

STUDENT b/n/f PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
BRAZOS INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner Student by next friends *** and *** (“Petitioner” is referred to within this Decision as “Student,” “Parent,” or “Petitioner”) brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 et seq., (hereinafter referred to as “IDEA”), against Respondent Brazos Independent School District (hereinafter referred to as “Respondent,” “District,” or “Brazos ISD”). Petitioner filed a written request for a Due Process Hearing which was received by the Texas Education Agency (“TEA”) on September 14, 2012 which was styled and docketed as shown above. Petitioner filed petitioner’s Amended Request for Due Process Hearing on September 24, 2012; and Second Amended Request for Due Process Hearing on October 12, 2012. On October 15, 2012, the District filed a Motion for Counter-Claim (“Motion”) to defend its evaluation and assessment of Student and the Motion was granted on October 22, 2012. Petitioner was represented by next friends *** and *** of ***, Texas. Ms. Carolyn Morris, Parent Advocate, of Parent-to-Parent Connection Advocacy in Lancaster, Texas, also participated in the hearing and assisted Petitioner’s next friends. Respondent was represented by Attorneys Mr. David Hodgins and Ms. Amber King of Thompson & Horton in Houston, Texas. The Due Process Hearing in this matter was held from Thursday, November 1, 2012 through Friday, November 2, 2012 in the Brazos Independent School District Administrative Building. Following the conclusion of the hearing, the parties agreed that written closing arguments would be filed by Friday, November 16, 2012, and that the Decision of the Hearing Officer would be issued on or before Tuesday, November 20, 2012.

A Prehearing Conference was held on Monday, October 22, 2012, at which time the issues to be addressed in the Due Process Hearing were defined. Petitioner’s Second Amended Request for Due Process Hearing (“Complaint”) replaced all issues plead in previous Complaints. Petitioner’s Complaint raised the following issues regarding the special education identification, evaluation, placement, programs and services of Petitioner, and Respondent’s alleged denials of a free appropriate public education (“FAPE”):

1. Respondent failed to address the Behavioral Intervention Plan (“BIP”). Respondent also failed to complete a Functional Behavior Assessment (“FBA”) to include most recent behaviors of Student. Respondent failed to conduct an appropriate Manifestation Determination Review (“MDR”) on Student’s misbehavior, and such determination resulted in Student’s removal to a Disciplinary Alternative Educational Placement (“DAEP”). Respondent’s removal of Student from the classroom on a daily basis created mental harm to Student and Student has been placed on additional medication to control depression and anxiety;
2. Respondent failed to address all the behaviors of Student, outlined in the goals of the Student’s existing BIP. Therefore, Petitioner alleges that Student’s BIP is not appropriate and is ineffective;
3. Respondent has not provided necessary and sufficient training to the District’s staff who directly serve Student for the implementation of Student’s BIP;

4. Respondent has failed to perform the requested Full Individual Evaluation (“FIE”) and denied Petitioner’s request for an Independent Educational Evaluation (“IEE”);

5. The Student’s Admission, Review and Dismissal (“ARD”) Committee did not appropriately address the psychologist’s recommendation for a highly structured environment; and

6. Respondent inappropriately suspended Student for three (3) days and placed Student in the DAEP.

As relief in this Special Education Due Process Hearing, Petitioner requests that Respondent be ordered to do the following:

1. Overrule the determination of the Student’s MDR Committee and allow Student to return to Student’s regular educational placement;

2. Reimburse Petitioner for all past and future costs, for medical care related to Student’s removal, including but not limited to, private individual counseling, family counseling and doctor visits;

3. Provide 60 minutes a week for counseling services with a special education counselor for the 2012-2013 school year as compensatory services;

4. Institute an in-home training program to address Student’s stress and anxiety;

5. Provide training to Student’s teachers regarding Student’s unique needs and monitoring techniques;

6. Designate a district-level liaison to facilitate communication between Petitioner’s next friends and Respondent; and

7. Provide any and all relief deemed necessary and equitable by the Hearing Officer.

In its response to the Complaint, Respondent generally denies all of the allegations set forth by the Petitioner. Respondent stated that the District complied with the requirements of IDEA and provided the Student with a FAPE. Respondent filed its Motion for Counter-Claim to Defend Evaluation/Assessment on October 15, 2012. In that Motion, the District asserts that its November 10, 2010 evaluation of Student was appropriate and requests such a finding from the Hearing Officer in this Due Process Hearing.

After considering the evidence of record and the arguments of the parties, the Special Education Hearing Officer makes the following Findings of Fact and Conclusions of Law:

II. Findings of Fact

1. Petitioner is a ***-year old in the *** grade. Petitioner has been receiving special education services as a student who has Emotional Disturbance (“ED”) as the primary eligibility classification and Other Health Impairment (“OHI”) related to Attention Deficit Hyperactivity Disorder (“ADHD”) as the secondary eligibility classification.

2. Respondent is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Petitioner a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400, *et seq.*, and the Federal and Texas rules and regulations promulgated pursuant to IDEA.

3. An ARD Meeting was held on Student's behalf on **October 13, 2010**. The purpose of the meeting was to review Student's disciplinary placement.
4. Student's October 13, 2010 ARD Committee ("ARDC") reviewed: a Psychological Evaluation dated January 28, 2008; Counseling Eligibility Evaluation dated January 28, 2008; a FBA dated March 5, 2008; FIE dated May 24, 2006 and January 28, 2008; information from Petitioner; and records from agencies/professionals. Based on the information presented, Student's ARDC concluded that Student met the eligibility criteria as a student with OHI (ADHD).
5. The Student's October 13, 2010 ARDC conducted an MDR regarding an ***, 2010 incident where Student ***. The ARDC determined that the behavior was a manifestation of Student's disability and Student's programming/placement should be determined by the ARD/IEP.
6. During the October 13, 2010 ARDC, Student's so-called "****" program was discussed, and it was recommended that Student be re-oriented within the *** program for the three (3) to four (4) weeks in order to gather more information to address educational programming and to address behavioral concerns. The District decided to increase consultation for the **** program for the next four (4) weeks. During the four (4) week *** program period, transition was to occur upon recommendation of the *** teacher and principal, and all transition out of the *** program was to be implemented with shadow personnel.
7. Student's October 13, 2010 ARDC determined that additional assessments were needed and agreed that an FIE should be completed by January 28, 2011. The ARDC further determined that a Counseling Eligibility Evaluation, Psychological Evaluation and FBA should be completed by November 10, 2010.
8. Student's October 13, 2010 ARDC determined that Student's ***, 2010 suspension for *** was directly related to Student's disability. Student's ARDC determined that Student's current placement "is substantially likely to result in injury to the child or others." The ARDC further determined that Student's BIP addressed Student's behavior satisfactorily.
9. Student's October 13, 2010 ARDC determined that Student's Least Restrictive Environment ("LRE") would be in a self-contained classroom more than 60% of the time, and that Student's disability interferes with Language Arts/English, Reading, Math, Science, and Social Studies. The ARDC recommended that each of these classes should be modified with positive reinforcers and behavior management plan.
10. The October 13, 2010 ARDC determined that Student should receive counseling four (4) times every six (6) weeks, and transportation two (2) times per day.
11. Student's parents signed in agreement along with the remainder of Student's October 13, 2010 ARDC.
12. On **November 10, 2010** Student's Psychological Re-Evaluation Report was completed by a District psychologist. The referral was made to reconsider previous District psychological evaluations completed on May 24, 2006 and July 11, 2006 that identified Student solely as a student with an OHI (ADHD).
13. The November 10, 2010 Psychological Re-Evaluation was completed while Student was *** years, *** months and was in the *** grade *** school.
14. The November 10, 2010 Psychological Re-Evaluation used the following testing and assessment instruments:

- a. Medical/Developmental/Social History, Parent Questionnaires, Teacher Questionnaires
- b. Conner's Continuance Performance Test
- c. Review of Educational History
- d. Bender Gestalt Test
- e. Personality Inventory for Children
- f. Oral Directions Test
- g. Wechsler Freedom from Distractibility Seales
- h. Reynold's Child Depression Scale
- i. Brief Rating Inventory of Execution Functioning

15. The November 10, 2010 Psychological Re-Evaluation noted that Student was identified for special education services in the *** grade as a student with ED. Criteria met for ED eligibility included "inappropriate types of behavior under normal circumstances" and "a general pervasive mood of unhappiness or depression." Behavioral concerns at that time included "severe tantrums, problems following routines or directives, and becoming more physically aggressive towards teachers."

16. The November 10, 2010 Psychological Re-Evaluation noted that a January 28, 2007 Psychological Re-Evaluation of Student indicated that Student had significant difficulties with hyperactive, impulsive, and inattentive behaviors, consistent with a diagnosis of ADHD, and supporting TEA eligibility criteria as a student with OHI. The January 28, 2007 Psychological Re-Evaluation further found the presence of oppositional, defiant, and aggressive behaviors consistent with a diagnosis of Conduct Disorder. At the time, Student was placed in a self-contained classroom setting.

17. The November 10, 2010 Psychological Re-Evaluation noted that Student's ARDC recommended that Student's emotional and behavioral status be re-evaluated following an October 13, 2010 MDR determination that Student's *** was a manifestation of Student's disability.

18. The November 10, 2010 Psychological Re-Evaluation noted that Student's teachers describe Student as a very bright student who is capable of above average academic performance and whose academic progress is impeded by behavioral difficulties. The teachers' primary concern was Student's response to behavioral redirection. The teachers often needed to redirect Student for talking out of turn, refusing to initiate an assignment, or insisting on doing something other than what was requested.

19. The November 10, 2010 Psychological Re-Evaluation observed that Student exhibits an excessive need for control and routinely challenges teacher authority when asked to do something undesirable. Student does not like being "singled out" for misbehavior, yet is unable to regain behavioral control once angry. Student often exhibits inflexible thinking. Once Student's mind is set on something, Student refuses to follow teacher instructions.

20. The November 10, 2010 Psychological Re-Evaluation confirms Student's eligibility for special education services as a student with an OHI (ADHD). The re-evaluation further concludes that Student has continuing difficulties with oppositional defiant, disruptive, and verbally or physically aggressive behaviors, consistent with a diagnosis of Conduct Disorder. Finally, the re-evaluation concludes that Student's feelings of vulnerability and defiant and aggressive behavior, particularly from the perceived "threats" from adults and teachers, are likely the symptoms of an anxiety disorder. Therefore, the re-evaluation concludes that Student appears to meet TEA eligibility criteria as a student with an ED.

21. The November 10, 2010 Psychological Re-Evaluation recommended specific home behavioral management exercises for Student's family that included encouragement to use words to assist in problem solving; having family members explain their own feelings; reminding Student of the consequences of good and bad choices; and

exercising consistent disciplinary measures as a consequence of misbehavior. Finally, the evaluation suggested specific measures to remediate Student's apparent low self-esteem.

22. The November 10, 2010 Psychological Re-Evaluation contained a detailed FBA for Student that included specific precipitating conditions; behavior specifics; consequences and functions. The re-evaluation proposed strategies for implementation in the classroom that were similar to those recommended for Student's family such as encouragement to use words, understand consequences, and build self-esteem. Central to the behavioral recommendations was direction for handling behavior outbursts in a calm manner and providing a place for Student to calm down and regain composure when Student has become angry and agitated.

23. The November 10, 2010 Psychological Re-Evaluation included a *** Behavior Consult. The report for the consult was dated November 9, 2010. Student was observed on October 19, 2010 and November 2, 2010 in settings that included the *** classroom. The recommendations contained within the *** consult report focused on instructional strategies and methodologies for responding to Student's ADHD; Student's tendency to become agitated and lose control; and Student's tendency to become oppositional and defiant when responding to teacher directives.

24. The November 10, 2010 Psychological Re-Evaluation contained a report entitled *Counseling As a Related Service Evaluation*. The evaluation weighed the strengths and weaknesses of counseling as a related service and concluded that counseling was appropriate to support Student's instructional services. The counseling evaluation suggested specific counseling goals and activities for Student.

25. The November 10, 2010 Psychological Re-Evaluation performed by District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments were administered appropriately. The assessments were used for a varied and reliable purpose. The assessments were administered by trained and knowledgeable personnel and in accordance with all applicable instructions for said assessments.

26. An ARD was held on **November 12, 2010**. The purpose of the meeting was to review Student's current disciplinary placement and to review the completed evaluations.

27. Student's November 12, 2010 ARDC reviewed: FIEs dated May 24, 2006, January 28, 2008, and November 10, 2010; Psychological Re-Evaluation, FBA, and Counseling Eligibility Evaluation dated November 10, 2010; information from Petitioner; and records from agencies/professionals. Based on the information presented, Student's ARDC concluded that Student met the eligibility criteria as a student with OHI (ADHD) and ED.

28. Student's November 12, 2010 ARDC discussed the transition from *** and re-orientation. It was recommended that Student have *** with a *** teacher, and that each teacher explain classroom expectations to Student.

29. Student's November 12, 2010 ARDC, decided that Student's placement would be mainstream in general education classes with accommodations, including less than 21% of time in a resource classroom, and counseling services would be provided six (6) times per six (6) weeks for 30 minutes. The ARDC determined that transportation would no longer be provided to Student.

30. Student's November 12, 2010 ARDC changed Student's placement from a highly structured classroom based on the November 10, 2010 Psychological Re-Evaluation. The ARDC concluded that Student's disability interferes with Language Arts/English, Reading, Math, Science, and Social Studies. The ARDC determined that Academic Skills Lab and Counseling Adjustment would be provided in the Special Education classroom; and ***, Language Arts, Math, Physical Education ("PE"), Reading, Science and Social Studies will be provided General Education classroom. The

ARDC recommended that each of these classes was to be modified with positive reinforcers and a behavior management plan.

31. Student's November 12, 2010 ARDC developed a BIP for Student with the following goals:

- a. Student will demonstrate self control in regards to keeping hands and feet to self and displaying appropriate noise and movement;
- b. Student will accept and seek adult assistance, and Student will refrain from verbal or physical aggression from teachers or peers. Student will seek adult assistance when angry or frustrated, request a cooling off period or "problem solve;"
- c. Student will verbalize anger or frustration in appropriate manner with adults (i.e. redirection, private conversation, without making threats); and
- d. Student will maintain compliant behaviors and adhere to classroom rules and expectations.

32. Student's November 12, 2010 ARDC developed a IEP for Student including specific mastery with the following academic and behavioral goals to be implemented using accommodations and Student's BIP:

- a. Using accommodations and BIP, Student will maintain passing grades by completing assignments/assessments. Student will complete unfinished assignments, study for tests/quizzes, retake assessments and demonstrate reading comprehension period. Success will be measured using teacher observations/feedback on the rate of completion of assignments/assessments;
- b. Using accommodations/modifications, Student will complete grade level assignments and assessments. Success will be measured using teacher tests and observations.
- c. Using counseling literature, manipulatives, District approved evidence-based interventions, therapeutic games/activities, Student will maintain compliant behaviors (i.e. follow teachers directives and/or redirections, to participate in reorientation/*** activities as directed, adhere to classroom rules and expectations).
 - i. Student will learn, rehearse, and demonstrate appropriate assertive language and behavior skills to avoid the appearance or perception of disobedient or opposition when asked to follow or meet a school related expectation.
 - ii. Student will practice and demonstrate appropriate behavior responses that do not appear non compliant when asked to follow a teacher's directive.
- d. Using counseling literature, manipulatives, District approved evidence-based interventions, therapeutic games/activities, Student will demonstrate self control.
 - i. Student will develop an ability to express feelings or fears respectively to authority figures and peers when encountering frustration with school rules, teacher directives, difficult assignments and provocative situations. Student will actively participate and/or complete provided counseling activities. Student will use respectful language with peers and authority figures with two (2) or less reminders.

- ii. Student will learn, practice, and identify positive coping statements to apply before, during, and after situations that may impede success or increase fears or anxious behavior at school. Student is expected to learn and implement 12 of the 24 provided coping statements to reduce anxiety in academic settings and beyond. Student will be able to identify and/or verbalize four (4) new positive coping statements to avoid negative consequences each six (6) weeks or each 30 days of instruction.
 - iii. Student will be able to give a positive statement to express frustrations, fears, displeasure, etc. to replace any rude/discourteous/language that may lead to negative consequences.
- e. Using counseling literature, manipulatives, District approved evidence-based interventions, therapeutic games/activities, Student will demonstrate empathy and sensitivity for the feelings of others and reaction to Student's disruptive behaviors.
- i. Student will be able to explain to give examples on how someone might experience a certain feeling and behave impulsively due to the situations or events to help Student better understand how people feel in reaction to disruptive behavior.
 - ii. Student will increase frequency of civil and respectful interactions with authority figures and peers and keep a log to see if others will treat Student with more respectful interactions.
 - iii. In 18 instructional weeks, Student will practice and complete activities regarding perspective taking, during non-provoking situations so Student will be better prepared to do so when Student feels provoked.

33. Student's parents signed in agreement along with the remainder of the Student's November 12, 2010 ARDC.

34. The purpose of Student's **August 31, 2011** ARD was to review Student's program and placement, develop a consensus as to the need to change anything about Student's program, and to answer any questions or concerns that Student's parents might have about the program at the start of a new school year. The ARDC determined that In-Home Training was not necessary at that time and the parents' questions about the *** ("****") function as a cooling off space were answered. The ARDC developed new counseling goals and objectives and made a change in Student's schedule from *** to a ***, with assurances to the parents that accommodations would be maintained. The meeting was positive, optimistic and ended in agreement among all the ARDC members, including Petitioner.

35. On **September ***, 2011** Student engaged in ***. Student was observed ***. ***. ***. Student was given a discipline referral to the principal for the incident.

36. During the September ***, 2011 ***, Student did not appear to be angry or agitated, there were no teachers or adults involved in the incident, and Student was not responding to an instructional directive. Finally, the incident was sustained, over several minutes. As a result of the incident, Student was initially suspended for three (3) days pending a meeting of Student's MDR Committee.

37. An ARD was convened on Student's behalf on **October ***, 2011**. The purpose of the ARD was to review Student's IEP. Student's October ***, 2011 ARDC reviewed: current FIE, Psychological Re-Evaluation, FBA,

and Counseling Eligibility Evaluation dated November 10, 2010; previous year's IEP and information from school personnel. Based on the information presented, the Student's ARDC concluded that Student met the eligibility criteria as a student with OHI (ADHD) and ED.

38. Student's October ***, 2011 ARDC discussed the Student's September ***, 2011 incident. Student's October ***, 2011 ARDC's MDR determined that Student ***. *** provided written reports documenting multiple *** with Student involving ***. Student denied each of these events. Student's current discipline record indicates one (1) event of physical aggression in the week prior to this current event. The ARDC determined that Student's conduct was not caused by nor had a direct substantial relationship to Student's disability conditions, and Student's conduct was not a direct result of the District's failure to implement Student's IEP. Based on this determination, District placed Student in DAEP for *** school days. Petitioner verbally disagreed with the determination and maintained that the incident was a manifestation of Student's disability. Student's ARDC concluded that Student's IEP could be appropriately implemented in a DAEP setting.

39. The October ***, 2011 ARDC further determined that *** orientation will be *** hours a day and *** monitoring during classroom time, daily.

40. The October ***, 2011 ARDC maintained the rest of Student's special education program with minor changes to the IEP, BIP and related services.

41. Student's October ***, 2011 ARDC determined specific measurable academic and behavioral annual goals.

42. The Student's parents did not sign in agreement along with the remainder of the Student's October ***, 2011, and Prior Written Notice of the recommendations agreed upon by the other ARDC members was issued.

43. The **November 10, 2011** ARD was the regularly scheduled annual ARD for Student. This was the first ARD meeting that followed Student's disciplinary action because of the September ***, 2011 incident. The school and the parents were represented by counsel and involved in mediation. There were no major changes to Student's program other than updated goals and objective for academic, behavioral intervention plan and counseling. The ARD ended in agreement among all the ARDC members, including Petitioner.

44. Student's ARDC met on **January 19, 2012** to review Student's program and to discuss Student's progress and concerns about program implementation, because of Student's placement in the DAEP, based on the September ***, 2011 incident. The parents expressed concerns about Student's IEP and BIP being followed. There were two (2) disciplinary incidents that were discussed and the procedures used to address them. The ARDC discussed the DAEP environment and how Student was interacting in that environment. Student's Licensed Specialist in School Psychology ("LSSP") discussed the counseling strategies Student worked on during the counseling sessions. There were no significant changes to Student's program and the ARD ended in agreement among all the ARDC members, including Petitioner.

45. Student's ARDC convened on **April 23, 2012** at the request of Student's parents. The purpose of the meeting was to discuss a specific behavioral incident that occurred since Student transitioned back to the main campus from DAEP.

46. The April 23, 2012 ARD addressed an incident involving Student *** teacher and ***. Student's actions were deemed to be inappropriate. During the ARD meeting, the ARDC heard from Student and the teacher in question. The ARDC also heard about other behavioral issues and the teacher involved. There were no changes to Student's IEP or BIP. There were no actions taken by the ARDC on any of the behavioral issues and the ARD ended in agreement.

47. An ARD was convened on **May 24, 2012** to review Student's program and to consider the facts surrounding a May ***, 2012 disciplinary infraction involving Student, a ***, and *** other students **. Student had been involved in an incident where Student and/or *** of the other students were ***, against District rules. There were allegations that the *** of the students to **. The *** disputed that accusation.

48. During the May 24, 2012 ARD, Student's parents question whether Student's BIP had been followed by the ***, based on the allegation of **. The ARDC determined that Student's BIP was followed. There were no changes to Student's program and Student's parents were assured that all *** students involved in the incident were given a three (3) day suspension. Nevertheless, the ARD adjourned with Petitioner in disagreement with agreement to reconvene on a later date.

49. On **September ***, 2012**, Student engaged in **. Prior to ***, Student was **. *** ***. *** ***

50. During the September ***, 2012 ***, Student was not apparently angry or agitated, there were no teachers or adults involved in the incident, and Student was not responding to an instructional directive. When confronted about the incident Student denied anything had occurred and also denied that Student was in any way upset or anxious.

51. An ARD Meeting was held on Student's behalf on **October 9, 2012**. The purpose of the meeting was to discuss proposed disciplinary change of placement and manifestation determination review.

52. Student's October 9, 2012 ARDC reviewed: the Psychological Re-Evaluation dated November 10, 2010; previous IEP; information from Petitioner; observations; and disciplinary records. Based on the information presented, the Student's ARDC determined that Student's behavior was not a manifestation of Student's disability and disciplinary procedures applicable to students without a disability may be applied to Student in the same manner in which they would be applied to students without disabilities, except FAPE must be approved.

53. During Student's October 9, 2012 MDR ARD, the ARDC discussed the witness' accounts of the September ***, 2012 incident. *** student confirmed the facts of the September ***, 2012 incident set out above, and complained of Student's behavior.

54. District determined that Student's September ***, 2012 actions included violations described in **. Student was suspended for three (3) days, ***, 2012. Once Student returned to District, Student was placed in In-School Suspension ("ISS"); **. District's Principal recommended that Student be placed in DAEP program for *** school days.

55. During Student's October 9, 2012 MDR ARD, Petitioner asserted that the September ***, 2012 incident is related to Student's disability and that District failed to implement Student's IEP. All other members of the IEP team (ARDC) agreed indicated that Student's behavior was not related to Student's disability, and the MDR ARDC determined that DAEP placement is scheduled to begin October ***, 2012 and end after *** completed school days.

56. During Student's October 9, 2012 MDR ARD, Petitioner requested that Student's counseling increase to two (2) times per week. Student's ARDC recommended an increase in counseling to 60 minutes per week while Student was in DAEP, and that general education counseling be available to address behaviors and misconduct that are not a manifestation of Student's disability.

57. During Student's October 9, 2012 MDR ARD, Petitioner requested that District conduct a full FIE and IEE. District declined to provide the FIE and to pay for the IEE, reporting that the current FIE is up to date and accurate and noting that Student is not up for re-evaluation until November 10, 2013.

58. Student's October 9, 2012 MDR determined that Student's ED is characterized by the following:

- a. Anxiety Disorder: Feelings of vulnerability, subsequent defiant and aggressive behaviors. This diagnosis meets TEA eligibility criteria for a student with ED.
- b. Conduct Disorder: Difficulties with oppositional-defiant, disruptive, and verbally or physically aggressive behaviors. Student has excessive need to exert control and does so in an apparent effort to feel safe and secure. Student is often distrusting of adults and if Student perceives a "threat" from an adult, through their efforts to exert authority, Student may become increasingly oppositional and defiant. When Student perceives an alliance between self and an adult, Student can exhibit highly complaint and respectful behaviors. This diagnosis does not meet TEA eligibility criteria for a student with ED.

59. Student's October 9, 2012 MDR determined that Student's conduct did not have a direct and substantial relationship to Student's disability; and that Student's conduct was not the result of the District's failure to implement Student's IEP.

60. Student's parents did not sign in agreement along with the remainder of the Student's October 9, 2012 ARDC.

61. There is no competent evidence of record that proves that Student's ARDC abused its discretion by not amending Student's IEP or BIP based on Student's September ***, 2011 incident involving ***. At the time of the September ***, 2011 incident and prior to the September ***, 2012 ***, Student had not demonstrated a clear behavioral concern that warranted an amendment to Student's IEP or BIP pertaining to ***.

62. There is no competent evidence of record that proves that Student's ARDC abused its discretion by not ordering an additional assessment of Student prior to the October 9, 2012 MDR of Student's September ***, 2012 ***.

63. There is no evidence that Student's placement in DAEP resulted in a need for additional medication to control depression and anxiety.

64. Student's school has assigned a teacher, acting as Student's assigned caseworker, who holds daily meetings with each of Student's teachers to discuss the appropriate implementation of student's current IEP and BIP and Student's progress toward IEP and BIP goals and objectives. Student's parents are regularly contacted which information regarding Student's educational progress, including Student's behavioral challenges and success.

III. Discussion

School Disciplinary Actions Involving Disabled Students

IDEA and its implementing regulations direct the Local Educational Agency ("LEA") in the appropriate handling of a disciplinary infraction committed by a student who has an educational disability. The overall guiding principle is that a student should not be *punished* for exhibiting a disability. If the disability itself *caused* the disciplinary infraction, then the student is not at fault and punishment is unwarranted. Likewise, if the disciplinary infraction happened because the LEA failed to implement established and agreed elements of the Student's IEP (usually found in a BIP that has been included in the IEP), then the student is not considered at fault for the infraction. In either case, the assumption is that a violation of a school Code of Student Conduct caused by a manifestation of a disability should not result in the punishment of a disabled student. Since a change of placement to a disciplinary alternative educational setting is usually a

key element of a disciplinary punishment, a student should not be removed *as punishment* from the general setting because of a manifestation of a disability.

The sections of IDEA that encompass the aforementioned “guiding principle” are found at 20 U.S.C. §1415, and are further implemented in 34 CFR §§300.530 and 300.532. The statute provides in pertinent part:

“School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 school days... [20 U.S.C. §1415(k)(B)]

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability... the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedure would be applied to children without disabilities... [20 U.S.C. §1415(k)(C)]

...the local education agency, the parent, and relevant members of the [ARD Committee]... shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine –

- (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
- (II) If the conduct in question was the direct result of the local education agency’s failure to implement the IEP.
- (III) Manifestation. If the local educational agency, the parent, and relevant members of the [ARD Committee] determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability. [20 U.S.C. §1415 (k)(E)]”

The implementing regulations at 34 CFR §300.532 mirrors what is set out in the statute, including the requirement that *an appeal* of a decision of the MDR Committee must be handled as an expedited hearing. [34 CFR §300.532(c)]

IDEA also outlines conditions wherein a Local Education Agency such as the District in this case, is *deemed* to have knowledge that a child is a child with a disability that is manifested by the disciplinary infraction. This section of IDEA is framed as the dichotomy between disabled versus *nondisabled* child. However, it is nonetheless applicable to this case because the central issues in this case is whether the District should have known that Student’s ED disability had changed to include *** at school.

IDEA states at 20 U.S.C. §1415(k)(5)(B):

“(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that the child is a child with a disability if, **before the behavior that precipitated the disciplinary actions occurred—**

- (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

- (ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 U.S.C. §1414(a)(1)(B)]; or
- (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a *pattern of behavior* demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

[20 U.S.C. §1415(k)(5)(B)]
(emphasis added)

The facts of this case must be applied to the legal standards established by the foregoing sections of IDEA. The law requires the MDR Committee to relate the violation in question to the disability *already determined* to apply to the student. On the facts of this case, Student's October 9, 2012 MDR Committee was required to review Student's September ***, 2012 misbehavior against established disability determinations of OHI (ADHD) and ED. However, the specific terms of Student's ED disability were appropriately defined by Student's current November 10, 2010 Psychological Re-Evaluation and Student's existing BIP. Student's current BIP does not provide for specific behavioral interventions to address misbehaviors of the type that Student exhibited on September ***, 2012. Moreover, there is no evidence that shows that the District did not implement Student's IEP and BIP exactly as it was originally designed in Student's November 12, 2010 ARD and carried forward to the present day. In fact, the record shows that Student was assigned a teacher acting as a caseworker who had daily meetings with all of Student's teachers to ensure the proper implementation of Student's BIP. The information derived from these special staff meetings has been shared with Student's family.

IDEA directs a Special Education Hearing Officer to decide an appeal of a student's ARDC by examining the misbehavior against what the student's program was, not what it could have been if the student's ARDC had "20-20 hindsight." Sometimes, misbehavior for a student with a disability is the same as misbehavior for a student without a disability—a consciously exercised poor decision. However, if the student's special education program has not been faithfully implemented or appropriately updated, and the student's misbehavior is a manifestation of a new disability or a neglected program, then the student cannot be faulted for the misbehavior.

This record does not show that Student's program was neglected. In fact it shows the opposite. There were numerous ARD meetings to revisit and revise Student's program. Counseling related services were prescribed by Student's ARDC and provided. Student was allowed to go to *** when it was necessary. At all relevant times, Student's parents were notified and actively involved in decision making.

The question is whether Student's BIP was appropriately *updated* to include *** as a manifestation of Student's ED disability. Student's *parents* never requested a psychological re-evaluation in a timely period. When the parameters of Student's ED were established by the District's November 10, 2010 Psychological Re-Evaluation and the November 12, 2010 ARD, the parents did not disagree with the November 12, 2010 ARDC or request an IEE within *one year* of the November 10, 2010 Psychological Re-Evaluation [19 T.A.C. §89.1151(c)]. Also, the "pattern of behavior" discussed in 20 U.S.C. §1415(k)(5)(B), cited herein, is consistent with the District's LSSP testimony that a misbehavior should be repeated before a student's BIP is adjusted to account for it. Prior to the September ***, 2012 ***, no one anticipated that Student would commit such an act. Before September ***, 2012, Student's only act of similar misbehavior (September ***, 2011) was not a "pattern," but a single act.

The record in this case raises a question as to the appropriate *future* course for Student's educational program. It is difficult to ignore that Student's disability may now include ***. The Hearing Officer is not completely persuaded by the District's witnesses that the two (2) incidents wherein Student *** are unrelated to Student's ***, or are not affected by Student's tendency for insecurity and inflexible thinking as the November 10, 2010 Psychological Re-Evaluation stated. Also, the Hearing Officer is not persuaded that a new behavior must be *chronic* before it indicates that an additional

assessment of Student's *** development is appropriate. If a chronic pattern were absolutely necessary, it would lead to the asinine conclusion that Student would have to *** "chronically" or "regularly" before Student is re-evaluated to rule out *** as a manifestation of Student's ED. In other words, the Special Education Hearing Officer is of the opinion that the District is *now* put on notice that another re-evaluation of Student may be indicated by changed circumstances that may warrant a re-evaluation prior to the three (3) year period prescribed for a re-evaluation [See 34 CFR §300.303(a)(1)].

However, *this* record does not indicate a failure of Student's ARDC to develop and appropriately implement Student's IEP and BIP. Also, Student has received a FAPE by receiving more than minimal educational benefit in Student's least restrictive environment of general education mainstreaming with resource support and related services of regular psychological counseling. On this record, the District's position has the greater merit. The District's evaluation must be found appropriate, and the decision of the MDR must stand.

IV. Conclusions of Law

1. Petitioner is a student who resides within the District who is eligible for special education as a child with the disabilities Other Health Impairment (ADHD) and Emotional Disturbance. [20 U.S.C. §1400(3); 34 CFR §300.8(c)(4); 19 T.A.C. §89.1040.]

2. Respondent has a responsibility to provide Student with a free appropriate public education including reimbursement for Petitioner's private school placement if Respondent did not provide Petitioner a free appropriate public education. [20 U.S.C. §1412; 34 CFR §300.300; 19 T.A.C. §89.1001.]

3. Petitioner did not prove that Respondent denied Petitioner a free appropriate public education based on the unique needs of a child with emotional disturbance. [20 U.S.C. §1414; 34 CFR §300.1, et seq.; 19 T. A. C. §89.1001; *Bd. Of Education v. Rowley*, 458 U.S. 176, 73 L.Ed 2d 690, 102 S. Ct. 3034(1982), *Cypress Fairbanks ISD v. Michael F.* 118 F.3d 245 (5th Cir. 1997)].

4. Respondent District convened a duly constituted Manifestation Determination Review to consider the appropriate disciplinary action following the Student's September ***, 2012 ***. The determination of the MDR Committee members was appropriately based on the Student's existing IEP and reports of the details of ***. The MDR Committee's determinations that Student's *** was not the manifestation of Student's disability or the result of a failure of the District to implement the Student's IEP is consistent with the law and the facts. [20 U.S.C. §1415(k); 34 CFR §300.530; §300.532]

5. The District's November 10, 2010 FIE of Student was appropriately developed and administered to Student in accordance with applicable Federal regulations. The District's November 12, 2010 FIE is appropriate. [34 CFR §300.304(b)-(c) and §300.502(b)(3)].

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

ISSUED in Austin, Texas this 20th day of November, 2012.

/s/
Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 011-SE-0912

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STUDENT b/n/f PARENTS	§	BEFORE A SPECIAL EDUCATION
	§	
v.	§	HEARING OFFICER FOR THE
	§	
BRAZOS INDEPENDENT SCHOOL DISTRICT	§	STATE OF TEXAS

SYNOPSIS

Issue: Did Respondent convene and perform an appropriate Manifestation Determination Review meeting to consider the actions of a *** year old *** school student with OHI (ADHD) and ED who ***?

Federal Citation: 20 U.S.C. §1415(k)(B); and 34 CFR §300.530; §300.532.

Held: For the Respondent: Respondent held a duly constituted MDR that considered the Student’s IEP, teacher and parent input and established disability as required by IDEA.