a manifestation of Student's disability, the school district must conduct a FBA and implement a BIP for the student, or, if a FBA had been conducted prior to the conduct that led to the discipline, modify the BIP to address the behavior that led to the discipline. *34 C.F.R. § 300.530 (f)(1)*.

Student's behavior at school has significantly and dramatically deteriorated. The District must complete the FBA it had in progress since *** 2017 to develop a better understanding of the nature of Student's behavior. It follows that the District then must also modify Student's BIP to attempt to reduce the inappropriate behavior.

C. Removals Under Special Circumstances

Under the special circumstances detailed in the IDEA, a school district may remove a student to a disciplinary placement for up to forty-five school days, regardless of whether the student's behavior was a manifestation of Student's disability. These special circumstances are when:

- The student carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function;
- A student 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
- A student 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).

The District contends that Student ***:

- ***;
- ***;
- ***; or
- ***;

***.

***. ***. These facts do not ***.

D. Request To Remove Because Maintaining Placement Is Substantially Likely To Result In Injury To The Student Or Others

A school district may file a due process hearing request to request an order from the hearing officer to remove a student to an alternative disciplinary placement for up to forty-five school days. To prevail on this request, the district must show that maintaining the student's current educational placement is substantially likely to result in injury to the student or others. *34 C.F.R. § 300.532.*

Student's behavior and placement have deteriorated to the point that Student is engaging in *** behavior ***. On Student's *** in this placement, Student ***. In addition, Student's behavior in *** of 2017 resulted in ***. The evidence establishes that maintaining Student's placement at the *** is substantially likely to result in harm to Student and others. Thus, the District may place Student in a disciplinary placement for up to forty-five school days. *34 C.F.R. § 300.532.*

VII. CONCLUSIONS OF LAW

1. Respondent complied with the IDEA's procedural disciplinary requirements when it *** for violating the District Student Code of Conduct and then conducted a manifestation determination review to ascertain whether the conduct that resulted in a disciplinary change of placement was related to Student's disability. *34 CFR §300.530.*
2. Student's conduct on ***, 2017 had a direct and substantial relationship to Student's

disability. Petitioner proved the conduct was a manifestation of Student's disability. *34 C.F.R. § 300.530 (e) (1); Tex. Educ. Code § 37.004(b)*.

3. Student did not ***, 2017. The District failed to meet its burden of proof to show that Student should be removed under the special circumstance ***. *34 C.F.R. § 300.530 (g)*.
4. Student is substantially likely to cause harm to ***self or others if Student remains in Student's current placement at the ***. The District met its burden of proof to show that Student should be removed to an appropriate interim educational placement for up to forty-five school days as Student is substantially likely to cause harm to ***self or others. *34 C.F.R. § 300.532(a)*.

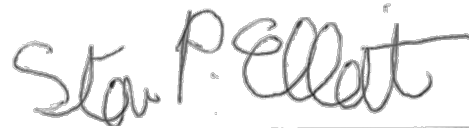
ORDER

Based upon the foregoing findings of fact and conclusions of law Petitioner's requests for relief are **GRANTED IN PART AND DENIED IN PART** and it is further ORDERED Respondent's requests for relief are **GRANTED IN PART AND DENIED IN PART** as follows:

1. Respondent document in Student's education record that Student's conduct on ***, 2017 had a direct and substantial relationship to Student's disability and was a manifestation of Student's disability;
2. Respondent set aside ***;
3. Within thirty calendar days, Respondent complete a FBA for Student and provide a copy of the FBA report to Petitioner by the same date;
4. Within ten school days of completion of the FBA, or by a date agreed to by the parties, Respondent to convene Student's ARD committee to review the FBA and draft a new behavior intervention plan for Student, based upon the findings and recommendations of the FBA; and
5. Student be placed in the District's JJAEP for up to forty-five school days, beginning on ***.

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

SIGNED August 18, 2017.

A handwritten signature in black ink that reads "Steve P. Elliot". The signature is written in a cursive style with a horizontal line underneath it.

**Steve Elliot
Special Education Hearing Officer
For the State of Texas**

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. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*