

STUDENT <i>B/N/F</i> PARENT,	§	BEFORE A SPECIAL EDUCATION
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
NORTH EAST INDEPENDENT SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER IN EXPEDITED CASE

**I.
STATEMENT OF THE CASE**

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 (“IDEA”), 20 U.S.C. §1400 *et. seq.* Petitioner asserted multiple issues in Student’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 August ***, 2019. The MDRC found that Petitioner’s misconduct, ***, was neither a manifestation of Student’s disabilities nor a result of the District’s failure to implement Student’s individualized education program (“IEP”) or Student’s behavior intervention plan (“BIP”). Petitioner disagrees, asserting that Student’s resulting assignment to Respondent’s Disciplinary Alternative Educational Program (“DAEP”) for forty-five (45) days was a prohibited change in placement; as such, Respondent has deprived Petitioner of a free, appropriate public education (“FAPE”).

**II.
PROCEDURAL HISTORY**

On August 26, 2019, Student filed a Complaint with TEA against North East Independent School District (“Respondent” or “District” or “NEISD”), requesting an impartial Due Process Hearing, pursuant to IDEA. On August 26, 2019, TEA assigned this matter to me as the impartial Due Process Hearing Officer and sent a copy of the Complaint and Notice of Filing to Respondent.

On August 27, 2019, Respondent filed a Response to Complaint, Motion to Bifurcate, and Motion for Partial Dismissal. The basis for the Motion to Bifurcate related to Petitioner’s stated issues in Student’s Complaint, which included (1) issues about the placement of Petitioner under 34 C.F.R. §300.530 and/or §300.531, *i.e.*, disciplinary change in placement, and (2) general issues related to Petitioner’s special education program.

On August 27, 2019, the undersigned issued Order No. 1, which ordered bifurcation and scheduled the expedited hearing in compliance with the operative rules and regulations: the prehearing conference (“PHC”) would convene September 9, 2019; the Disclosure Deadline was set for September 17, 2019; the Hearing was set for September 24, 2019; and the Decision Deadline was set for October 8, 2019.¹

The Parties convened a Resolution Session in the expedited case but failed to settle the issues.

On September 9, 2019, the Parties and Hearing Officer convened the PHC. In attendance were the following: (1) Ms. Karen Dalglish Seal, Petitioner’s counsel; (2) Mr. Ricardo R. Lopez, Respondent’s counsel; (3) Ms. Maia Levenson, Respondent’s counsel; (4) the undersigned Hearing Officer; and (5) the court reporter, who made a record of the PHC. The Parties discussed the issues for this Expedited Hearing and confirmed that the original dates set out in Order No. 1 were available for the Expedited Hearing.

The Expedited Due Process Hearing convened on September 24, 2019. Both Parties introduced documentary evidence; Petitioner called several witnesses, who were cross-examined by Respondent; Respondent called several witnesses, who were cross-examined by Petitioner. During the hearing, Petitioner was represented by Student’s attorney, Ms. Karen Dalglish Seal. Also in attendance were Ms. ***, Student’s Parent, and Ms. ***, Student’s ***. Respondent was represented by counsel, Mr. Ricardo R. Lopez and Ms. Maia Levenson. Also in attendance were Mr. ***, Respondent’s Director for Psychological Services and Child Find; Ms. ***, the District’s Coordinator for Critical Cases; and Mr. ***, an observer with Respondent’s attorneys.

At the conclusion of the hearing, counsel requested time to make a written closing argument, which was granted. Under the applicable statutes, the Decision Deadline was confirmed to be October 8, 2019. Both Parties filed and served their closing arguments on October 4, 2019. This Decision of the Special Education Hearing Officer in Expedited Case is being delivered to the Parties on the statutory deadline: October 8, 2019.²

I. FINDINGS OF FACT

1. NEISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEA and its implementing rules and regulations.
2. Student *** qualifies for special education and related services under the primary disability of Autism (“AU”) and the secondary disability of Speech Impairment (“SI”) in the area of pragmatic language (R.4.1-2).
3. Student resides within NEISD’s jurisdictional boundaries with Student’s mother and ***. NEISD is responsible for providing Student with an appropriate education under IDEA and its federal and state implementing statutes.

¹ Finding that issues under the expedited and regular track timelines were intertwined, the undersigned issued an order bifurcating the case into case A, the expedited case, and case B, the regular track case: **401-SE-0819-A** contains the limited issues related to the disciplinary change in placement under the expedited hearing and shortened deadlines; **401-SE-0819-B** contains all remaining issues that fall under the regular due process hearing deadlines.

² References to the Expedited Due Process Hearing Record are identified as follows: “T.#.#” refers to the one-volume Court Reporter’s Transcription of testimony made on September 24, 2019, and the specific page and line numbers contained therein; “P.#.#” refers to Petitioner’s Exhibits by number and page; “R.#.#” refers to Respondent’s Exhibits by number and page.

School Year 2018-19:

4. Student attended *** through early Fall 2018 (R.5.30). Student enrolled in NEISD in October 2018 and was assigned to Student's home school, *** (R.5.1 & 33). Student's Parent informed the District that although Student had been evaluated for AU in 2016, Student did not qualify for special education and related services under this disability. Rather, Student was identified as a child with Attention Deficit, Hyperactivity Disorder ("ADHD"), mixed receptive/expressive language disorder, articulation disorder, ***, and sensory disorder (R.5.1).
5. In Fall 2018, Student's Parent requested that the District perform a Full and Individual Evaluation ("FIE"). The District agreed and conducted the assessments in December 2018 and January 2019 (R.5.1-2). This FIE was completed on January ***, 2019. The FIE Report found that Student met the TEA guidelines for AU and SI (R.5.34).

January ***, 2019, FIE:

6. Student's FIE revealed the following (R.5.33-34):
 - a. The intellectual assessment suggested that Student functions in the low average range, with adequate verbal problem-solving skills;
 - b. Informal data indicated that Student's adaptive behavior is less well-developed than what would be expected for a student of Student's age;
 - c. Informal and formal academic assessments suggested Student is functioning within grade and age expectations in the area of reading, with some weaknesses in math;
 - d. Test data suggested that Student manifests unique impairments often associated with an autism spectrum disorder; language and communication; sensory use and interests; and social relating and emotional responses;
7. Student's FIE demonstrated that Student has deficits in the following behavioral areas (R.5.34):
 - a. Pragmatic language, to include social communication;
 - g. Qualitative impairment in social interaction; and
 - h. Restricted repetitive and stereotypical patterns of behavior, interest, and activities.
8. Student's assessors recommended the following for the content of Student's IEP (R.5.35):
 - a. Teach appropriate problem-solving skills and conflict resolution;
 - b. Practice appropriate methods of gaining attention;
 - c. Increase conversation skills by increasing awareness of appropriate versus inappropriate

topics;

- d. Reduce occurrence of off-topic comments by teaching how to make appropriate comments; and
 - e. Teach unexpected versus expected behaviors.
9. Student demonstrated different behaviors during the assessment. Student constantly changed Student's sitting position; tapped Student's hands and feet; made fleeting eye contact; and failed to consistently look at the assessor during conversation (R.5.7).

February *, 2019 ARDC Meeting:**

10. Student's Admission, Review, and Dismissal Committee ("ARDC") met on February ***, 2019, to discuss the results of Student's FIE. The ARDC accepted the assessors' recommendation that Student qualified for special education eligibility under the categories of AU and SI.
11. In crafting Student's IEP and BIP, the ARDC reviewed teachers' comments regarding Student's behaviors: Student is***. Student demonstrated a high number of behaviors that adversely affect other students. Student ***, ***, ***, Student is often restless and has trouble controlling Student's impulses; however, Student is no more aggressive than others in Student's age group; Student has difficulty staying on task; Student engages in *** (R.5.3 &12).
12. The ARDC developed annual goals in SI, Math, English/Language Arts, and Behavior. The ARDC developed a BIP to help teachers and staff adapt classroom instruction, use additional materials, alter assignments and testing, and manage behavior (R.3.1)(R.5.11). In managing Student's behavior in class, the Committee included positive reinforcement, private discussion about behavior, reminders to stay on task, and seat Student near the teacher (R.5.12).
13. Student was enrolled in *** for intensive behavioral supports and received grade-level Texas Essential Knowledge and Skills ("TEKS") (R.2.18).
14. Noting that Student currently followed the Student Code of Conduct and participated in school-wide and classroom positive behavior supports, the ARDC determined that these behavior supports were sufficient for Student to make progress (R.2.27). Student would follow the Student Code of Conduct (R.3.1).
15. The February ***, 2019, ARDC reached consensus (R.2.21).
16. Student's BIP targeted off-task behaviors and included supports for use in the classroom and social skills training (R.3.1-2):
17. Regarding supports for the classroom environment, the BIP called for the following: set well-defined limits, rules, and task expectations; remove distractions; provide a structured environment; establish consistent routine; and provide Student with a quiet, non-threatening, non-stimulating place in order to regain control when needed (a safe area) (R.3.1).

18. Regarding classroom strategies, the BIP called for the following: set easily obtainable daily goals; offer choices; praise behaviorally appropriate students; provide nonverbal signal for appropriate behavior; planned ignoring of minor inappropriate behavior; and verbal reminders (R.3.1).
19. The BIP called for a reward system involving the Premack Principle, ³ positive reinforcers, and earned activities and privileges (R.3.1).
20. The BIP called for social skills training using the following supports: help student to use language (communication system) to label and communicate feelings; provide direct instruction in pro-social behaviors; teach alternative behaviors; and coach in problem-solving situations (R.3.2).
21. The BIP provided a list of consequences that were reasonably calculated to improve Student's behavior: review consequences before behavior escalates; signal nonverbal disapproval; ask Student to practice an appropriate response; allow peer pressure; withhold earned activities/privileges; offer Student a choice of changing Student's behavior or going to a cooling off area; and teacher-initiated cooling off period (R.3.2).
22. Student was successful during the 2018-19 school year. Student passed all of Student's classes and was promoted *** (R.7).

The * Incident: **, 2019**

23. On **, 2019, Student attended **. ** (T.167.20-168.5). ** (T.167.24-168.9). ** (T.168.14-16).
24. Student was in the classroom of a redirection teacher (T.166.4-20). The redirection teacher works with children to improve social skills and coping strategies (T.166.23-167.3).
25. There were ** students in the classroom, including Student. There were also three (3) adults in the classroom: the redirection teacher, a special education paraprofessional, and a partner teacher (T.169.15-170.3).
26. Student was compliant with all school rules between **. Student did not display any negative or impulsive or distracted behaviors (T.177-16-25).
27. ** (T.172.2-10) (R.10). **. ** (T.173.2-15).
28. **. ** (T.173.16-174.3). ** (T.174.8-14). ** (T.174.5-17).
29. ** (T.174.3-4) (R.10).
30. **. **. ** (T.174.23-176.1).

³ The Premack Principle can be used when one wants a child to do something, but the child finds the behavior undesirable. This Principle makes it easier to do an unpleasant activity by putting a pleasant activity right after it. An example of its use is: "if you want a piece of cake, you need to eat all of your peas." The child knows that accessing the reward is contingent upon completing the task. If the child still refuses to eat the peas, the child does not get the cake. The child is given the power to earn or lose the reinforcer.

31. ***. *** (T.176.7-16).
32. Student answered truthfully when asked if Student had ***. Student explained that *** (T.177.5-9) (R.10). Student's Mother was informed of the incident and met with the school administration to discuss the problem and the possible consequences for Student's violation of the Student's Code of Conduct (R.10).
33. On August ***, 2019, Student's mother met with school administration and was informed that because Student had ***, Student was being recommended for placement in the DAEP for forty-five (45) days (R.11).
34. Also on August ***, 2019, Student met with the school's Licensed Specialist in School Psychology ("LSSP"). Student explained to her that Student ***. Student confirmed that Student *** (R.4.30).
35. The school principal referred Student's case to the Pupil Personnel Services to conduct a Disciplinary Conference. The hearing was conducted on ***, 2019. Student testified to the Hearing Officer that Student would never *** at home because Student would get in trouble and that Student ***. The Hearing Officer ordered Student to be placed in the DAEP but deferred such placement until Student's MDRC could convene (T.18.19-25) (R.9).

The August *, 2019 MDRC Meeting:**

36. On August ***, 2019, Student's ARDC convened the mandatory MDR related to Student's false alarm. During this August ***, 2019, MDR, the Committee reviewed Student's current evaluation: Student's January ***, 2019, FIE (R.4.1).
37. The MDRC reviewed information from Student's IEP and BIP in the areas of reading, speech and related services, written expression, math, behavior, functional performance, science, and social studies (R.4.2-4).
38. The MDRC reviewed information from Student's Mother, who stated Student did not understand the ramifications of *** until after she explained it to Student (R.4.23).
39. The MDRC reviewed information from Student's Mother, who stated that the District was not implementing Student's IEP and BIP (R.4.23). Student's Mother failed to provide an example of such failure to implement.
40. The MDRC reviewed and adopted an additional goal and behavior accommodations (R.4.23).
41. The MDRC determined that Student's *** was not caused by, or had any direct and substantial relationship to, Student's AU disability (R.4.22-23). The MDRC determined that Student's *** was not the direct result of the District's failure to implement Student's IEP or BIP (R.4.31).
42. The MDRC adopted the recommendation of the Hearing Officer's August ***, 2019, recommendation that Student be placed in the DAEP for forty-five (45) days (R.4.23).

43. The MDRC agreed to the following placement criteria (R.4.23):
- a. Student will be placed in a setting in which Student can participate in the general curriculum and continue to receive services and modifications, including those described in Student's current IEP, that will enable Student to meet the goals set out in the IEP;
 - b. Student will be placed in a setting that will include services and modifications designed to address the behavior that resulted in the DAEP placement;
 - c. Student's placement was determined by a Hearing Officer and Student's disciplinary action was determined using procedures applicable to students without disabilities. Student's special education and disciplinary records were given to the Pupil Personnel Services Hearing Officer who will be responsible for making the final determination regarding the disciplinary action and the consequences to follow.⁴
44. Student's *** is a serious offense. Texas Penal Code ***.
45. The evidence supports a finding that Student knowingly ***.
46. The evidence does not support a finding that Student's conduct, ***, was caused by, or had a direct and substantial relationship, to Student's disabilities.
47. The evidence does not support a finding that Student's conduct, ***, was the direct result of the District's failure to implement Student's IEP and/or BIP.

IV. DISCUSSION

IDEA 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. 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).⁵ A child with a disability who is assigned to a DAEP must continue to receive education services

⁴ The Hearing Officer had already determined that Student would be placed in the DAEP for forty-five (45) days, subject to the MDRC's agreement.

⁵ The district may unilaterally remove the student to an interim alternative educational setting 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.

to enable the child to continue to participate in the general education curriculum and to make progress on Student's goals. 34 C.F.R. §300.530(d). The student must receive, where appropriate, an FBA and behavioral intervention services and modification that are designed to address the behavior violation so that it does not recur.

A. Basics of an MDR Appeal:

The MDR is an important discipline procedure under the IDEA. 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 IDEA-eligible student's violation of a code of conduct. 34 C.F.R. §300.530(e).⁶

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).

Because Student is eligible for special education and related services under the AU and SI categories, Student's ARDC had to convene to determine whether Student's placement at the DAEP for forty-five (45) days was a prohibited change of placement.

B. MDR Answers to MD Questions:

Student's Mother and Advocate attended the August^{***}, 2019, MDRC meeting. The MDRC reviewed Student's evaluations; relevant information related to Student's disability and behavior; Student's class participation and class work; anecdotal information provided by Student's teachers, paraprofessional, related services staff, and the school's administrators; the finding of the Pupil Personnel Hearing Officer; and the Parent's concerns and belief.

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 question, 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 appropriately considered all relevant information in reaching its determination that Student's misconduct was not caused by, or substantially related to, Student's disabilities.

Student claims that the behavior was certainly caused by, or had a substantial relationship, to Student's AU disability^{***}. However, the record does not support this premise. While there is ample evidence

⁶ A "change of placement" occurs when, as here, the district removes the IDEA-eligible student from Student's current educational placement for more than ten (10) consecutive school days. 34 C.F.R. §300.536.

of Student's unusual behaviors, ⁷ Student's *** does not evidence the type of behavior consistently shown by Student. When Student ***, Student knew what it meant ***; Student was inspired to ***; and Student knew Student could get in trouble for ***. Student relayed this information to the school's administrator prior to the arrival of Student's Mother. This incident occurred without any anger, frustration, impulsion, or agitation. Student made the decision ***, knowing what it meant, and knowing Student could get into trouble. This act cannot be linked to Student's AU disability.

b. Question 2: Implementation of Student'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, BIPs, teacher observation, and any other relevant information provided by the Parent. Notwithstanding the many strategies and supports provided to Student under Student's IEP and BIP, the sole concern voiced by Student was the MD must be set aside because Student's teacher failed to implement one (1) behavior strategy: she failed to ***.

In addressing Student's behavior, Student's redirection teacher instructed Student to *** Student complied. This shows the teacher's use of redirection, reminder to stay on task, and verbal reminder for targeting off-task behavior. Clearly, this was appropriate.

When Student made Student's ***, again Student's redirection teacher told Student to *** Student complied without anger, frustration, or agitation. It was not until the Student ***.

Student has difficulties due to Student's AU and SI disabilities. But Student is bright, Student works on grade-level TEKS, Student's teachers like Student, and Student is able to engage in conversation when Student feels safe. Student does not manifest harmful behaviors towards Student's peers and teachers. Student is able to describe some feelings and to understand the requirements under the Student Code of Conduct. The evidence does not support a finding that Student's behavior resulted from the District's failure to implement Student's IEP and/or BIP.

**V.
CONCLUSIONS OF LAW**

1. Student's August ***, 2019, MDRC conducted a comprehensive and appropriate MDR, pursuant to 20 U.S.C. §1415(k)(1)(E) and 34 C.F.R. §300.530(e). Student's *** was not caused by, or had a substantial relationship to, Student's disabilities. Student's *** was not the result of the District's failure to implement Student's IEP and/or BIP.

**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 Student is DENIED.

⁷ *** (R.5.3 &12).

SIGNED this the 8th day of October 2019.

Deborah Heaton McElvaney
Special Education Hearing Officer

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