

DOCKET NO. 172-SE-0318A

STUDENT, b/n/f PARENT,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
v.	§	HEARING OFFICER FOR
	§	
CYPRESS-FAIRBANKS	§	
INDEPENDENT SCHOOL DISTRICT,	§	
Respondent	§	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, ***, b/n/f *** (Petitioner or Student), brought this expedited case against the Cypress-Fairbanks Independent School District (Respondent or District) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et. seq.* and its implementing state and federal regulations.

Petitioner filed a request for a due process hearing on March 21, 2018. The Texas Education Agency issued a Notice of Filing of Request for a Special Education Due Process Hearing the same day. Issues related to discipline of students with disabilities are subject to an expedited due process hearing. On March 22, 2018 the hearing officer bifurcated the complaint in Order No. 1 and Petitioner’s challenge to the District’s disciplinary decision and placement was assigned Docket No. 172-SE-0318A. Respondent filed its Response on March 29, 2018.

The main issue for decision in this expedited matter is whether Student’s conduct forming the basis of the District’s disciplinary placement was a manifestation of Student’s disability. Because the District concluded Student’s conduct was not a manifestation of Student’s disability, it imposed a disciplinary placement of 30 days. The hearing officer concludes Student’s conduct was not a manifestation of Student’s disability, and therefore Student’s disciplinary placement was proper.

A. Legal Representatives

Student was represented throughout this litigation by Student's mother and next friend, ***. Respondent was represented throughout this litigation by Marney Collins Sims, General Counsel for the District. ***, Director of Special Education for the District, participated as the party representative.

B. Resolution Session

The parties met in a Resolution Session on March 27, 2018 but did not reach agreement.

C. Preliminary Matters**1. Bifurcation**

The hearing officer concluded Petitioner's complaint should be bifurcated as it raised claims subject to the expedited hearing process for disciplinary matters under 34 C.F.R. § 300.532(c) as well as non-disciplinary claims related to denial of a Free Appropriate Public Education (FAPE) to Student. An Order Bifurcating Hearing was issued on March 22, 2018 in Order No. 1. Petitioner's remaining IDEA claims (Docket No. 172-SE-0318B) will be heard in a separate due process hearing on May 15-16, 2018.

2. Recusal Request

Petitioner requested recusal of the hearing officer and reconsideration Order No. 1 on March 22, 2018. The hearing officer denied both requests on March 27, 2018 in Order No. 3. The Texas Education Agency forwarded Petitioner's request to Hearing Officer Lynn Rubinett as required by 19 Tex. Admin. Code § 89.1170(g). Hearing Officer Rubinett denied Petitioner's recusal request on April 2, 2018.

II. DUE PROCESS HEARING

The due process hearing was conducted on April 18, 2018. Petitioner continued to be represented by Petitioner's parent and next friend, ***. ***, a family friend, attended to support Student's parent. Respondent continued to be represented by Marney Collins Sims, General Counsel for the District. ***, Director of Special Education for the District, attended as the District representative. The hearing was recorded and transcribed by a certified court reporter. The Decision of the Hearing Officer is due on May 2, 2018.

III. ISSUES

A. Petitioner's Issue

The sole issue raised by Petitioner in this case is whether Student's alleged conduct was a manifestation of Student's disability.

B. Respondent's Position

The District contends Student's Admission, Review, and Dismissal (ARD) Committee correctly determined Student's alleged conduct was not a manifestation of disability or the result of the District's failure to implement Student's Individualized Education Program (IEP).

IV. FINDINGS OF FACT

1. Student has *** disabilities due to a *** disorder, ***. ***, and cognitive deficits, including intellectual disability.¹ Student received *** services and attended *** in the District.²

¹ Tr. at 81-82, 84-85.

² Petitioner's Exhibit (P.) 16 at 2, 4.

2. Student is currently in the *** grade and receives special education and related services in the District as a student with an Other Health Impairment (OHI) due to *** and ***.³ Student's *** disorder caused cognitive deficits and Student tests in the moderate range of intellectual disability with an estimated Full Scale Intellectual Quotient of ***.⁴ Student has a history of *** and ***.⁵
3. Student is currently ***. Student's parent is deeply concerned about her ***'s future, including the possibility of ***.⁶ Student does not fully appreciate *** and the potential impact on Student's life and future.⁷ Throughout this litigation, parental concerns were raised about alleged *** of Student by District personnel when Student was in *** grade.⁸ The District adamantly denies any abuse occurred.
4. Student attends school at *** in the District, a program serving only students with disabilities, where Student has been a student since the fall of 2016.⁹ Student's educational placement is a self-contained *** classroom.¹⁰ Student requires constant supervision by staff to address Student's behavioral needs.¹¹ Student receives instruction as directed by Student's IEP in the *** classroom in the areas of ***.¹² Student's IEP calls for modified Texas Essential Knowledge and Skills (TEKS) curriculum appropriate to Student's instructional level and needs.¹³
5. Student's February ***, 2018 IEP included three Behavior goals with related objectives and two counseling goals. Behavior goals addressed socially appropriate personal space boundaries, following directives and redirection, ***, and identifying ***. Counseling goals focused on identifying *** and ways to avoid *** and identifying ways to ***.¹⁴
6. Student's behavior impedes Student's learning and that of other students and a Behavior Intervention Plan (BIP) is therefore a component of Student's educational program. Student's BIP in place at the time of the alleged conduct addressed: social skills deficits; ***, disruption of classroom/school activities; ***, ***, ***, violation of classroom rules;

³ P. 16 at 9, 19; Respondent's Exhibit (R.) 2 at 1-2; R. 6 at 21; Transcript (Tr.) at 118.

⁴ P. 4 at 3.

⁵ P. 11 at 2; P. 16 at 9; Tr. at 108-109.

⁶ Tr. at 101.

⁷ R. 2 at 6; Tr. at 98-99.

⁸ Complaint at 2.

⁹ Tr. at 117.

¹⁰ R. 2 at 1-2, 4.

¹¹ R. 2 at 2, 3; Tr. at 52.

¹² R. 2 at 25.

¹³ Tr. at 132.

¹⁴ R. 2 at 23-24.

- ***; and ***.¹⁵ Student's BIP addressed the target behaviors of ***, ***, ***; and ***. Student's BIP required close proximity supervision throughout the school day.¹⁶
7. Student has difficulty with *** at school and in the community.¹⁷ Student ***.¹⁸ Student struggles to connect with peers and has no friends.¹⁹ Strategies called for in Student's BIP and used by Student's Special Education teacher to address Student's social skills deficits include redirection and behavioral reminders, discouraging ***, reminding Student to ***.²⁰
8. In January 2018, ***.²¹ ***.²² The alleged incident occurred off campus. *** administrators were verbally notified *** and received written notification on ***.²³
9. Under The District's Student Code of Conduct, a *** is a *** Infraction requiring mandatory Disciplinary Alternative Educational Program (DAEP) placement.²⁴ In a letter dated January ***, 2018, *** administrators notified Student's parent of Student's suspension and the District's recommendation of a DAEP placement for 30 days. Student's parent was invited to discuss this recommendation in a meeting the following week and was provided notice of her right to appeal and IDEA Procedural Safeguards.²⁵
10. Student's ARD Committee convened on February ***, 2018 to conduct a Manifestation Determination Review (MDR) of Student's alleged off campus behavior ***.²⁶ Student's parent participated in the meeting.²⁷ The MDR ARD Committee considered information from Student's Special Education teacher as to Student's current functioning, the characteristics of a student with an OHI, reviewed Student's Present Levels of Academic Achievement and Functional Performance (PLAAFPs) and Student's progress towards mastery of Student's IEP goals and objectives.²⁸

¹⁵ R. 2 at 6.

¹⁶ R. 2 at 8.

¹⁷ Tr. at 62, 102.

¹⁸ R. 2 at 6; Tr. at 102.

¹⁹ Tr. at 102, 106.

²⁰ Tr. at 63-64, 70-71.

²¹ R. 1; R. 2 at 4; R. 5 at 1.

²² R. 2 at 4; Tr. at 118-119.

²³ R. 1; R. 2 at 6, 8; Tr. at 119.

²⁴ R. 5 at 6; Tr. at 120.

²⁵ R. 5 at 6.

²⁶ R. 2 at 34; Tr. at 121.

²⁷ R. 2 at 30.

²⁸ Tr. at 122.

11. Student's PLAAFPs in the area of Behavior showed Student enjoys positive interactions with adults on preferred topics. Student requires modeling, assistance, and positive reinforcement to follow directive(s) and participate in class activities. Student engages in the inappropriate behaviors targeted in Student's BIP, including ***. Behaviors included ***. Student has no history of *** at school.²⁹
12. Student's MDR ARD Committee found Student is not capable of understanding and following school rules as outlined in the District's Code of Conduct.³⁰ However, this does not mean Student may not be disciplined for alleged off campus conduct that Student's ARD Committee finds is not a manifestation of disability.
13. An experienced Licensed Specialist in School Psychology (LSSP) familiar with Student participated in the MDR ARD Committee. She did not find a causal or direct link between Student's alleged conduct and Student's disability. The LSSP further opined diminished cognitive functioning like Student exhibits would not cause a person to ***.³¹ With the exception of Student's parent, the MDR ARD Committee determined Student's alleged conduct was not caused by or have a direct and substantial relationship to Student's confirmed disabilities as a student with an OHI.³²
14. At this time, Student is identified only as a student with an OHI. Student's parent has declined to consent to additional evaluations proposed by the District since Student reenrolled in the fall of 2016.³³ The District therefore lacks information needed to determine if Student is also a student with an Intellectual Disability or an Emotional Disturbance under IDEA. Based on available information, the MDR ARD Committee nonetheless also considered whether intellectual disability or emotional disturbance caused or directly and substantially contributed to the alleged conduct and answered these inquiries in the negative.³⁴
15. Student's ARD Committee also found Student's alleged conduct was not a result of the District's failure to implement Student's IEP.³⁵ Student's Special Education teacher described daily use of interventions consistent with Student's identified behavioral deficits and BIP. Student's Functional Behavioral Assessment (FBA) and BIP were revised by the MDR ARD Committee to address the behavior of *** due to a single, off campus event.³⁶

²⁹ R. 2 at 22-23

³⁰ R. 2 at 10; Tr. at 67, 81.

³¹ Tr. at 86-87.

³² R. 2 at 32; Tr. at 65, 86, 122-123.

³³ R. 2 at 10; R. 3; Tr. at 88.

³⁴ Tr. at 88-89, 124.

³⁵ R. 2 at 5; R. 3; Tr. at 66, 87, 89, 123-124.

³⁶ R. 2 at 4; R. 3; Tr. at 62-63.

16. Student's parent disagreed with the MDR ARD Committee's findings.³⁷ She argues her ***'s low cognitive functioning and restrictive placement without access to more peers explains Student's alleged conduct. She believes Student is not capable of understanding the District's Student Code of Conduct and should therefore not be disciplined. She argues the District failed to provide Student *** students receive.³⁸ Student, however, received modified instruction in this area consistent with TEKS *** curriculum for *** students during the 2016-2017 school year.³⁹
17. The MDR ARD Committee considered Student's needs and behaviors and determined the DAEP was not an appropriate placement. The committee recommended *** instructional setting without access to *** at ***.⁴⁰ Student's disciplinary placement began on February ***, 2018 and ended on April ***, 2018. Student then returned to Student's regular classroom at ***.⁴¹
18. Student's MDR ARD Committee agreed Student would receive *** counseling sessions in the area of social skills instruction during Student's disciplinary placement.⁴² The MDR ARD Committee also adopted two new counseling goals focusing on issues with Student's school and classroom behavior.⁴³ An LSSP helped develop these goals and then implemented them during Student's disciplinary placement.⁴⁴
19. An ARD Committee reconvened on April ***, 2018 before Student's return to Student's regular placement at ***.⁴⁵ The ARD Committee recommended continuation of the two counseling goals added at the February ***, 2018 MDR ARD meeting and continued direct counseling. A third goal was added to teach Student relaxation strategies for use when angry or frustrated.⁴⁶

V. DISCUSSION

A. Burden of Proof

³⁷ Tr. at 124.

³⁸ Tr. at 130, 139, 141.

³⁹ Tr. at 47.

⁴⁰ R. 3.

⁴¹ R. 6 at 21;; R. 2 at 5; R. 3; Tr. at 125-126.

⁴² Tr. at 127.

⁴³ R. 2 at 33, 44; R. 3; Tr. at 78, 89-90.

⁴⁴ R. 7; Tr. at 77, 83.

⁴⁵ Tr. at 90-91.

⁴⁶ R. 6 at 12; Tr. at 91, 127.

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement.⁴⁷ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.3d 127, 131 (5th Cir. 1993). This expedited case challenges Student's IEP to the extent its implementation is an issue, and also seeks to overturn Student's MDR finding and disciplinary placement. The burden of proof is therefore on Petitioner. *Schaffer*, 546 U.S. at 62.

B. School Notification of ***

State law requires ***. Subject to the student's rights under IDEA, state law directs school districts to place a student in a DAEP ****. ****. However, the change in 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. Tex. Educ. Code § 37.004(a)-(b).

C. Disciplinary Removals Under IDEA

School districts may discipline students with disabilities, including removal to a disciplinary alternative educational setting, if certain procedural and substantive rights under IDEA are afforded to the student. A school district must:

- follow its Student Code of Conduct;
- only impose discipline consistent with that imposed upon students without disabilities;
- when changing a student's placement for disciplinary purposes, establish if the alleged conduct that violated the Student Code of Conduct was a manifestation of disability; and
- provide educational services during disciplinary removals that are change in placement. 34 C.F.R. § 300.530.

⁴⁷ There is no distinction between the burden of proof administrative and judicial hearings. *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009).

The District received written notice of Student's ***. On January ***, 2018, the District provided written notice to Student's parent of the District's Student Code of Conduct provision requiring a mandatory DAEP placement for students ***. She was invited to attend a conference to discuss the District's recommendation and advised of her right to dispute it. Student's parent was also provided notice of IDEA's Procedural Safeguards because Student receives special education services. The purpose of the MDR ARD Committee held on February ***, 2018 was to consider whether Student violated the Student Code of Conduct and, if so, whether the alleged conduct was caused by or had a direct and substantial relationship to Student's disability. 34 C.F.R. § 300.530(e); Tex. Educ. Code § 37.004. After concluding Student's alleged conduct was not a manifestation of Student's disability and recommending a 30 day disciplinary placement, the MDR ARD Committee tailored the placement to Student's needs.

The District followed state and federal law and its Student Code of Conduct for imposing disciplinary consequences on students with disabilities. As required under IDEA, the District convened an MDR ARD Committee to discuss its disciplinary placement recommendation and connection between the alleged conduct and Student's disability. Student's MDR ARD Committee considered Student's behavioral and educational needs in recommending Student receive services in *** disciplinary classroom on *** without access to ***, rather than a DAEP. The District therefore followed the required process under IDEA before disciplining Student.

D. The Manifestation Determination Review

IDEA requires an ARD Committee to convene within 10 school days of any decision to change the placement of a student with a disability for an alleged violation of a Student Code of Conduct. The ARD Committee must review all relevant information in a student's file, including his or her IEP, teacher observations, and any relevant information provided by the parent. The ARD Committee then determines whether the alleged conduct was caused by or had a direct and substantial relationship to the student's disability, or was a direct result of the school district's failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(1)(ii); Tex. Educ. Code § 37.004(b). A parent who disagrees with this finding may request a special education due process hearing. 34 C.F.R. § 300.532(a).

1. Student's Recommended Disciplinary Placement

As a disciplinary consequence for violating the Student Code of Conduct, a school district may remove a student with a disability from his or her current educational placement for more than ten days for behavior that is not a manifestation of the student's disability. 34 C.F.R. § 300.530(c). When the District found Student's alleged conduct was not a manifestation of Student's disability, it could therefore impose a disciplinary consequence as applied to student without disabilities consistent with the Student Code of Conduct.

On February ***, 2018, the District convened an MDR ARD Committee and found Student violated the District's Student Code of Conduct when Student allegedly *** in an off campus incident. The District recommended the minimum mandatory sentence prescribed by the Student Code of Conduct for students ***. The MDR ARD Committee considered Student's behavioral and educational needs and determined Student would best be served *** disciplinary placement at ***, rather than a DAEP. The District's disciplinary placement of Student was therefore proper.

2. Relationship Between Student's Disability and Alleged Conduct

The evidence showed the District's finding that Student's alleged conduct of *** was not caused by or had a direct and substantial relationship to Student's disability was correct. With the exception of Student's parent, District members of the ARD Committee agreed with this finding. While Student has cognitive deficits and exhibits ***, apart from Student's parent's testimony, no credible evidence was presented to support a causal or direct and substantial link between Student's alleged conduct and Student's disability. Student's educators and other professionals present also found no direct link between Student's disability and the conduct at issue. This evidence was credible and supports the MDR finding.

3. Implementation of Student's IEP

The evidence showed the MDR ARD Committee correctly concluded Student's alleged conduct was not a result of the District's failure to implement Student's IEP. Student's BIP addressed certain *** and this behavior was known to District personnel. However, Student's alleged conduct was more serious than Student's known *** at school that included ***. Further, Student has no history of *** at school.

Importantly, Student's alleged conduct occurred off campus. Even for students receiving services under IDEA, there are limits to a school district's responsibilities. The District cannot reasonably be expected to anticipate or prevent all conduct by students with disabilities it serves in the community. Student's BIP adequately addressed Student's known behaviors at school and was implemented properly by District personnel. The District therefore did not err in finding Student's alleged conduct was not a result of its failure to implement Student's IEP. 34 C.F.R. § 300.530(e)(1)(ii).


VI. CONCLUSIONS OF LAW

1. Respondent complied with IDEA's requirements when it disciplined Student for violating the Student Code of Conduct after holding an MDR to determine whether the alleged conduct was caused by or had a direct and substantial relationship to Student's disability. 34 C.F.R. § 300.530.
2. Student's alleged conduct was not caused by and did not have a direct and substantial relationship to Student's disability. Petitioner did not meet Petitioner's burden of proving the conduct in question was a manifestation of Student's disability. Tex. Educ. Code § 37.004(b); 34 C.F.R. § 300.530(e)(1)(i); *Schaffer v. Weast*, 546 U.S. 49 (2005).
3. Student's alleged conduct was not a direct result of the District's failure to implement Student's IEP. 34 C.F.R. § 300.530(e)(1)(ii).

VII. ORDERS

Based upon the foregoing findings of fact and conclusions of law it is **ORDERED** that Petitioner's appeal of the manifestation determination and disciplinary placement at issue in this expedited hearing is **DENIED**.

SIGNED May 2, 2018.



Kathryn Lewis
Special Education Hearing Officer
For the State of Texas

VIII. 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 district court of the United States. Tex. Gov't. Code § 2001.144(a)(b); 19 Tex. Admin. Code § 89.1185(p).