

DOCKET NO. 333-SE-0619-A

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

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

Petitioner, 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), 20 U.S.C. §1401 et seq. and its implementing federal and state regulations. The Complaint was filed on June 3, 2019, and the Texas Education Agency (TEA) issued a Notice of Filing of Request for a Special Education Due Process Hearing on the 4th day of June, 2019. Respondent to the Complaint is the Pasadena Independent School District. On June 20, 2019, the hearing officer bifurcated the Complaint in Order No. 2 of Docket No. 333-SE-0619, and Petitioner’s challenge to the District’s disciplinary decision and placement was then assigned Docket No. 333-SE-0619-A.

The main issue for decision in this expedited case is whether Student’s conduct forming the basis of the District’s disciplinary placement was a manifestation of Student’s disability. As the District determined that Student’s conduct was not a manifestation of Student’s disability, it imposed a disciplinary placement of sixty days. The hearing officer

concludes that Student's conduct was not a manifestation of Student's disability, and therefore Student's disciplinary placement was proper.

A. Legal Representation

Student was represented throughout this litigation by Student's mother and next friend, PARENT. Respondent was represented throughout this litigation by David Hodgins and Hailey Janecka, of Thompson & Horton. ***, Executive Director of Special Education for the District participated as the party representative.

B. Resolution Session

The parties met in a Resolution Session of the 10th day of June, 2019, but were unable to reach an agreement.

C. Preliminary Matters

A number of issues were raised prior to the due process hearing. These include the need for Bifurcation, the Motion to Disqualify Counsel for Respondent, and the Subpoenas of Minors and the Motion to Quash.

1. Bifurcation

Although this matter was originally filed as a request for an expedited due process hearing, after the original filing and the Initial Scheduling Order, specifically on the 12th of June, 2019, Petitioner filed Petitioner's Amendment Hearing Request. In that filing, Petitioner restated the expedited issues, as well as alleged the District's violation of a Free Appropriate Public Education (FAPE). Although that Amendment was subsequently withdrawn by Petitioner, that correspondence or pleading also included a claim of a denial of FAPE. Therefore, as a result, the matter was appropriate for bifurcation, since additional non-disciplinary claims against the Respondent relating to the denial of FAPE

remained. The Order of Bifurcation was issued on June 20, 2019, and at that time this expedited matter, under 34 C.F.R. §300.532 was assigned Docket No. 333-SE-0619-A. Petitioner's remaining IDEA claims were assigned Docket No. 333-SE-0619-B, and those will be addressed in a separate due process hearing on September 26 & 27, 2019.

2. Disqualification of Counsel

On the 30th day of June 2019, Petitioner filed in this case a Motion to Disqualify Counsel for the Respondent District. Respondent was provided the opportunity to respond to the Motion, and the Respondent filed its Response on July 12, 2019 in accordance with Order No. 2 of Docket No. 333-SE-0619-A. On the 20th of July, 2019, Petitioner's Motion was denied.

3. Witness Subpoenas and Motion to Quash

On July 28, 2019, Petitioner filed two Motions for Subpoenas of witnesses for the due process hearing in this matter. The two subpoenaed individuals are minors and students in the District. On July 31, 2019, Respondent filed its Objection and /or Motion for Protective Order to Issuance of Subpoena Compelling Attendance and Testimony of *** and ***. Petitioner on August 1, 2019 then filed a letter emphasizing the importance of the testimony of those witnesses. On August 2, 2019 Respondent filed its Reply to Petitioner's Letter in Response to Respondent's Objection Regarding Requested Subpoenas. On the 5th of August 2019, the two Subpoenas were issued.

II. DUE ROCESS HEARING

The Due Process Hearing was conducted on August 9, 2019, and was, at the request of Petitioner, an open hearing. Petitioner continued to be represented by Petitioner's parent and next friend ***, and *** attended to support Student's parent. Respondent

continued to be represented by David Hodgins and Hailey Janecka, and ***, Executive 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 August 30, 2019.

III. ISSUES

A. Petitioner's Issue

The issue raised by Petitioner is whether Student's conduct was a manifestation of Student's disability or caused by or had a substantial relationship to the Student's disability.

B. Respondent's Position

The District contends that Student's Admission, Review, and Dismissal (ARD) Committee held a Manifestation Determination Review (MDR) in accordance with the applicable law and correctly determined that Student's conduct was not a manifestation of Student's disability and was not caused by, or had a substantial relationship to the student's disability.

IV. FINDINGS OF FACT

1. The Student resides with Student's parent in the Pasadena Independent School District (PISD), and was in the *** grade during the 2018-2019 school year. Student attended *** in the PISD. R.10.
2. Student qualified for special education and related services as a Student with Other Health Impairment (OHI) due to Attention Deficit and Hyperactivity Disorder (ADHD). Student was in regular education classes. Tr. 28:16-21; 192:12-14. R. 10.

3. Student was ***. Tr. 191:17-15; 192:1-6; R.10.
4. Student's Individual Education Plan (IEP) provided for accommodations for ADHD. R. 10.
5. On ***, 2019, Student was ***. At that time, Student told the nurse, counselor and others that ***. Tr. 103:10-13; 115:14-22; 129:21-25. P. 3. R.2.
6. On ***, 2019, school personnel were also informed that the Student ***. Tr. 202:22-25. P.9. R.2.
7. Shortly thereafter, the school staff, in particular ***, vice-principal at *** conducted an investigation concerning the Student's alleged conduct. Tr. 69:15-17; 71:6-12; 99:15-23. P.3. R.2.
8. As a result of the investigation, a determination was made that Student had *** violation of the PISD Student Code of Conduct. Tr. 110:7-21. R. 12 Pursuant to the Code, Student was assigned to PISD's disciplinary alternative education program (DAEP), known as *** for sixty (60) successful school days. Tr. 112:1-12. R. 9,12.
9. On ***, 2019, Parent and Student were informed of the placement and that Student was assigned to ***, while awaiting the MDR. P.3. R.2.
10. On ***, 2019, the ARD Committee held the MDR to determine if Student's conduct was a manifestation of Student's disability. At that time, a number of factors were considered by the committee. Tr. 63:16-25; 64:1-6. P.1. R.9.
11. Ms. ***, an experienced Licensed Specialist in School psychology (LSSP) familiar with the student, participated in the ARD MDR. She determined that, based upon her expertise and familiarity with Student, that Student's actions *** was not a manifestation of Student's disability. Tr. 51:1-17; 52:7-20. R.9.
12. A determination was also made that the Student's conduct in question was not the result of the District's failure to implement Student's IEP. Tr.54:18-20; 114:16-19. P.1. R.9.

13. All members of the ARD, except for Student's parent, agreed with the determination that the conduct in question for which student was disciplined was not a manifestation of disability. P.1. R.9.
14. More specifically, the ARD Committee reviewed the two issues that are to be decided during the MDR, and determined that the conduct was not caused by, nor had a direct and substantial relationship to Students' ADHD and further that the conduct was not a direct result of the district's failure to implement the Student's IEP. Tr. 54:4-22; 114:7-19. P.1. R.9.
15. As a result of the MDR determination, Student was assigned to the DAEP, *** for sixty (60) successful school days. P.1. R. 9.
16. It was also determined that the District was able to implement the Student's IEP at the DAEP, ***. Tr. 54:23-25; 55:1-8. P.2 R.9.
17. On ***, 2019, Parent and Student were formally informed of the MDR decision. P.1. R.7.
18. The Decision of the ARD MDR was then appealed to the PISD Central Administration Hearing Committee, and a hearing was held on ***, 2019. The Committee determined that the placement at *** was appropriate. Tr.113: 8-12. R.7.
19. The matter was then appealed to the PISD Board of Trustees, and after a hearing on ***, 2019, issued a decision on ***, 2019 upholding the determination and placement. Tr. 113:16-26. R. 8.
20. On June 3, 2019, Petitioner filed a Request of an expedited due process hearing and the hearing for this matter was held on Friday, August 9, 2019.

V. DISCUSSION

A. Burden of Proof

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). Further, there is no distinction between the burden of proof in administrative proceedings and judicial hearings. *Richardson Independent School Dist. V. Michael Z.*, 580 F.3d 286, 292 n.4 (5th Cir. 2009). This expedited case seeks to overturn the Respondent District's MDR finding and disciplinary placement of Student. The burden of proof is on Petitioner. Petitioner contends that the MDR was in error, urging that the conduct at issue was caused by, or had a direct and substantial relationship to the Student's disability.

B. School Notification

Subject to the student's rights under IDEA, school districts may place a student in a Disciplinary Alternative Education Program (DAEP) or apply disciplinary measures in the same way as to nondisabled peers. The change of placement of a student with a disability who receives special education services however, may only be made by an ADR 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).

C. Disciplinary Removals Under IDEA

A change in placement to an alternative educational setting must afford the student certain procedural and substantive rights under the IDEA. In doing so, a school district must follow its Student Code of 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 Student Code of Conduct was a manifestation of disability; and if the placement is made, provide special educational services in the alternative placement. 34 C.F.R. §300.530.

In this instance, the District complied with federal and state law for imposing disciplinary consequences for students with disabilities. As required by the IDEA, the District convened the MDR ADR Committee to consider the disciplinary placement, in light of Student's disability.

D. The Manifestation Determination Review

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, which it did.

After considering the information, the MDR ARD was required to address two issues: (1) was the Student's conduct caused by, or had a direct and substantial relationship to Student's disability; or (2) was the conduct in question the direct result of the District's failure to implement the Student's IEP. 34 C.F.R. §300.530 (e). The parent of a child with a disability may appeal a disciplinary placement and / or manifestation determination decision under IDEA through the due process hearing procedures. 34 C.F.R. §300.532.

1. Student's Recommended Disciplinary Placement

A school district may remove a student with a disability from his or her current educational placement for more than ten days for conduct that violates the Student Code of Conduct, and that is not a manifestation of the student's disability. 34 C.F.R. §300.532. In this instance, the MDR ARD was convened to consider the recommended disciplinary placement as the Student had allegedly ***. During the MDR, the members of the

committee were required to review all relevant information in Student's educational file, including the IEP, teacher observations, and any relevant information provided.

On ***, 2019 the District convened an MDR ADR Committee and found that Student violated the District's Student Code of Conduct when Student allegedly ***. All but the parent concluded that the conduct was not caused by or had a direct or substantial relationship to the disability, and all agreed that the District had properly implemented the IEP.

When the District found that Student's alleged conduct was not a manifestation of Student's disability, it could impose disciplinary consequences as it would to students without disabilities consistent with the Student Code of Conduct. 34 C.F.R. §300.530. As the conduct was found not to be a manifestation of Student's disability, the sixty (60) day disciplinary placement was upheld. The District's disciplinary placement of Student was therefore proper.

2. Relationship Between Student's Disability and Alleged Conduct

The evidence demonstrated that 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 the Student's parent, the other members of the ARD Committee agreed with the finding. While the Student has ADHD and testified to some past impulsivity, no credible evidence was presented to support a causal or direct and substantial connection between Student's conduct that is the subject of this proceeding and Student's disability. Student's educators and administrators familiar with Student found no direct link between Student's disability and the conduct forming the basis of the disciplinary placement. The evidence was credible and supportive of the MDR finding of the District.

3. Implementation of Student's IEP

Additionally, no evidence was presented that would support the contention that the Student's conduct was a result of the District's failure to implement Student's IEP. 34 C.F.R. §300.530 (e)(1)(ii).

4. Additional Considerations

The evidence presented also demonstrated that Student will receive FAPE in the District's DAEP. The jurisdiction of an independent hearing officer in expedited proceedings is essentially to determine whether the conduct in question was a manifestation of Student's Disability or a result of the district's failure to implement the student's IEP. The hearing officer cannot substitute his or her judgment for that of the MDR ARD Committee, as deference, based upon the expertise and exercise of judgment by school authorities, should be afforded the school District. *Andrew F. ex.rel. Joseph P. v. Douglas Cnty Sch. Dist. RE-1*, 137 S.Ct. 1001; (2017).

VI. CONCLUSIONS OF LAW

1. 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 related statutes and regulations, and such is to be provided by the Pasadena Independent School District.
2. Respondent District complied with the requirements of IDEA when it imposed discipline in response to the Student's alleged ***. The District timely convened and conducted Student's MDR to determine if the alleged conduct was caused by or had a direct and substantial relationship to the Student's disability or was the result of the District's failure to implement Student's IEP in compliance with the relevant procedural and substantive requirements of the IDEA. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(a) – (f).

3. Student's 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 that the conduct was a manifestation of Student's disability. 34 C.F.R. § 300.530 (e)(1)(i). Tex. Educ. Code 37.04 (b); *Schaffer v. Weast*, 546 U.S. 49 (2005).

4. Student's alleged conduct was not a direct result of the District's failure to implement the 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 hereby ORDERED that all relief sought by Petitioner, including the appeal of the manifestation determination and disciplinary placement, is DENIED and Petitioner's claims are DISMISSED with Prejudice.

SIGNED: August 29, 2019



Kimberlee Kovach
Special Education Hearing Officer
for the State of Texas

NOTICE TO THE PARTIES

The Decision of the Hearing Officer 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. 20 U.S.C. §§1415(i)(2) and (3)(A); 19 Tex. Admin. Code § 89.1185(n).