

**DOCKET NO. 134-SE-0122**

<b>STUDENT b/n/f PARENT,</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>Petitioners</b>	§	
	§	
<b>v.</b>	§	
	§	<b>HEARING OFFICER FOR</b>
	§	
<b>YSLETA INDEPENDENT SCHOOL DISTRICT,</b>	§	
<b>Respondent</b>	§	
	§	<b>THE STATE OF TEXAS</b>

**DECISION OF THE HEARING OFFICER**

**I. Statement of the Case**

This matter concerns a claim brought by Petitioner pursuant to the Individual with Disabilities Education Act [hereinafter IDEA], and its implementing state and federal regulations, for violations of the Act. In particular, the issues presented in this expedited matter concern whether the Student’s conduct on \*\*\*, 2021, that formed the basis for the District’s disciplinary action, that being the decision to change the Student’s placement to a Disciplinary Alternative Educational Program (hereinafter DAEP), was a manifestation of the Student’s disability or the result of the District’s failure to properly implement the Student’s Individualized Education Plan (IEP) including the Student’s Behavior Intervention Plan (BIP).

The hearing officer concludes that the Student’s conduct was a manifestation in that it was the direct result of the District’s failure to properly implement the Student’s BIP, making the change in placement improper.

**II. Procedural History**

Petitioners, Student, b/n/f Parent (collectively, Petitioner), filed a request for an expedited impartial due process hearing (the Complaint) pursuant to the Individuals with Disabilities Education Act (IDEA). The Complaint was received by the Texas Education Agency (TEA or Agency) on the 28<sup>th</sup> day of January, 2022, and the Notice of Filing of Request for a Special Education Due Process Hearing was issued by TEA on January 28, 2022. The Respondent to the Complaint is the Ysleta Independent School District (hereinafter District or Respondent). The Initial Scheduling Order was issued on January 29, 2022 and set the Pre-hearing Conference (PHC)

for February 15, 2022. In accordance with the Scheduling Order, the PHC was held on February 15, 2022, and the Order following the PHC was issued February 18, 2022. Order No. 2 also addressed and denied the Respondent's Motion to Dismiss on the basis of Mootness.

**a. Representatives**

Petitioner was represented throughout the case by counsel Mr. Sesenu Woldemariam of Texas RioGrande Legal Aid. The Respondent District was represented by Mr. Jose Martin of Richards, Lindsay & Martin, LLP.

**b. Mediation**

The parties had agreed to participate in mediation in lieu of a resolution session. The mediation was held on February 8, 2022, and no agreement was reached at that time.

**c. Continuances**

As this matter was filed and proceeded as an expedited matter, there were no continuances requested or granted.

**d. Preliminary Matters**

As noted in the procedural overview, a preliminary issue of mootness was presented to the hearing officer. On the 11<sup>th</sup> day of February, 2022, Respondent filed a Motion for Judgment on the Basis of Mootness, and on February 14, 2022 Petitioner filed a Response to the Motion. Thereafter, on February 16, 2022 Respondent filed its Reply to Petitioner's Response, and on February 17, 2022, Petitioner filed a Surreply. On February 18, 2022, Order No. 2 was issued denying Respondent's Motion.

**e. The Due Process Hearing**

In accordance with the scheduling order, the parties timely made their respective disclosures. The parties had also agreed to the admission of all of the exhibits that had been timely disclosed. The expedited due process hearing (DPH) was then conducted on February 21, 2022 on the Zoom platform, and lasted one day. The Petitioner continued to be represented by Mr. Woldemariam. Also attending the hearing were Ms. Amber Banks, a law graduate, who served to assist Petitioner's counsel, and Ms. \*\*\*, the Student's parent. The Respondent District continued to be represented by its legal counsel, Mr. Jose Martin, and Mr. \*\*\*, Director of Special Education for the District, attended the hearing as the District representative. In addition, Ms. \*\*\* was in attendance throughout the hearing and served as an interpreter for Ms. \*\*\*, the Student's parent.

#### f. Post Hearing Matters

Upon completion of the evidentiary due process hearing, but prior to the formal closure of the hearing, the parties acknowledged the expedited nature of the proceeding. In light of the District's calendar, the Decision Due Date of March 21, 2022, and the hearing transcript completion, the time for the submission of post-hearing briefs was set by agreement for March 11, 2022, and an Order so stating was issued March 3, 2022.

### III. Issues

#### A. Petitioner's Issues

Petitioner alleges that the District has incorrectly determined that the Student's conduct during an incident on \*\*\*, 2021 was not a manifestation of Student's disability and that the placement at the District's DAEP was improper. More specifically, Petitioner's claim consists of the following component issues:

- Whether the Student's Admission, Review, and Dismissal (ARD) Committee appropriately determined that the Student's conduct on \*\*\*, 2021 was not a manifestation of, or had a direct and substantial relationship to, the student's disabilities;
- Whether the Student's ARD committee failed to determine that the alleged conduct was the direct result of the District's failure to implement the Student's IEP; and, as a consequence,
- Whether the District's placement of Student at the DAEP for 45 days was proper.

#### B. Petitioner's Requested Relief

- That the decision of the ARD committee be overturned; and
- That a finding be issued that the Student's conduct was a manifestation of Student's disability or the result of the District's failure to implement Student's IEP.

#### C. Respondent's Issues and Legal Position

The District denies the allegations and contends that it properly conducted the MDR and the finding that the conduct was not a manifestation of, or had a substantial relationship, to Student's disability and that the District had properly implemented the Student's IEP and BIP was correct.

#### IV. Findings of Fact\*

1. The Student resides with Student's mother within the boundaries of the Ysleta Independent School District [hereinafter YISD or District], is \*\*\* years old, and currently in the \*\*\* grade at \*\*\* within the District.<sup>1</sup>
2. Student had been enrolled in the District during 2016 and 2017, as an evaluation was conducted in 2016, dated February \*\*\*, 2016, with a psychological evaluation done thereafter in 2017. Ms. \*\*\*, a Licensed Specialist in School Psychology (hereinafter LSSP) conducted the evaluation dated November \*\*\*, 2017. The evaluation concluded that the Student did not qualify for special education with an Emotional Disturbance (ED), but did meet eligibility of Other Health Impairment (OHI) with Attention Deficit Hyperactivity Disorder (hereinafter ADHD).<sup>2</sup>
3. Thereafter, the Student attended school in the \*\*\* Independent School District, and during Student's time in the \*\*\* district, the Student was also evaluated. The evaluation was dated March \*\*\*, 2019, with the report date of April \*\*\*, 2019. The evaluation was conducted by \*\*\* ISD's LSSP, Mr. \*\*\*, and it was noted to be a thorough evaluation. The determinations were that the Student did not qualify for special education under ED, and that Student would continue to receive services with the prior eligibilities of OHI, (ADHD and Oppositional Defiant Disorder (ODD)). A Revision ARD held October \*\*\*, 2020 noted the eligibility of OHI, including ADHD, ODD, and \*\*\*.<sup>3</sup>
4. Student transferred back to the Ysleta School District and enrolled in August, 2021. Upon re-enrollment in the District, the Student's initial ARD was held on September \*\*\*, 2021. Mr. \*\*\*, an Assistant Principal (AP) at \*\*\*, testified that the District, YISD, was not aware that the Student was a special education student.<sup>4</sup> Yet, the evidence clearly demonstrated that the Student attended Ysleta ISD a few years prior, and, as noted, that an evaluation was conducted by the District's LSSP, Ms. \*\*\* in November 2017.<sup>5</sup>

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\*References to the Due Process Hearing Record throughout this section are as follows: Citations to Petitioner's Exhibits and Respondent's Exhibits are designated with a notation of "P" or "R" respectively, followed by the exhibit number or letter and page number. Citations to Joint Exhibits are designated with a notation of "J", and followed by the exhibit number and page number. Citations to the transcript are designated with a notation of "T" followed by the page number.

<sup>1</sup> R.1.

<sup>2</sup> T.261; R.11.

<sup>3</sup> T.262; R. 12, R.16:3.

<sup>4</sup> T.70, 79.

<sup>5</sup> T. 261-262; R.11.

5. While Mr. \*\*\* testified that the concerns of \*\*\* were with bullying and foul language and not physical aggression,<sup>6</sup> the Student's IEP, dated September \*\*\*, 2021 noted target behavior as that to lessen both verbal and physical aggression and violence against peers, with additional concerns and target behaviors including lack of respect toward authority.<sup>7</sup>
6. Mr. \*\*\* testified that at the time of the ARD meeting, that being September \*\*\*, 2021, the District did not have all of the needed paperwork.<sup>8</sup> Yet, the ARD Committee determined that no need for a new evaluation existed. In fact, it was specifically noted in the deliberations that the District was continuing the prior eligibilities, as "the committee agrees it has sufficient date (sic) to continue with Student's eligibility, and therefore a formal evaluation will not be conducted".<sup>9</sup>
7. Some confusion was apparent as to whether, as Mr. \*\*\* testified, Ysleta ISD accepted the findings of \*\*\*, or did not, as the eligibility of \*\*\* was not included. However, the IEP concludes that the District was implementing the \*\*\* IEP without modification. It was also unclear as to what the needed paperwork was, as well as what was actually provided and relied on in continuing the eligibility.<sup>10</sup>
8. On \*\*\*, 2021, a sequence of events occurred that are the subject of this expedited due process hearing.
9. Prior to \*\*\*, 2021, during Student's enrollment in the District beginning in August 2021, the Student had several disciplinary incidents including \*\*\*, 2021; \*\*\*, 2021; \*\*\*, 2021; being tardy to class multiple times; and disrupting class by \*\*\*, and \*\*\*, 2021.<sup>11</sup>
10. The evidence demonstrated that on \*\*\*, 2021, around the \*\*\* hour, Student \*\*\*. Mr. \*\*\* who was on duty at that time, told the security officer \*\*\*, who had contacted him, to take \*\*\* to the counselor's office. Then Officer \*\*\* approached Mr. \*\*\* with the Student.<sup>12</sup>
11. The evidence demonstrates that after the \*\*\*, and that the Student (\*\*\*) was, at the direction of Mr. \*\*\*, taken by Officer \*\*\* to Ms. \*\*\*, a special education teacher who is assigned to work with the Student.<sup>13</sup> Evidence showed that during the Student's time with Ms. \*\*\*, Student was asked why Student was there, and given praise for not fighting. It was also reported that the Student was calm and willing to cooperate when Student left.<sup>14</sup>

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<sup>6</sup> T.71-72;

<sup>7</sup> T.73-74; P.10:17.

<sup>8</sup> T.80-81.

<sup>9</sup> T.75-76; P.10:33; R.13:33.

<sup>10</sup> T.81-82; R.13:33.

<sup>11</sup> T.21-24; R.9.

<sup>12</sup> T.27; R.2.

<sup>13</sup> T.28; R.2.

<sup>14</sup> R.17:5.

12. Evidence showed that at least \*\*\* police or security officers were involved during the time of the incident in question, although the evidence is unclear at times as to who was doing what at what time. Apparently it was Officer \*\*\* who brought the student back to Mr. \*\*\*' office after the meeting with Ms. \*\*\*.<sup>15</sup>
13. Mr. \*\*\* also testified that the Student then, when returning from Ms. \*\*\*' office, needed to write a statement. Further, that he, Mr. \*\*\*, talked to the Student and a statement was made that the Student wanted to 'end it' meaning, presumably, \*\*\*. Mr. \*\*\* then, with Officer \*\*\*, brought the \*\*\* together to discuss the matter, as a "mediation", which is included in the Student's IEP or BIP.<sup>16</sup>
14. The evidence indicated that as \*\*\*, there was an initial agreement to 'end it', also noting no one knew what 'it' was. Present with the \*\*\* were Mr. \*\*\* and Officer \*\*\*.<sup>17</sup> The conversation, however, soon resulted in the Student \*\*\* and Mr. \*\*\* then instructed Officers \*\*\* and \*\*\* to take the Student to his office. In doing so, Student \*\*\*. As security tried to stop Student, Student \*\*\*.<sup>18</sup>
15. Mr. \*\*\* testified that when he went back to his office, the Student was there \*\*\*. The testimony is unclear, however, as to when the \*\*\*.<sup>19</sup> Evidence also shows that Mr. \*\*\* then called the Student's mother and requested that she come to the campus. Testimony indicated that the initial reason for the call was the Student's safety and to request that Student's mother take Student home, so to remove Student from campus.<sup>20</sup>
16. The evidence revealed that upon the arrival of Student's mother and grandmother, Mr. \*\*\* engaged them in a conversation about the incident. The Student remained in the room and did not leave the campus. After the initial discussion, Student was invited to join the conversation, and the incident continued to be discussed. During this time, argumentation among all present transpired. Everyone remained in the room, \*\*\*, discussing the incident, resulting in the Student becoming more and more agitated.<sup>21</sup>
17. While the details are unclear, it appears from the evidence presented that the Student became, and continued to be, worked up, \*\*\*. The Student continued to \*\*\*, while Student's mother and grandmother attempted to get Student to stop.<sup>22</sup> At some point during this exchange, an officer, the SRO \*\*\*, threatened \*\*\* Student. Also present was Officer \*\*\*.<sup>23</sup>

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<sup>15</sup> T.30; R.2.

<sup>16</sup> T.31-32, 34-35, 193.

<sup>17</sup> T.35-37.

<sup>18</sup> T.36-39; R.2, R.3.

<sup>19</sup> T.41-45; R.2.

<sup>20</sup> T.193-194.

<sup>21</sup> T.45-50; R.2.

<sup>22</sup> T.54, 166.

<sup>23</sup> T. 54-55; R.4.

18. The Student's mother and grandmother, who were present, were apparently also trying to calm Student down.<sup>24</sup> The Student continued making statements \*\*\*, stating essentially that \*\*\*.<sup>25</sup>
19. The evidence showed that the approximate duration of this conversation and exchange was between forty-five and fifty minutes. The estimated duration of the entirety of the events of that day was about three hours.<sup>26</sup>
20. No credible evidence was presented that indicated that any effort was made by the Assistant Principal, Mr. \*\*\*, a member of the Student's ARD committee and who was present throughout the entirety of the incidents in\*\*\*, to calm the Student. There was no evidence provided that the Student was provided a cool down location or other quiet place for the Student to regain control, as set forth in the Student's BIP.
21. Although some uncertainty was apparent with regard to the Student's specific disabilities under the OHI eligibility,<sup>27</sup> it is clear that the IEP, dated September \*\*\*, 2021 and in place at the time of the incident, included notations as to verbal and physical aggression and explosive behavior. The BIP included providing access or placing the Student in a quiet, non-threatening, non-stimulating place.<sup>28</sup>
22. Mr. \*\*\* stated that he did not intervene as it was his position that once the officers \*\*\*, that it was a police matter. The \*\*\*, however, occurred at the end of the 45-50 minute time period.<sup>29</sup>
23. The evidence demonstrated that near the end of the 45-50 minutes in \*\*\*, SRO \*\*\* requested that the Student \*\*\*. Student complied and \*\*\*.<sup>30</sup>
24. The Student then \*\*\*. As the officer was attempting to \*\*\*.<sup>31</sup>
25. Officer \*\*\* \*\*\*. The officers were never informed about the student's BIP or the need to allow the Student a space or time to cool down.<sup>32</sup>

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<sup>24</sup> T.60; 166-167.

<sup>25</sup> T.54.

<sup>26</sup> T.60, 182.

<sup>27</sup> T.80-81, 232-233, 267.

<sup>28</sup> R.13:47.

<sup>29</sup> T.60-62.

<sup>30</sup> T.55-56, 60, 169.

<sup>31</sup> T.57-58; R.3; R.4; R.14:13.

<sup>32</sup> T.58; 168-169.

26. As Student's mother and grandmother continued to \*\*\*.<sup>33</sup> Thereafter, the Student was attended to by the school nurse who \*\*\*, and upon request, \*\*\* (sic).<sup>34</sup>
27. Although some of the testimony indicated that the student had prepared to \*\*\*, the statements of the officers themselves describe the events somewhat differently. The statement of \*\*\* and the \*\*\* Police Department (\*\*\*) incident report both noted that as the Student was \*\*\*. It was when the officers were \*\*\* that the incidents occurred.<sup>35</sup>
28. The District then, as a result of the incident, changed the Student's placement. Student was assigned to the District's Disciplinary Alternative Education Program (DAEP), \*\*\*, for 45 days.<sup>36</sup>
29. On the \*\*\* day of October, 2021, more than a month after the incident, the District conducted a Manifestation Determination Review (MDR) to assess whether the conduct of the Student, and specifically the action at the end of the incident in question involving Officers \*\*\* and \*\*\*, was a manifestation of, or substantially related to, Student's disability; or whether the conduct in question was the result of the District's failure to implement the Student's IEP(BIP).<sup>37</sup>
30. As noted, only the last incident involving officers \*\*\* and \*\*\* was chosen for the implementation of disciplinary placement, although the earlier action on the \*\*\* of \*\*\* 2021 was included in the compilation of disciplinary referrals.<sup>38</sup>
31. At the MDR ARD meeting, the committee considered the disciplinary issue, and reached a decision that the conduct in question was not a manifestation of, or substantially related to, Student's disability or the direct result of the District's failure to implement the IEP.<sup>39</sup> The Student's mother disagreed with the determination.
32. At that time, on October \*\*\*, 2021, the ARD committee also revised the Student's BIP, and provided that attempting any mediation or meeting with \*\*\* would only occur after two days from any incident, and that counseling services were increased.<sup>40</sup>
33. The Student then attended the DAEP from November \*\*\*, 2021 until January \*\*\*, 2022 thus serving the entirety of Student's placement. The evidence demonstrated that during Student's time at the DEAP, Student was successful. The Student had only minor issues,

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<sup>33</sup> T.60, 170; R.2.

<sup>34</sup> R.3; R.4.

<sup>35</sup> R. 4; R.14:13.

<sup>36</sup> R.1.

<sup>37</sup> T.194-195; R.1.

<sup>38</sup> T.194-195; R.9.

<sup>39</sup> R.1:2-3.

<sup>40</sup> T. ;R.1:1,3.



and no disciplinary referrals. The evidence clearly demonstrated that the Student's BIP was implemented during Student's time at the DAEP, and when the Student challenged authority or was not meeting expectations, Student was easily redirected.<sup>41</sup>

34. The BIP that was implemented so successfully at the DAEP, while considered revised, had the same exact provision with regard to a "cooling off" or safe location as the one that was in effect on \*\*\*, 2021.<sup>42</sup>

35. Petitioner's expert on children's mental health, Ms. \*\*\*, testified that the reactions of the Student to the actions and comments of the police officer were expected under the circumstances, and consistent with the Student's disabilities. Specifically, she noted that it is common with \*\*\* that the more authority steps in, the more disruptive a person can become, and that time and space to calm down is needed. She also noted that restraint should be used only in extreme situations, and a struggle with restraint is expected. She also explained that the Student's comments \*\*\* are not necessarily evidence of a premeditated intent to \*\*\*.<sup>43</sup>

36. Petitioner's other expert on mental health, Ms. \*\*\*, who had worked with the Student, explained that most of Student's behaviors present as anger and agitation. When she works with Student, and Student becomes agitated, she provides some time and space for cool down, which has been very effective.<sup>44</sup>

37. Evidence also indicated that the characteristics of \*\*\* such as defiance and anger are also reinforced by, and combine with, the mood disorder and irritability of \*\*\*. Each can reinforce the other.<sup>45</sup>

38. Testimony from Ms. \*\*\* and \*\*\* the District's diagnostician, noted that \*\*\* behavior does not generally manifest with ADHD or \*\*\* or \*\*\* or mood disruption.<sup>46</sup> However, others noted that the restraint and \*\*\* can be a trigger for even more defiant behavior and impulsivity.<sup>47</sup>

39. Additional evidence showed that Student's mother has learned to work with Student when Student becomes angry, and that providing Student space and allowing Student to relax keeps things from escalating.<sup>48</sup>

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<sup>41</sup> T. 244-246, 272-274.

<sup>42</sup> T.272-273; R.1:11; R.13:47.

<sup>43</sup> T. 94, 101-102, 106, 107-110.

<sup>44</sup> T.147.

<sup>45</sup> T.153.

<sup>46</sup> T.231-232, 260, 264.

<sup>47</sup> T.155.

<sup>48</sup> T.172.

## V. Discussion

The following discussion reviews the legal standards that govern the considerations and issues brought forward in this case.

### A. Burden of Proof

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. The burden of persuasion or proof falls upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Ind. Sch. Dist. v. Todd L.*, 999 F. 2d 127, 131 (5<sup>th</sup> Cir. 1993). No distinction has been established between the burden of proof in an administrative hearing or in a judicial proceeding. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5<sup>th</sup> Cir. 2009).

In terms of the application of the approach, the Fifth Circuit went on to establish that a presumption exists “in favor of a school system’s educational plan, placing the burden of proof on the party challenging it”. *White ex Rel. White v. Ascension Parish Sch. Bd.* 343 F.3d 373, 377 (5<sup>th</sup> Cir. 2003); *Teague* at 132. This expedited case seeks to overturn the Student’s MDR finding and disciplinary placement. The burden of proof is on Petitioner.

### B. Disciplinary Removals Under the IDEA

Under the IDEA, a change in placement to an alternative educational setting must afford a student with a disability who receives special education certain procedural and substantive rights. While school districts have the authority to discipline students with disabilities, in doing so, a school district must follow its code of student conduct and impose only discipline consistent with that imposed upon students without disabilities. 34 C.F.R. §300.530. In addition, when changing a student’s placement for disciplinary purposes, the district must first determine if the alleged conduct that violated the code of student conduct was a manifestation of the student’s disability; and if the placement is made, provide special educational services in the alternative placement. 34 C.F.R. §300.530.

### C. The Manifestation Determination Review

If students who qualify for special education violate the code of conduct of the local education agency (LEA) or commit an act that would be disciplined, that they are entitled to a review in order to determine whether that conduct was a manifestation of that student’s disability. Thus, a change of placement of a student with a disability who receives special

education services may only be made by an ARD committee after conducting a manifestation determination review within ten school days of any decision to change a student's placement. 34 C.F.R. §300.530 (e); TEX. EDUC. CODE §37.004 (a)-(b). More specifically, the ARD committee must:

(1)

...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 LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met. (*Emphasis added*). 34 C.F.R. §300.530 (e).

Should the ARD committee determine that the conduct in question was a manifestation of the student's disability, then the ARD committee must either modify any existing BIP, or conduct a functional behavioral assessment (FBA) and develop a BIP. 34 C.F.R. §300.530 (f).

The MDR process must involve a review of all of the relevant information in the student's file, and the IDEA provides that considerations with regard to the appropriateness of the change in placement may include any unique circumstances on a case-by-case basis. 34 C.F.R. §300.530(a). Further, if a child with a disability is assigned to a DAEP, then the LEA must assure that the student receives educational services so to participate in the curriculum and make progress on the student's goals.

#### D. Due Process Review of the MDR

Additionally, the IDEA provides that the parent of a child with a disability may appeal a disciplinary placement or manifestation determination decision through the due process hearing procedures. 34 C.F.R. §300.532 (a). The statute further provides that the due process hearing be an expedited one, as is the case in this matter.

## VI. Analysis

In this case, Petitioner brings forth issues surrounding the Student's conduct, and more specifically, whether, contrary to the finding of the Student's ARD committee, the conduct in question was a manifestation of the Student's disability. The following examines the issues presented, considering the evidence and the applicable law.

#### A. Preliminary Rulings

##### a. Mootness

As a preliminary matter, Respondent raised an issue with regard to mootness, contending that the matter should be dismissed. In support of the motion, Respondent noted that the Student had already completed Student's time in the DAEP, and was back to Student's home campus. Petitioner asserted that the claim was not just to reverse the placement, but that relief could be granted that would find that the ARD committee's finding during the MDR incorrect, and that the Student's conduct in question was a manifestation of Student's disabilities. Respondent's motion was denied, and the matter proceeded to the due process hearing.

##### b. Jurisdiction

In the Complaint, Petitioner also brings forth additional claims and causes of action under a number of Federal Acts, including, but not limited, to Section 504 or the Rehabilitation Act and the Americans with Disabilities Act, as well as a request for attorneys' fees. Noting that a hearing officer's jurisdiction is limited, the claims must be dismissed, as a special education hearing officer has jurisdiction only for claims under IDEA. The authority of a hearing officer under the IDEA is limited to determinations relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. Therefore, all claims not within the jurisdiction of the hearing officer are hereby dismissed.

#### B. Manifestation Determination

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. *Schaffer v. Weast*, 546 U.S. 49 (2005). This expedited case seeks to overturn the Student's ARD Committee MDR finding and resulting disciplinary placement. The burden of proof is on Petitioner. Petitioner contends that the MDR was in error, urging that the Student's conduct was a manifestation of Student's disability.

First, no claims of procedural violations were made with regard to the process of conducting the MDR. As noted, School districts may discipline students with disabilities, including removal to a disciplinary alternative educational setting (DAEP). The change in placement of a student with disability who receives special education services however, may only be made by

an ARD Committee after conducting a manifestation determination review. Tex. Educ. Code § 37.004 (a)(b); 20 U.S.C. § 1415(k); 34 C.F.R. §300.530 (e). The District was obligated to convene the MDR ADR Committee within ten school days.

The issue presented then, is whether the conduct in question is a manifestation of the Student's disability. In making this determination, two distinct questions must be answered: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. §300.530 (e)(1)(i)(ii). If the MDR ARD Committee determines either that the conduct was caused by, or had a direct and substantial relationship to, the student's disability, or that the conduct was directly related to a failure to implement the student's IEP, then the behavior is considered a manifestation of the student's disability. 34 C.F.R. § 300.530(e)(2).

As required by the IDEA, the District in this matter convened the Student's ARD Committee to consider the disciplinary placement in light of Student's disability. In conducting the MDR, the ARD committee, with the exception of the Student's mother, answered no to both questions, thereby determining that the conduct was not a manifestation. Respondent District strongly contends that since the Student had made statements in advance of \*\*\*, that the action could not have been impulsive, and the result of ADHD or \*\*. Impulsivity, however, while often associated with conduct of individuals with ADHD, is not a prerequisite to a determination that a student's conduct is a manifestation of, or substantially related to, the disability. The IDEA also provides that, when making a change in placement, school personnel may consider any unique circumstances on a case-by-case basis. 34 C.F.R. §300.530 (a).

The second, separate and distinct question is whether the conduct in question was a direct result of the District's failure to implement the Student's IEP. The Student's BIP, in place at the time of the incident, contained a provision for having Student access a quiet, non-threatening, non-stimulating place. Maintaining the environment in \*\*\* for over 45 minutes was, in fact, contradictory action. The environment was both stimulating and threatening, and could not be considered during that time a 'safe place' for the Student. Student was not provided an opportunity for 'cool down'. As the police action was not until the end of the time period, and only for a few minutes, there was more than ample time for the Student's IEP to be implemented. Moreover, it is clear from the evidence, that when the Student's IEP was implemented with fidelity, as was the case at the DAEP, that Student was successful and redirected without incident. The evidence established that the BIP is effective, and if implemented on \*\*\*, 2021, it is quite likely the incident would have been avoided. Thus, the evidence supports a finding that Student's conduct was the direct result of the District's failure to implement the Student's BIP.

As the condition in paragraph 34 C.F.R. §300.530 (e) (1)(ii) is met, then the conduct is hereby determined to be a manifestation of the Student's disability. As the District has already revised the Student's BIP, no further action is necessary.

## VII. Conclusions of Law

1. This Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 C.F.R. §300.301 and 19 TEX. ADMIN. CODE §89.1011.
2. The Ysleta Independent School District is responsible for properly identifying, evaluating, and serving students under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 C.F.R. §300.301, and 19 TEX. ADMIN. CODE §89.1011.
3. The jurisdiction of the hearing officer is limited to issues involving claims made under the IDEA. 34 C.F.R. §300.507; 34 C.F.R. §300.511.
4. Petitioner, as the party challenging the District's MDR finding, met the burden of proof on the claim asserted in this case, as the burden is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984).
5. Petitioner met the burden of proof in establishing that the conduct in question was the direct result of the District's failure to implement the IEP, and thus was a manifestation of the Student's disability. 34 C.F.R. §300.530(e)1; 34 C.F.R. §300.530(e)2.

## ORDERS

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law,

It is hereby ORDERED that all claims arising under any law other than the Individuals with Disabilities Education Act are outside the jurisdiction of this case, and are DISMISSED.

It is further ORDERED that Petitioner prevails on the appeal of the Manifestation Determination as the conduct in question was a Manifestation of the Student's disability.

All other relief not specifically stated herein is DENIED.

Signed this 21<sup>st</sup> day of March 2022.

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Kimberlee Kovach

Special Education Hearing Officer for the  
State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. 1415 I.2. 19 Tex. Admin. Code §89.1185(n); Tex. Gov't Code, § 2001.144(a)-(b)(g).