

STUDENT, *b/n/f*
PARENTS,
Petitioner,

§ BEFORE A SPECIAL EDUCATION
§
§
§
§ HEARING OFFICER
§
§
§
§ FOR THE STATE OF TEXAS

V.

LEWISVILLE INDEPENDENT
SCHOOL DISTRICT,
Respondent.

**INTERIM DECISION OF THE SPECIAL EDUCATION HEARING
OFFICER ON EXPEDITED APPEAL**

**I.
STATEMENT OF THE CASE**

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Expedited Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting an Expedited Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.* Petitioner asserted multiple issues in petitioner’s Complaint, only a portion of which are subject to the expedited hearing rules and regulations. The sole issue for consideration in the Expedited Due Process Hearing concerns Petitioner’s appeal of the Manifestation Determination (“MD”) made by Petitioner’s Manifestation Determination Review Committee (“MDRC”) on April 12, 2012, and April 23, 2012, which found that Petitioner’s misconduct, in *** was not a manifestation of petitioner’s disabilities. Petitioner asserts that the alleged misconduct was, in fact, a manifestation of petitioner’s disabilities; the resulting assignment to Respondent’s Disciplinary Alternative Educational Placement (“DAEP”) for thirty-five (35) days was a prohibited change in placement; and as such, Respondent has deprived Petitioner of a free, appropriate public education (“FAPE”).¹

**II.
PROCEDURAL HISTORY**

Petitioner filed petitioner’s Complaint on April 17, 2012. On that same date, TEA assigned Docket No. 241-SE-0412 to the undersigned Hearing Officer, who immediately sent the Initial Scheduling Order to the parties, setting out the procedural deadlines of this expedited proceeding, pursuant to 20 U.S.C. §1415(k)(3) and (4)(B); §1415(f)(1)(A); 34 C.F.R. §300.532(c)(2) and (3): the Resolution Session would convene on, or before, April 26, 2012; the pre-hearing telephone conference would convene on April 27, 2012; the Expedited Due Process Hearing would take place on May 10, 2012; and the Decision would issue by May 24, 2012.

The parties participated in a Resolution Session on April 25, 2012, but did not resolve the due process issues.

On April 26, 2012, Petitioner filed a Motion to Conduct Hearing on Neutral Site.

On April 27, 2012, Respondent filed its Motion for Partial Dismissal for Lack of Jurisdiction (seeking dismissal of all non-IDEIA claims) and Ten-Day Response to Complaint.

¹ Petitioner argued that the *** by Petitioner on, or before, April ***, 2012, was not a violation of the District’s Student Code of Conduct and that the Hearing Officer has jurisdiction to make that determination. That issue is addressed separately in the Decision.

Also on April 27, 2012, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) Mr. Tomas Ramirez, III, Petitioner's counsel; 2) Ms. Jan Watson, Respondent's counsel; 3) ***, Respondent's Special Education Director; 4) the undersigned Hearing Officer; and 5) the court reporter, who made a record of the telephone conference. The parties discussed Petitioner's pending request for records, the location of the hearing, stay-put during the pendency of the expedited proceeding, and confirmed the May 10, 2012, setting for the Expedited Due Process Hearing. The undersigned 1) denied Petitioner's stay-put request, which is not available during this phase of an appeal of a MD, pursuant to 20 U.S.C. §1415(k)(4)(A) and 34 C.F.R. §300.533; 2) granted Petitioner's request to conduct the expedited hearing at a neutral location, but instructed Petitioner's counsel to locate the venue and inform the parties; 3) ordered Respondent to provide Petitioner's Parents with the student records requested in Petitioner's Complaint, as well as any additional documents that the Parents requested prior to the MDRC meeting on April 12, 2012; and 4) agreed to dismiss all issues and claims for relief over which Texas Special Education Hearing Officers have no jurisdiction.

On April 28, 2012, the undersigned issued the Orders 1) Scheduling Expedited Due Process Hearing and 2) Abating Unrelated Issues. Per this Order, the undersigned scheduled the Expedited Due Process Hearing for May 10, 2012, confirmed the agreed Disclosure Deadline of 5:00 p.m., May 3, 2012, as well as the Decision Deadline of May 24, 2012. Likewise, this Order instructed Respondent to deliver all requested student documents to Student's Parents by noon, April 30, 2012, and dismissed all issues and claims under statutes over which a Texas Special Education Hearing Officer has no jurisdiction.²

The Expedited Due Process Hearing convened on May 10, 2012, at a neutral location, as requested by Petitioner, and was closed to the public. Both parties introduced documentary evidence; Petitioner called several witnesses who were cross-examined by Respondent; Respondent called no witnesses. During the hearing, Petitioner was represented by petitioner's attorney, Mr. Ramirez, and Ms. Melanie Watson, paralegal. Also in attendance were *** and ***, Petitioner's Parents. Respondent was represented by counsel, Ms. Watson and Ms. Melissa Scherer. Also in attendance was ***, Respondent's Executive Director of Special Education.

At the conclusion of the hearing, Petitioner's counsel made an oral closing argument. Respondent's counsel requested time to make a written closing argument, which was granted. Under the applicable statutes, the Decision Deadline was confirmed to be May 24, 2012. Respondent filed and served its closing argument on May 18, 2012; Petitioner filed and served a written rebuttal on May 19, 2012. This Interim Decision of the Special Education Hearing Officer on Expedited Appeal is being delivered to the parties on the statutory deadline: May 24, 2012.³

III. FINDINGS OF FACT

1. LISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Petitioner is a ***-year-old student who qualifies for special education and related services under the primary disability of Other Health Impairment ("OHI"), based upon Attention Deficit Hyperactivity Disorder ("ADHD")—Combined Type, and a secondary disability of Emotional Disturbance ("ED"), based

² Specifically, all issues and claims for relief included under the following statutes and regulations were dismissed for want of jurisdiction: Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA); the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, 34 C.F.R. Part 99; the No Child Left Behind Act (NCLBA); Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983; Title VI of the Civil Rights Act of 1964; the Technology Related Assistance for Individuals with Disabilities Act, 29 U.S.C. §2109; Section 505, Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. §1988; 28 U.S.C. §1927; 29 U.S.C. §794a(b); and the Civil Rights Act of 1871.

³ References to the Expedited Due Process Hearing Record are identified as follows: "T.#" refers to the one-volume Certified Court Reporter's Transcription of testimony made on May 10, 2012, and the specific page numbers contained therein; "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page.

upon a general and pervasive mood of unhappiness or depression (R.8.4; R.2.23; R.4.8). Petitioner's ADHD is classified as "moderate," characterized with impulsivity; poor attention, focus, and organizational skills; irritability; and inappropriate social skills, resulting in an inability to make and maintain friendships with petitioner's peers (P.20.2-4). Until March 9, 2012, Petitioner was on medication for the ADHD. Because petitioner appeared to be making progress in controlling petitioner's behaviors, Petitioner's Parents and Pediatrician agreed to withdraw this medication.

3. In addition to these eligibilities and attendant characteristics, Petitioner manifests other characteristics leading to suspicions that petitioner may also suffer with a Pervasive Developmental Delay–Not Otherwise Specified ("PDD-NOS") (P.20.13-14) and/or Asperger's Syndrome (R.8.12).
4. Petitioner resides within LISD's jurisdictional boundaries with petitioner's Parents and ***. LISD is responsible for providing Petitioner with an appropriate education under IDEIA and its federal and state implementing statutes.

The * Incident:**

5. Petitioner is described by teachers and petitioner's Parents as a very sweet young *** who wants, more than anything, to fit in with petitioner's peers. Petitioner has always struggled with a lack of appropriate social skills, which, in many instances, causes individuals to distance themselves. Petitioner attempts to attract attention from petitioner's peers by means that are often inappropriate, impulsive, and immature (T.271; P.3.20). At times, Petitioner gets aggressive and physical in petitioner's antics, although these appear to be good-natured play without benefit of a social filter (T.438-43). Petitioner's social difficulties and immature impulsive behaviors towards petitioner's peers are a fairly common manifestation of ADHD (T.281; P.3.20).
6. On the morning of April ***, 2012, Petitioner's Parents met with petitioner's teachers to discuss concerns about petitioner's increasing negative behaviors and decreasing academic performance since the cessation of petitioner's ADHD medication in early March 2012 (T.409-410). When the Parents arrived for this meeting, the Assistant Principal at *** School, ***, met them and explained briefly that an incident had occurred that day involving Petitioner (the *** incident) but an investigation had to be completed before she could discuss the ramifications (T.409). The Parents proceeded with the scheduled meeting, which concluded without reference to the *** incident (T.410).
7. Later in the afternoon of April ***, 2012, the Principal of *** School, ***, contacted Petitioner's Mother to come back to the school and pick up Petitioner because petitioner was being suspended for three (3) days: April *** and ***, 2012, for *** (T.410; R.7.30). At that time, *** provided the Parent with copies of three (3) office referrals related to the incident (R.11.7).
8. Earlier on April ***, 2012, *** received several reports that Petitioner was compiling a *** (R.7.2 and 7.4). *** immediately conducted an investigation into the allegations and completed her report on April ***, 2012. The report consists of teacher-input on discipline referral sheets; notes taken during student interviews; students' written statements; teachers' written statements; notes taken during the interview with Petitioner and petitioner's Mother; and Petitioner's written statement (R.7). *** learned, apparently for the first time, that Petitioner has been ***. Over the months that Petitioner has made *** as Petitioner receives reinforcement from petitioner's teacher and petitioner's peers.
9. Because *** had suspended Petitioner for three (3) days, beginning on April ***, 2012, Petitioner's Father stayed home with petitioner on April ***, 2012. *** contacted Petitioner's Mother on that date and requested that she and Petitioner return to school for interviews related to the *** (T.410-11). At the conclusion of these interviews, *** informed Petitioner and petitioner's Mother that she was sending Petitioner to Respondent's DAEP for thirty-five (35) days, or through the remainder of the school year (T.135; 411; R.7.30). At that time, *** provided the Parent with a copy of Petitioner's *** for the very first time (R.11.7).

10. On April ***, 2012, Petitioner's Mother obtained an Integrated Assessment and Psychosocial Assessment from *** (***) (P.20). Respondent's Licensed Specialist in School Psychology "(LSSP)", ***, provided the Parents with information about this facility. This assessment was a risk assessment in light of Petitioner's ***. *** issued its report ("the *** Report") on April ***, 2012, and found that generally, Petitioner was a not a danger to ***self or others and that petitioner could be returned to the home for out-patient treatment with referrals (P.20.10). The *** Report indicated the following problems that should be addressed: a) depressed mood; b) inattentive/impulsive/disruptive behaviors; and c) poor social skills/pervasive developmental behaviors (P.20.10). The *** Report indicated the following Axis I clinical disorders/conditions that may be a focus of clinical attention: a) Mood Disorder-NOS; b) ADHD-Inattentive Type; and c) rule out PDD-NOS (P.20.11). *** provided a copy of its report to the District and to Petitioner's Pediatrician but not to the Parents. Neither the Pediatrician nor Respondent provided a copy of the *** Report to the Parents until the end of the first day of the MDR on April ***, 2012 (T.96-7; 286-87; 414-15; 433).
11. On April ***, 2012, Petitioner's Parents requested Petitioner's entire educational record (R.8.32; R.11.3). On April ***, 2012, Petitioner specified the documents needed for the April ***, 2012, MDR: information related to the specific Student Code of Conduct violation, a copy of the Written Report of Investigation, and related statements and documents from the investigation (R.11.3). Respondent sent the Parents copies of the investigation report a few hours prior to the April ***, 2012, MDR (R.11.7).

The April *, 2012, MDR:**

12. On April ***, 2012, Petitioner's ADRC convened the mandatory MDR of the April ***, 2012, *** incident. In attendance were the following: a) ***, b) Ms. Melanie Watson, Parent Advocate; c) ***, d) ***, one of Petitioner's General Education Teachers; e) ***, Special Education Teacher; f) ***, Evaluator; g) ***, Special Education Director; h) ***, i) ***, Psychology Intern; and j) *** (R.8.27). Petitioner's Pediatrician, ***, attended the meeting for a period of time to provide information regarding her years of treating Petitioner.

The MDR lasted approximately three (3) hours and accomplished little. The Parent Advocate and several District representatives interrupted each other, talked over each other, bickered over a plethora of matters, such as specific wording in the minutes, missing documents, *etc.*, and generally, allowed this very important meeting to devolve to nothing more than a chaotic environment that fostered hurt and defensive feelings, supported already-formed misconceptions, and culminated in the need to reconvene to finish the two-step MDR (P.24c).

13. The April ***, 2012, MDR was convened in compliance with the ten-day requirement.
14. During this April ***, 2012, MDR, the Committee attempted to review Petitioner's current evaluations:
 - a. Petitioner's November 26, 2010, Full and Individual Evaluation ("FIE"), which concluded that Petitioner is ED and ADHD-Combined Type, although there was no supporting Physician's OHI eligibility form (R.2.23);
 - b. Petitioner's December 8, 2010, OHI eligibility form completed by ***, which diagnosed ADHD-Combined Type (R.4.8);
 - c. *** April ***, 2012, letter, which sets out *** concerns over Petitioner's delayed behavioral development, the inappropriate reinforcement of Petitioner's teacher related to Petitioner's ***, her diagnosis of PDD-NOS, and Petitioner's inability to understand the ramifications of petitioner's misconduct (R.8.29-30); and
 - d. the April ***, 2012; *** Report, which determined that Petitioner is PDD-NOS, ADHD, and has a Mood Disorder-NOS (P.20).

The April ***, 2012, MDRC did not complete this review of all evaluations on that date and re-convened on April ***, 2012, to complete their review (R.8.13).

15. During the April ***, 2012, MDR, the Committee attempted to review information from Petitioner's Individual Education Programs ("IEPs"):
 - a. Petitioner's ARDC met on December 7, 2010, to review the November 26, 2010, FIE. Petitioner's Parents expressed concerns about petitioner's poor social skills and relationships with petitioner's peers. The ARDC determined that Petitioner's behavior impedes petitioner's learning based upon petitioner's problems with attention and social interactions. A Functional Behavioral Assessment ("FBA"), added as an ARD Supplement to the December 7, 2010, Report, noted Petitioner's behavioral problems as a) attracting attention of peers inappropriately, and b) struggling to initiate work independently (R.3.10). The ARDC developed a Behavior Intervention Plan ("BIP") to address these two (2) behavioral deficits (R.3.12; R.3.15). The ARDC also added counseling as a related service and developed a counseling IEP (R.3.13).
 - b. Petitioner's ARDC met again on February 23, 2011, to review petitioner's OHI eligibility form and to make changes to petitioner's IEPs. The ARDC added the OHI eligibility and recommended direct counseling services by a special education counsel for twenty (20) minutes per week (R.4.30-31). The ARDC made changes to Petitioner's BIP in the goal related to petitioner's working independently (R.4.3).
 - c. On September 15, 2011, Petitioner's ARDC amended Petitioner's IEP to remove an accommodation that Petitioner no longer needed: small group testing (R.5.1). By agreement, the ARDC did not meet to effect this amendment.
 - d. On November 15, 2011, Petitioner's ARDC met for petitioner's annual ARD. Petitioner's teachers reported that petitioner was doing very well academically and that generally, petitioner was not a behavior problem, although petitioner sometimes loses focus and blurts out from time to time (R.6.18). The Parents reported that Petitioner appears to be doing better in that petitioner feels petitioner is being accepted. The ARDC discontinued Petitioner's BIP, discontinued several accommodations, and drafted counseling goals to provide services twenty (20) minutes per week until the end of the third grading period and then twenty (20) minutes every other week (R.6.18).

The April ***, 2012, MDRC did not complete this review of Petitioner's IEPs on that date and re-convened on April ***, 2012, to complete their review (R.8.13).

16. During the April ***, 2012, MDR, the Committee reviewed information from Petitioner's Parents and petitioner's Pediatrician regarding the recent cessation of petitioner's ADHD medication and its potential impact on petitioner's behavior.
17. During the April ***, 2012, MDR, the Committee briefly discussed the Parents' concerns that Petitioner's IEPs were not being implemented. Specifically, the Parents challenged whether Petitioner's counseling services were being provided as required by petitioner's counseling IEP (R.8.13; P.24c).
18. During the April ***, 2012, MDR, the Committee discussed the fact that since the fall semester, Petitioner had been engaging in ***, a fact that was known only by petitioner's teacher and fellow classmates until the *** incident.
19. During the April ***, 2012, MDR, the Parents were not provided with additional copies of the relevant evaluations or IEPs to review as the attempt was made to conduct an appropriate MDR. Clearly, the Parents had received copies of these documents at the time each was discussed in prior meetings, but no such additional information was provided on April ***. When asked about copies of Petitioner's file, the

Parents were informed that all copies of petitioner's file documents were stored online and were not available to review at the MDR (P.24c). Most unusual was the fact that the District had a copy of the *** Report, a report that was clearly being reviewed as part of the MDR, but refused to provide the Parents with a copy until the end of the meeting (P.24c). Declining to provide the Parents copies of relevant documents during the MDR was inappropriate.

20. After three (3) hours of the attempted MDR on April ***, 2012, Petitioner's Parents and Advocate concluded the meeting and left prior to completing the MDR. Petitioner's Parents requested a re-convene MDR after they had an opportunity to consult an attorney.

The April *, 2012, MDR:**

21. On April ***, 2012, Petitioner's MDRC re-convened to complete the MDR. Although Petitioner's Parents received notice of this meeting, they declined to attend (R.8.13).
22. The April ***, 2012, MDR was convened in compliance with the ten-day requirement.
23. In attendance were the following: a) ***, b) ***, c) ***, d) ***, e) ***, f) ***, g) ***, h) ***, and i) ***, Respondent's Executive Director of Special Education.
24. Because the prior MDR failed to achieve any cogent resolution to the two (2) MD questions, the April ***, 2012, MDRC re-visited both inquiries and evaluated the relevant information in Petitioner's file, as well as information provided prior to, and at, the April ***, 2012, MDR (R.8.13).
25. The April ***, 2012, MDRC determined that Petitioner's conduct, the ***, was not caused by, or did not have a direct and substantial relationship to, the Petitioner's disabilities (R.8.13).
26. The April ***, 2012, MDRC determined that Petitioner's conduct, the ***, was not the direct result of Respondent's failure to implement Petitioner's IEP (R.8.13).
27. *** placement of Petitioner at the DAEP following the April ***, 2012, investigation does not prove that Petitioner's MDRC had already pre-determined petitioner's placement.
28. The April ***, 2012, MDRC adopted *** recommendation that Petitioner be placed at the District's DAEP for thirty-five (35) school days (R.8.13).
29. Petitioner's Parents have not allowed such placement and have become involved in truancy proceedings (P.24a). At the April ***, 2012, MDR, the Parents informed the Committee that they were placing Petitioner in a private placement and would be requesting reimbursement for such placement (R.8.13; R.24c).
30. The investigation into Petitioner's *** was a general education disciplinary process. When the Parents disputed the resulting finding, they should have activated the appellate process authorized by the Texas Education Code §37.009(a) and the District's complaint procedures set out in the Student Code of Conduct (R.23). There is no jurisdiction under IDEIA for a Texas Special Education Hearing Officer to hear appeals from a general education disciplinary determination.
31. The evidence does not support a finding that Petitioner's Parents were deprived of their right to be meaningful participants in the MDR. This issue was eviscerated when the Parents declined to participate in the April ***, 2012, MDR, a re-convened MDR that the Parents requested and supported.
32. The evidence does not support a finding that Petitioner's conduct, the ***, was the direct result of Respondent's failure to implement Petitioner's IEP (R.8.13).
33. The evidence does support a finding that Petitioner's conduct, the ***, had a direct and substantial

relationship to Petitioner's disabilities.

IV. DISCUSSION

IDEIA provides that when a district decides to change a disabled student's placement because of a violation of a code of student conduct, the student's ARDC must determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability or was the direct result of the district's failure to implement the student's IEP, *i.e.*, the Manifestation Determination Review ("MDR"). 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e). If the behavior is determined not to be a manifestation of the student's disability, then the student may be disciplined in the same manner and for the same duration as would apply to children without disabilities. 20 U.S.C. §1415(k)(1)(C); 34 C.F.R. §300.530(c). If the behavior is determined to be a manifestation of the student's disability then, with limited exceptions, the ARDC must either modify any existing BIP or conduct a functional behavioral assessment ("FBA") and develop a BIP. 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f).⁴

A. Basics of an MDR Appeal:

The MDR is an important discipline procedure under the IDEIA. It is an evaluation of a student's misconduct to determine whether that conduct is a manifestation of the student's disabilities. It must be performed within ten (10) school days of the change in placement that stemmed from an IDEIA-eligible student's violation of a code of conduct. 34 C.F.R. §300.530(e).⁵

The MDR should be conducted by the district, the parents, and relevant members of the student's ARDC, as determined by the parents and the district. 34 C.F.R. §300.530(c). The MDR must involve a review of all of the relevant information in the student's file, including the student's IEPs, teacher observations, and any other relevant information provided by the parents. 34 C.F.R. §300.530(e). While parents have the right to invite additional participants to the MDR, they do not have the right to veto a district's choice of team members or the MDRC's determination that the student's misconduct is unrelated to student's disability. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008)

B. Petitioner's MDR Appeal:

Because Petitioner is eligible for special education and related services under the OHI and ED categories, petitioner's ARDC had to convene to determine whether petitioner's placement at the DAEP for thirty-five (35) days was a prohibited change of placement.

Petitioner actually had two (2) separate and distinct avenues to review this placement: 1) the complaint process under the District's general education track, as authorized by Tex. Ed. Code §37.009 and specified in the District's Code of Conduct, a copy of which was provided to the Parents on April ***, 2012; and 2) the MDR process under the federally mandated discipline procedures of the IDEIA. Simply put, Petitioner had available to petitioner two (2) separate tracks for appealing the April ***, 2012, DAEP assignment. Petitioner, for whatever reasons, failed to implement the general education protections afforded petitioner at Tex. Ed. Code §37.009 and the District's Code of Conduct. As such, petitioner could only rely on the mandatory MDR proceedings under the special education umbrella.

⁴ The district may unilaterally remove the student to an interim alternative educational setting ("IAES") for not more than forty-five (45) days, without consideration of whether the conduct was a manifestation of the student's disabilities, if the student 1) carries or possesses a weapon on school premises or to or at a school function; 2) 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 3) inflicts "serious bodily injury" upon another person while on school premises or at a school function. 20 U.S.C. §1415(k)(1)(G)(iii); 34 C.F.R. §300.530(g). Section 300.530(i) specifically incorporates the definitions of "controlled substance," "illegal drug," "serious bodily injury," and "weapon" from federal law.

⁵ A "change of placement" occurs when, as here, the district removes the IDEIA-eligible student from student's current educational placement for more than ten (10) consecutive school days. 34 C.F.R. §300.536.

1. No Appeal of a Finding Under the Student Code of Conduct:

Special Education Hearing Officers have very limited jurisdiction. A parent or a public agency may file a due process complaint on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE. 34 C.F.R. §300.507(a). It is the disabled child's ARDC that makes such decisions. The Texas Administrative Code, 19 T.A.C. §89.1151(a), incorporates Section 300.507(a) in setting the limits of a Due Process Hearing. Clearly, the issues over which a Texas Special Education Hearing Officer has jurisdiction derive from decisions made by the disabled student's ARDC. The issues under the Hearing Officer's jurisdiction do not involve the application of a school district's Student Code of Conduct.⁶

2. Procedural Violations Attendant to the MDR Process:

Petitioner's MDRC met on two (2) separate occasions: April ***, 2012, and April ***, 2012. Petitioner asserts several procedural violations related to these two (2) MDR meetings:

a. Ten-Day Requirement:

Petitioner first argues that Respondent failed to comply with the mandatory time constraints for convening an MDR of a disciplinary change in placement. 34 C.F.R. §300.530(e) mandates that the MDR meeting must convene within ten (10) school days of the change in placement. Petitioner asserts that petitioner was suspended on April ***, 2012, and that counts as the first day of the ten-school-day countdown. Using this calculation, Petitioner sets the ten-day deadline at ***, April ***, 2012.⁷

The record reveals that Petitioner's calculation is incorrect. Petitioner was not suspended on April ***, 2012. The Principal called the Parent to pick petitioner up on the afternoon of April ***, 2012, but petitioner's suspension, and ultimate placement at the DAEP, was effective April ***, 2012. As such, the ten-day deadline for convening the MDR was ***, April ***, 2012.

b. Meaningful Participation:

During the first MDR attempt, the meeting very quickly devolved into a divisive, accusatory, unproductive encounter that required a second attempt to complete the required MDR analysis. It is my belief that Respondent deprived Petitioner's Parents of meaningful participation in that first meeting 1) when Respondent declined to provide any hard copies of evaluations or IEPs or teacher notes for the Parents to review as these documents were discussed, notwithstanding the fact the Respondent had provided copies of these documents in prior meetings; 2) when Respondent broke from tradition and declined to provide the Parents with access to Petitioner's online educational records during the meeting; and 3) when Respondent declined to provide Petitioner's Parents with a copy of the *** Report until the end of the April ***, 2012, meeting. When the Parents requested a re-convene MDR, which the Respondent granted, this provided Respondent an opportunity to assemble the relevant documents, provide them to the Parents in advance of the April ***, 2012, re-convened MDR, and in essence, allow the Parents to participate in a more meaningful manner.

For whatever reasons, the Parents declined to attend the April ***, 2012, re-convened MDR. This act completely nullifies their claim that they were not allowed meaningful participation in determining whether Petitioner's misconduct was a manifestation of petitioner's disability. To be a meaningful participant, one must "participate." Accordingly, all claims related to procedural deficiencies in the MDR meetings are denied.

3. MDR Answers to MD Questions:

⁶ All of Petitioner's complaints related to whether Petitioner's *** violated the District's Code of Conduct should have been presented via the general education complaint process. They are not appropriate issues for a Due Process Hearing under the IDEIA. The IDEIA "cannot be used as a tool to litigate a district's determination of its own student code of conduct." *Bland ISD*, 110 LRP 17539, Dkt. No. 072-SE-1209 (Tex. 2010).

⁷ ***.

Notwithstanding the description above of the April ***, 2012, MDR, there were some accomplishments garnered: 1) the Parents were afforded the opportunity to bring Petitioner's Pediatrician, Dr. ***, to present her most recent assessment of Petitioner and to explain her very clear position that Petitioner's misconduct was caused by, or had a direct and substantial relationship to, Petitioner's disabilities; 2) the Parents were afforded, albeit reluctantly, an opportunity to review the *** Report and to have it considered along with the report of Dr. ***; 3) the Parents were afforded the opportunity to discuss the relationship of the cessation of Petitioner's ADHD medication and petitioner's increased negative behaviors, all supported by Dr. *** discussion along these lines during the meeting; and 4) the Parents were afforded the opportunity to discuss, candidly, the effect of Petitioner's ***.

a. Question 1: Relationship Between Misconduct and Disabilities:

The first question in the MDR asks: Was the conduct in question caused by, or did it have a direct and substantial relationship to, the child's disability? 20 U.S.C. 1415(k)(1)(E)(i). In reaching an answer to this questions, the MDRC must review all evaluation data, the student's discipline history, details of the incident, IEPs, teacher observation, and any relevant information provided by the Parents. In this case, the MDRC failed to consider all relevant information in reaching its determination that Petitioner's misconduct was not caused by, or substantially related to, Petitioner's disabilities.

The record is replete with references to concerns of everyone involved in this young *** life, over many years, related to petitioner's poor social development, petitioner's inability to "read" people and react appropriately in social interactions, petitioner's propensity to draw attention to ***self to redeem ***self in the eyes of others, petitioner's anxiety in unfamiliar arenas, petitioner's impulsivity in reacting, or overreacting, to interaction with peers, and so on. While there may be debate as to whether Petitioner is truly ED or PDD or presents at some point on the autism spectrum, this debate does not corrupt a finding that Petitioner's misconduct in *** bears a substantial relationship to petitioner's disabilities.

Dr. *** was adamant that Petitioner's misconduct bore a substantial relationship to petitioner's ADHD and PDD in that Petitioner could not restrain ***self from lashing out when agitated by others; petitioner could not restrain ***self from irritating others in patently inappropriate ways; and petitioner could not filter or discern social cues.

The *** Report supported Dr. *** assessment, finding that Petitioner has a) depressed mood; b) inattentive/impulsive/disruptive behaviors; and c) poor social skills/pervasive developmental behaviors.

***, while not accepting the PDD-NOS assessment results, did concur that some facets related to Petitioner's misconduct could be caused by or related to petitioner's ADHD.

The District representatives were hesitant to make any finding that Petitioner's *** over a period of several days could relate in any fashion to petitioner's lack of impulse control. Dr. *** testified that the impulsivity aspect is seen in Petitioner's ***.

Added to this is the very relevant information discussed at the April ***, 2012, MDR regarding Petitioner's recent cessation of petitioner's ADHD medication; petitioner's teachers' contacting the Parents to discuss recent declining behaviors; and the inappropriate reinforcement Petitioner had been receiving from petitioner's teacher and peers ***.

This is not a case involving a student with a learning disability ("LD") who brings drugs or weapons to school or who in some other manner violates a Student Code of Conduct totally askew from the LD disability. This involves a student who has always manifested inappropriate responses to social cues, who has always done just

about anything to garner attention from others, who has rarely been able to restrain petitioner's impulsivity.⁸ The evidence established that Petitioner's misconduct was caused by, or had a direct and substantial relationship to, petitioner's disabilities.

b. Question 2: Implementation of Petitioner's IEP:

The second question in the MDR asks: Was the conduct in question a result of the district's failure to implement the student's IEP? 20 U.S.C. 1415(k)(1)(E)(i). Again, in reaching an answer to this question, the MDRC must review all relevant data, details of the incident, IEPs, teacher observation, and any other relevant information provided by the Parents. This MDR question was briefly discussed at the April ***, 2012, MDR but was tabled at the request of Petitioner's Parents when they left the MDR. This question was addressed in the April ***, 2012, MDR and based upon testimony at the hearing, as well as the April ***, 2012, MDR Report, Petitioner failed to prove that Respondent has not been implementing Petitioner's IEPs.

**V.
CONCLUSIONS OF LAW**

1. Petitioner's April ***, 2012, and April ***, 2012, MDRC failed to conduct an appropriate MDR, pursuant to 20 U.S.C. §1415(k)(1)(E) and 34 C.F.R. §300.530(e). Petitioner's *** was a manifestation of petitioner's disabilities in that such misconduct was caused by, or had a substantial relationship to, Petitioner's ED, ADHD, and PDD characteristics. However, Petitioner's misconduct was not a result of Respondent's failure to implement Petitioner's IEPs.
2. Respondent did not commit any procedural violations related to the April ***, 2012, and April ***, 2012, MDR meetings.
3. The Hearing Officer has no jurisdiction to address issues related to an appeal of a general education disciplinary finding. 34 C.F.R. §300.507(a); 19 T.A.C. §89.1151(a).

**VI.
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner is GRANTED. It is, therefore,

ORDERED that based upon a finding that Petitioner's MDR Committee failed to conduct an appropriate MDR and that Petitioner's *** was a manifestation of petitioner's disabilities, Petitioner may not be disciplined for this violation of the Student Code of Conduct. It is further

ORDERED that within five (5) school days, Petitioner's ARDC shall convene and conduct a new FBA and develop a BIP and return Petitioner to petitioner's educational placement. It is further

ORDERED that based upon the record of the Parents' refusal to take Petitioner to the DAEP, where petitioner would have received special education and related services, no award of compensatory services is appropriate or forthcoming. It is further

ORDERED that this is an interim order related to Petitioner's issues presented in the Expedited Due Process Hearing solely. It is further

ORDERED that all other pending issues are appropriate for the general due process procedures. It is further

⁸ See *Manteca Unified Sch. Dist.*, 50 IDELR 298 (SEA CA 2008) (kicking a peer in the groin was directly related to the post-traumatic stress the student suffered as the result of a sexual assault).

ORDERED the abatement of the remaining issues shall be lifted on May 29, 2012. At that time a Revised Scheduling Order will be issued with all applicable procedural deadlines.

SIGNED this the 24th day of May 2012.

/s/

Deborah Heaton McElvaney
Special Education Hearing Officer

COPIES SENT TO:

Mr. Tomas Ramirez, III
Law Office of Tomas Ramirez III
Ramirez Professional Building
217 W. Hondo Avenue, Suite 200
Devine, Texas 78016
Counsel for Petitioner

Ms. Jan Watson
Walsh, Anderson, Gallegos, Green & Treviño, P.C.
P.O. Box 168046
Irving, Texas 75016-8046
Counsel for Respondent

DHM:cgc
07929//ExpDec