

DOCKET NO. 120-SE-0114

STUDENT bnf PARENTS § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER FOR**
§
WEST ORANGE COVE §
CONSOLIDATED ISD § **THE STATE OF TEXAS**

INTERIM DECISION ON EXPEDITED APPEAL

Petitioner, *** (hereinafter “the student”), through next friends, ***, requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*, to challenge the student’s disciplinary placement (“DAEP”). The Respondent is the West Orange Cove Consolidated Independent School District (hereinafter “WOCCISD” or the “District”).

PROCEDURAL HISTORY

Petitioner filed a Request for Due Process Hearing on January 8, 2014. The parties participated in a Pre-Hearing Conference on January 6, 2014, at which time the undersigned hearing officer granted a continuance for good cause for the hearing on the merits of Petitioner’s claims. On February 27, 2014, Petitioner filed an “Emergency Motion to Enforce Pendency or Stay Put,” complaining of the District’s placement of the student in a Disciplinary Alternative Education Placement (DAEP) for *** that violated the Student Code of Conduct. Following an ARD Committee meeting, the District members of the ARD Committee determined that the student’s conduct was not a manifestation of student’s disability, or in the alternative, the conduct was *** requiring mandatory DAEP placement. The District timely notified the parent of its intent to place the student in the DAEP for a minimum period of 30 days.

Petitioner appealed the manifestation determination pursuant to 34 CFR §300.532 effective February 27, 2014. The undersigned hearing officer scheduled an interim hearing on the disciplinary issues to occur within 20 school days of the appeal, March 26, 2014. The parties appeared for hearing on that date, with Petitioner appearing with counsel, Dorene Philpot. The Respondent appeared with attorneys of record, David Hodgins and Amber King. The Decision is timely issued and forwarded to the parties no later than ten school days following the hearing.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter’s record will be designated “RR” followed by the page number. References to the exhibits will be designated “P” for Petitioner or “R” for Respondent, followed by the exhibit number and page number as applicable.¹

¹ Many exhibits were produced by both Petitioner and Respondent. For ease of reference, only one party’s exhibit will be referenced.

ISSUES PRESENTED BY PETITIONER

The issues in a disciplinary placement appeal under IDEIA are limited. In this case, the issues are:

1. Whether the student's conduct was a manifestation of this disability:
 - a. Whether the student's conduct was caused by, or had a direct and substantial relationship to, student's disability; or
 - b. Whether the conduct in question was the direct result of the District's failure to implement the student's IEP. 34 CFR §300.530(e).
2. If the student's conduct was a manifestation of student's disability, whether the student inflicted serious bodily injury upon another person while at school, and therefore, special circumstances exist authorizing placement in the DAEP for a period not to exceed 45 school days. 34 CFR §300.530(g).
3. Whether the removal violated 34 CFR §300.530. *See* 34 CFR §300.532(b)(2).

The relief available to the hearing officer for the purpose of an interim placement decision is limited to a return of the student to student's previous placement if there is a finding that the removal violated 34 CFR §500.530 or that the conduct was a manifestation of the student's disability. 34 CFR § 500.532(b)(2).

FINDINGS OF FACT

1. WOCCISD is a consolidated independent school district responsible for providing the student a FAPE under IDEIA and its implementing regulations.
2. The student is a *** year old, *** grade student who is eligible for special education and related services as a student with Autism and Emotional Disturbance. P10; R1.² The student receives academic instruction in the general education setting.
3. According to the student's FIE and psychological evaluation administered in December, 2010, the student's Emotional Disturbance is based upon a general pervasive mood of unhappiness or depression, an inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers, and inappropriate types of behavior or feelings under normal circumstances. R1-WOC000209. The psychologist diagnosed the student with Bi-Polar Disorder and ADHD. *Id.* The District's assessment is not current, due in part to the parent's revocation of consent. R6. The District filed a counterclaim in the underlying due process action seeking an order

²Petitioner asserts that the two eligibility classifications are mutually exclusive pursuant to 34 CFR §300.8(c)(1)(ii). The student's eligibility classification, and the impact on educational programming, is an issue for the hearing on the merits and not an issue for the disciplinary hearing.

overriding the parent's lack of consent. The evaluations in the record, however, are relevant to the issues for this hearing.

4. According to a psychological evaluation completed in July, 2011, the student was diagnosed with Asperger's Disorder and ADHD-Combined Type. The report identified hyperactivity, impulsivity and anger problems as issues to be addressed. R2-WOC000224. The psychologist reported that the student has limited coping skills and significant stress overload. As a consequence, student is at significant risk of overt anxiety, tension, nervousness, irritability, loss of self-control and impulsive behavior. *Id. at* WOC000220. Additionally, student demonstrates a tendency to repress angry feelings and then have explosive anger, as well as rigid thought processes. *Id.* According to the psychologist, the student works very hard at containing emotions to the point of interfering with student's ability to exercise good judgment and limit self-control. Notwithstanding these observations, the psychologist also acknowledged that the student does have a sense of responsibility for student's actions. *Id. at* WOC000221.

5. A Functional Behavior Assessment conducted in April, 2013 indicates that the student is physically and verbally aggressive, disruptive and insubordinate and has learned to receive attention from adults through student's acting out behaviors or engages in the behaviors to avoid tasks. The adult attention then negatively reinforces the behaviors. R3-WOCO000236. The evaluator recommended a crisis plan for the student to be implemented if student's behaviors escalated to an unmanageable condition. In such event student would be moved to a calm, less stimulating environment. Once student returns to a calm and manageable state, student would be moved to student's regular schedule or other placement depending on the infraction. The evaluator recommended the development of a BIP as well as social skills training. *Id. at* WOC000237-242.

6. The evaluator specifically recommended reduction of social interactions in which the student is likely to become aggressive as well as social skills training and counseling. *Id. at* WOC000242.

7. As of the date of the FBA, the student had received *** disciplinary referrals, including *** for physical aggression, *** for disruptive or insubordinate behavior, and *** for horseplay. *Id. at* WOC000253. One teacher reported that fighting and/or physical aggression occurred on a weekly basis. *Id. at* WOC000258.

8. One physical aggression referral involved an altercation initiated by the student after ***. R4-WOC000290. This particular incident was initiated by the student and appeared to be planned, even if student was aided by others. According to the discipline reports, the altercation was the continuation of a dispute ***. P22-21. However, the incident does reflect the student's limited coping skills and anger problems, even though it would appear to be a planned rather than an impulsive act. There are other referrals, however, where the behavior would appear to be impulsive or involve off-task behavior. For example, the student engaged in horseplay in class to avoid class work on more than one occasion and *** during horseplay on other occasions. *Id. at* WOC000291-296. There are other instances of fighting and aggressive behavior.

9. On June 6, 2013, the ARD Committee convened to review the FBA and the student's BIP. The ARD Committee noted the student's non-compliant and insubordinate behavior in the classroom, even with supports being implemented. P6-9. The IEP contains a reference to a Behavior Intervention Plan for the 2012-2013 school year, but not for the 2013-2014 school year. A cooling-off period is listed as an accommodation in every classroom setting. P6-5, 7, 10. The IEP contains a statement that the student's disability affects student's involvement or progress in the general curriculum due to emotional and behavioral issues. P6-3. However, the ARD Committee did not adopt behavioral goals or a BIP. Rather, the ARD Committee elected to implement the use of an agenda notebook to assist the student in self-regulation of student's behaviors. P6; RR81-84; P24-74. According to the LSSP, the agenda notebook was to be used in lieu of a BIP. RR82; P24-75.

10. On November 14, 2013, the ARD Committee convened to address the student's behavior and student's IEP. At the time of the ARD, the student had received *** disciplinary referrals for *** and *** for rude language, with out-of-school suspensions for ***. P9-16-17. The ARD Committee reviewed the student's IEP and adopted goals and objectives to address verbal and physical aggression and self-control. Each targeted behavior is addressed by the same basic intervention, which is providing access to a cooling off place upon request of the student and use of a daily behavior chart (or agenda) upon request of the student. P9-13-15.³ Although the minutes state that a BIP was reviewed and updated, there is no BIP. Although the IEP contains behavioral goals, they are neither specific nor measurable. P9-14-15.

11. The day following the November 14, 2013, ARD Committee meeting, the LSSP wrote a memorandum to the Special Education Director (who was present at the June and November meetings), documenting that her FBA and proposed BIP had been rejected by the June ARD Committee and her understanding that the June and November ARD Committees had adopted the agenda notebook as the student's BIP.⁴ RR83; R24-74.

12. On ***, 2014, the student became involved in an altercation ***. ***. RR214. On this date, the teacher reported that the student had been disruptive in class, had used inappropriate language ***, and had ***. The teacher previously redirected the student when student would not remain in student's seat and ***. The teacher signaled for assistance by pressing an alert button within the classroom as she sent the student ***. According to the teacher, the student did not request a cooling off period and walked calmly ***. ***. As the teacher turned toward ***, student ***. The teacher, in an effort to stop the altercation, *** and was struck by the student ***. The student eventually stopped and went to the office. *See testimony of teacher RR240-266; R8.*

13. The teacher testified that she experienced redness, swelling and pain and missed one day of work to go to the doctor. RR224. There was no testimony that she experienced protracted

³ While requiring a verbally or physically aggressive student to request a cooling off period or request use of an agenda notebook as a prerequisite to implementation is inappropriate, the appropriateness (or inappropriateness) of the IEP and behavioral goals is appropriately addressed at the hearing on the merits and not within the context of this disciplinary placement hearing.

⁴ The agenda notebook, as described, is a tool where the student can record student's own behavior and feelings and present it to teachers for signature. This does not meet the definition of a BIP in that it fails to identify target behaviors and positive behavioral supports and strategies to address those behaviors. 34 CFR §300.324(a)(2).

loss of use of *** or disfigurement, other than she said *** is “still a little sore.” There is no evidence the teacher sought further medical care. There is no evidence that the teacher suffered psychological trauma that rises to the level of serious bodily injury. I do not find the District’s argument that the teacher experienced serious bodily injury to be credible.

14. During the hearing, the teacher characterized the assault on her as accidental. RR257. However, it was obvious that *** was not accidental and continued after the teacher moved following being hit. *See video of incident*, P27.

15. On ***, 2014, the assistant principal completed an investigation and recommended that the student should be placed in the DAEP for a minimum period of 30 days. R8. The student was placed in ISS pending the ARD meeting. RR21.

16. The parent appealed the assistant principal’s recommendation to the principal, who upheld the decision. R9; P9.

17. The ARD Committee convened on ***, 2014, to conduct a manifestation determination review (MDR). Prior to the meeting, the District’s LSSP reviewed the student’s entire special education folder, including prior IEPs, evaluations, prior discipline referrals, as well as the witness statements for the incident in question. RR44-45. The LSSP’s report was provided to all members of the ARD Committee, including the parents, and she summarized it during the meeting. R12; RR21. The principal also summarized her investigation for the ARD Committee. RR21. The ARD Committee, in reviewing the report, also considered the student’s disciplinary history for the school year.

18. The parent presented an outside evaluation to the ARD Committee during the MDR meeting. R21; R12. The ARD Committee recessed in order for the LSSP to review the report.⁵ The LSSP reported to the ARD Committee that the evaluator, who had previously evaluated the student, now diagnosed the student with Autism Spectrum Disorder and ADHD, and did not include an emotional disturbance diagnosis. R21. The evaluation contained no school input. The LSSP reported that the evaluation did not change her recommendation. R12; R21.

19. The parent and her advocate fully participated in the ARD Committee meeting, which at times was contentious. The parent asked to delay the meeting so she could discuss the issues with counsel, but the District representative had provided notice to the parent and her attorney of the date and time of the meeting and informed the parent that they would continue with the manifestation determination. R21; R10; R12.

20. The ARD Committee discussed the video of the student’s behavior. On the tape, the student can be seen *** during the time leading up to the incident. R20; P27. The parent reported that the student *** when student is agitated and that the behavior was in fact, an indicator that student was escalating rather than cooling off. R21. Although the District alleged that the student

⁵ Petitioner did not disclose the outside evaluation (P-30R). Therefore, pursuant to 34 CFR § 300.512(a)(3), the document was not admitted into evidence and will not be considered except to the extent it was read into the record of the ARD Committee meeting.

used the *** as a cooling-off measure, cooling-off was specifically defined in the IEP as an opportunity to go to the counselor's office. R7. I find that the student's *** was not a removal to a cooling-off place.

21. The parent requested that the ARD Committee consider the context of a previous incident between the student and ***. The LSSP's response was that the circumstances during that event were not necessarily relevant. R12; R21.

22. According to the new evaluation, as read into the ARD Committee meeting record, the student has difficulty shifting attention from one matter to another, lacks mental flexibility, disregards social expectations, may fail to anticipate consequences of student's actions and may misconstrue the boundaries of appropriate behavior, causing student to make the same mistakes repeatedly. RR21.

23. The student's Special Discipline Plan for Administrative Intervention that was in effect at the time of the manifestation ARD and a part of the student's IEP did not provide for AEP placement as an option for discipline, although it allowed for "emergency removal." P3-23; RR109. At the conclusion of the MDR determination, the school members of the ARD Committee, at the request of the assistant principal, recommended that the Plan be removed from student's IEP altogether, after the ARD Committee made the decision to place the student in the DAEP. P10-34; R21.

24. Petitioner called an expert who testified that based on her review of the records she formed the opinion that the student's conduct was a manifestation of this disability. (See testimony of ***). Respondent called an expert who testified that based on her review of the records and consideration of hearing testimony she formed the opinion that the conduct was not a manifestation of the student's disability. (See testimony of ***). Neither expert had ever met with or evaluated the student or conducted an independent investigation. In other words, they based their opinion solely on the testimony and the records that are available to me as the hearing officer. I did not find either expert's testimony to be helpful or probative. Evaluation of the student's conduct, based on the facts and the record in this case, does not require the specialized knowledge of an expert.

25. Respondent's LSSP also provided expert testimony that in her opinion the student's conduct was not a manifestation of student's disability. However, the witness's credibility was undermined by other testimony she provided, such as the agenda being adopted as a BIP (RR82-83) and that the term "AEP" in the student's Special *Discipline* Plan for Administrative Intervention referred to an alternative program for at risk students such as pregnant teenagers (RR375). The witness's statements were at best disingenuous, and her testimony, along with the District's position that teacher experienced serious bodily injury, undermines the credibility of the District's case.

DISCUSSION

If the Student's Conduct was a Manifestation of the Student's Disability, Did the Student Inflict Serious Bodily Injury on the Teacher?

The District alleges that special circumstances exist warranting an emergency removal to a DAEP even if the conduct in question was a manifestation of the student's disability pursuant to 34 CFR § 300.530(g)(3). Serious bodily injury, for the purposes of IDEIA, is to be given the same meaning as under 18 USC §1365(h)(3). That provision defines serious bodily injury as bodily injury which involves (a) substantial risk of death; (b) extreme physical pain; (c) protracted and obvious disfigurement; or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

In this case, the District asserts that the teacher experienced extreme physical pain as well as serious mental, emotional and psychological trauma due to ***. R11-WOC000579. The incident in this case occurred on ***, 2014, and was described in an accident report as a "sprain." According to District records, the teacher missed one day of work, reported soreness ***. R17. The teacher also created a hand-written statement the day following the incident. R12-WOC000612. By all accounts, she was able to clearly communicate the events to school personnel and returned to her classroom immediately after the event. R12-WOC000616.

The facts in this case are similar to the facts in *Moon Township Area School District*, 113 LRP 3142 (Penn. State Educ. Agency, 2012). In that case, a teacher was injured during the process of attempting to calm an aggressive student. The student threw objects at and struck the teacher, causing an injury that required her to obtain a tetanus shot. The school argued the teacher experienced severe pain because she had difficulty sleeping due to keeping her arms elevated and iced and experienced pain and side effects from antibiotics and tetanus shot. The hearing officer disagreed, reasoning that the term "extreme pain" must be analyzed within the context of the remainder of the definition, including protracted and obvious disfigurement, risk of death, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. *Id.* Although in this case it is certain the teacher experienced pain, or bodily injury, there is no evidence that her injury rose to the level of serious bodily injury when considered in light of the entire definition. The District also argues that the teacher suffered psychological trauma as a justification for determining the student caused serious bodily injury. While it is apparent the event was disconcerting to the teacher at the time, and perhaps for a time thereafter, the teacher did not appear to have "protracted" loss of a mental faculty in that she returned to her duties in the classroom after missing one day of work and did not appear to be under any continued stress from the event during the hearing. The District's argument that the student inflicted serious bodily injury upon another is wholly without merit. Therefore, emergency removal to the DAEP irrespective of the manifestation determination was not warranted.

Was the Student's Conduct Caused By or Did it Have a Direct and Substantial Relationship to student's Disability?

The Student's disability categories are Autism and Emotional Disturbance, which arguably are mutually exclusive. However, previous evaluators diagnosed the student with Bi-Polar Disorder, ADHD, and Autism Spectrum Disorder (Asperger's) and identified certain accompanying behavioral characteristics as impeding the student's performance, including impulsivity, anger, defiance, verbal and physical aggression, difficulty in maintaining interpersonal relationships, low frustration tolerance, anxiety, over-sensitivity to criticism leading to anger outbursts, frequent tantrums,

becoming easily overwhelmed, and rigid thought processes. R1; R2. The student's discipline referral record and evaluative history are replete with references of physical aggression toward others and insubordination. In fact, during the Spring of 2013, an ARD Committee convened for the specific purpose of reviewing a Functional Behavior Assessment and BIP, which ultimately the ARD Committee declined to adopt. P6. The FBA contained information from the student's teachers describing the student's problem behaviors as physical and verbal aggression, disruptive, harassment, and insubordination. R3-WOC000257-263. One teacher reported that the problem behavior could last "several minutes and beyond" and could be severe. R3-WOC000261. One teacher reported that the behavior occurred weekly. R3-WOC000258. Two of the teachers reported that the behavior is likely to occur during unstructured time or transitions. *Id.*, 257-263. The FBA contained recommendations for social skills training to address the student's physical and verbal aggression as well as counseling to teach the student specific stress management techniques. R3-WOC000242. Additionally, the LSSP recommended that the teachers maintain supervision so the student would not be placed in situations where student may become aggressive. *Id.*

Unfortunately, in this case, the teacher, although well-meaning, ***. There are varying student reports of the incident which took place in the classroom immediately preceding the event ***. According to some of the statements, ***. Other reports identify only the student as ***. It is clear, however, that *** the student was the aggressor. R8. However, it is impossible to evaluate the incident *** without placing it in context of the events in the classroom. The student wandered the room, was not compliant with requests to be seated or work, used inappropriate language, and did not respond to redirection to the point that the teacher contacted student's mother. R8-WOC000549. It was following these events that *** and the teacher ultimately ***. Although she ***, she turned her back on the student when *** occurred. The student *** immediately before the incident for approximately 47 seconds. R11-WOC000576. It is reasonable to conclude, based on the evidence, that if the student was agitated to the point of *** in the classroom, the *** is a continued indicator of student's agitation. The student has a history of aggressive behaviors during transition times and directed at peers, an inability to relate to peers, poor self-control, and a tendency to fix on thoughts or engage in rigid thought processes. Sending the student *** for the altercation to continue. The student undoubtedly initiated ***, and in the process, struck the teacher as she attempted to ***. This is not a case involving a student with a learning disability who brings drugs or weapons to school or in some other manner violates the Student Code of Conduct totally askew from student's disability. Rather, the student has disabilities which manifest themselves in aggressive behavior, a lack of coping skills, poor self-control, and anger. The student's conduct, when placed in context of student's aggressive history and the events in the classroom, was caused by and had a direct and substantial relationship to student's disability.

The District asserts that because previous psychological reports stated that the student has a sense of responsibility for student's actions, student's behavior cannot be a manifestation of student's disability. *See* R2. The District's evaluator advised that the student's emotional disturbance does not excuse poor behavioral choices, especially student's oppositional behavior and aggression. R1. However, a sense of responsibility for one's actions after the fact does not negate the substantial relationship between the behavior and the disability when viewed at the inception of the behavior. The record, when viewed as a whole, does not support the District's conclusion that the student's behavior was not a manifestation of student's disability. In sum, the student's disability

manifests itself in aggression, limited coping skills, and lack of self-control. The student's behavior on the date in question was a manifestation of student's disability pursuant to 34 CFR §300.530(e)(1)(i).

Was the Conduct the Direct Result of the District's Failure to Implement the IEP?

Having resolved the question as to whether the conduct was caused by or had a direct and substantial relationship to the student's disability in Petitioner's favor, the issue of the relationship between the implementation of the IEP and the student's conduct is moot. Therefore, I make no findings on this issue.

CONCLUSIONS OF LAW

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations. The student resides within the physical boundaries of the WOCCISD.

2. WOCCISD is responsible for providing the student a FAPE under IDEIA and its implementing regulations.

3. Petitioner, as the party challenging the District's decision to place the student in the DAEP bears the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has met petitioner's burden.

4. The ARD Committee failed to conduct an appropriate MDR, pursuant to 34 CFR §530(e). Petitioner's conduct was caused by, or had a direct and substantial relationship to, the student's disabilities.

ORDER AND RELIEF

The interim relief in this case is limited to an order requiring the District to return the student to student's previous placement and to take actions required under IDEIA upon a finding that the conduct was a manifestation of the student's disability. 34 CFR §300.530(f); §300.532(b). Therefore, based on 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 IN PART as follows:

1. IT IS ORDERED that Petitioner may not be disciplined for this violation of the Student Code of Conduct.

2. IT IS ORDERED that Respondent shall return the student to student's placement in effect prior to the placement in the DAEP.

3. IT IS ORDERED that Respondent shall convene an ARD Committee meeting within five school days of April 9, 2014, to implement this decision. Based on the finding that the

conduct was a manifestation of the student's disability, the Respondent shall conduct a new FBA and develop a BIP to address the student's behavior.

4. IT IS ORDERED that this is an interim order related to the student's disciplinary appeal solely.

5. IT IS ORDERED that all remaining due process issues will be considered at the hearing on the merits of the Petitioner's Request for Due Process.

6. IT IS ORDERED that all prior scheduling orders shall remain in full force and effect.

Signed and entered this 9th day of April, 2014.

Sharon M. Ramage
Special Education Hearing Officer

NOTICE TO THE PARTIES

This Interim Decision is final and is appealable to state or federal district court as to the appeal of the student's disciplinary placement.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of Federal and State Education Policy of the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SYNOPSIS

Issue No. 1: Whether the student's conduct was a manifestation of student's disability.

Held: For Petitioner. The conduct was caused by, or had a direct and substantial relationship to, the student's disability. Additionally, the student did not inflict serious bodily injury upon another while at school. The District's placement of the student in the DAEP was not authorized.

Citation: 34 CFR §300.530(e)(1)(i); 34 CFR §300.530(g).