

DOCKET NO. 397-SE-0819

STUDENT b/n/f PARENT <i>Petitioner</i>	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER FOR THE
	§	
WIMBERLEY INDEPENDENT SCHOOL DISTRICT <i>Respondent</i>	§	STATE OF TEXAS
	§	

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner, *** (“ the student”), by next friend, ***, (“the parent”) filed a complaint requesting an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) on August 19, 2019 and sought an expedited hearing. The Respondent in the complaint is Wimberley Independent School District, (“the district,” “WISD,” or “Wimberley ISD”). The parties met in a resolution session on August 26, 2019, but failed to settle the matter. The matter was set for an expedited hearing within twenty (20) school days of the request for an expedited hearing.

The case came on for hearing in the offices of the district in Wimberley, Texas, on September 9-10, 2019, and this decision is timely issued on the tenth school day after the hearing.

Petitioner was represented by Meera Krishnan and Elizabeth Angelone, attorneys with Cuddy Law Firm PLLC in Austin, Texas. Respondent was represented by Jamie Turner and Kelly Janes, attorneys with Walsh Gallegos Trevino Russo & Kyle P.C. in Austin, Texas. The hearing was recorded and transcribed by Ann Berry, a duly certified court reporter,

At the close of the hearing, the parties requested the opportunity to file written closing arguments, and the requests were granted by the hearing officer. Both parties timely filed their closing arguments.

Issues for the Expedited Hearing

1. Whether the manifestation determination made by the district for an alleged *** occurring off campus during the summer and during which time the student was not in attendance at a school-sponsored or school related activity, was appropriate under the Individuals with disabilities Education Act (“IDEA”).
2. Whether the disciplinary placement of the student at the Disciplinary Alternative Education Program (“DAEP”) was appropriate under 34 CFR § 300.530(c).

Petitioner’s Requested Relief

Petitioner requested the following relief:

1. An Order finding that the alleged conduct was a manifestation of the student’s disabilities.
2. An Order directing the district to expunge the removal to the DAEP from the student’s educational records.
3. An Order directing the district to conduct an appropriate Functional Behavioral Assessment (“FBA”) of the student and develop and implement an effective behavior intervention plan (“BIP”) to be supervised by a master’s level Board-Certified Behavior Analyst (“BCBA”); and
4. An Order directing the district to provide compensatory education services to the student to make up for the inappropriate disciplinary placement.

Findings of Fact

1. Petitioner, ***, *** resides with Student’s father within the geographical boundaries of the district. The student currently attends *** and is eligible for special education as a student with a specific learning disability (“SLD”) in *** and Other Health Impaired (“OHI”) with Attention Deficit Disorder (“ADHD”). (R. 1, 3).
2. Student has diagnoses from private psychiatrists and psychologists of ***, ***, *** (“****”) and an ***. (P. 18; R. 9).
3. Student is currently ***. (P. 18).

4. Because of an alleged *** by the student on ***, 2019, when school was not in session, a Manifestation Determination Review (“MDR”) was conducted for the student on August ***, 2019. (P. 22, 25; R. 13, 31).
5. The district administration received notice of ***. (R. 8; Tr. 239-240). The district notified the parent via email on August ***, 2019, of the notification from *** and suggested times for the administrative disciplinary hearing, an Admission Review and Dismissal (“ARD”) meeting, and an MDR meeting. The parent agreed to meet on August ***, 2019. The administrative disciplinary hearing was held on August ***, 2019 at 9:30 a.m. (R.16; Tr. 240). The student was given an opportunity to present a statement at the disciplinary hearing. The student’s mother *** attended the disciplinary hearing. The student did not attend the hearing. (Tr. 240).
6. A Revision to the Annual ARD meeting was held at 10:00 a.m. on August ***, 2019, immediately followed by the MDR meeting beginning at 1:11 p.m. (R. 15; R. 14). The same individuals attended the Revision ARD committee meeting and the MDR meeting with the exception of the *** principal who did not attend the Revision ARD committee meeting. (P. 27; R. 14).
7. The student’s general education teacher was present at the ARD committee meeting from 10:04 a.m. until 11:31 a.m. when she was excused to attend an appointment with her doctor. The parent agreed to excuse the general education teacher from the meeting. (R. 15; Tr. 377-378).
8. The MDR addressed whether *** was caused by, or had a direct and substantial relationship to, the student’s eligibility for Special Education for a SLD in *** or OHI for ADHD (R. 31; P. 22) or whether the conduct was the direct result of the district’s failure to implement the student’s IEP. The MDR also addressed disciplinary consequences for the student under the district’s policy (FOC) Legal, Student Discipline, ***. (P. 27; R. 14; Tr. 107).
9. The MDR committee reviewed the student’s Full Individual Evaluation (“FIE”), BIP, teacher input, and information about the student’s disabilities, and the committee considered the input of the student’s mother ***. (P. 22; R. 31; Tr. 101-106).
10. The student’s parent *** were in attendance at the MDR meeting. The student’s ***, acting as the spokesperson ***, told the MDR that the student had an alibi, and that the family believed that if the student did commit the conduct, student’s impulsive behavior was the cause of Student’s conduct. *** discussed that the district’s Licensed Specialist in School Psychology (“LSSP”), the student’s DAEP teacher, and the Independent Education Evaluation (“IEE”) by *** all confirmed the student’s impulsivity. (P. 22, 25; R. 14, 31; Tr. 290-295).
11. *** did not present the MDR with, or present testimony of, any specific circumstances indicating a direct or substantial relationship between the student’s impulsivity and the ***. (P. 22, 25; R. 14, 31; Tr. 290-295).
12. *** was not permitted to present information to the MDR committee from the Diagnostic and Statistic Manual of Mental Disorders Fifth Edition (“DSM-5”). (P. 22; R. 31; Tr. 293-295).

13. The student's expert witness, ***, Ph. D. was questioned during the due process hearing about whether the student's ADHD, including the student's deficits in executive functioning, in particular behavioral inhibition, could have inhibited the student's ability to prevent the ***. She testified that she could not say with certainty without more information about the circumstances and context. (P. 18; Tr. 201-203).
14. *** testified that she had concerns about the student being placed in the DAEP. Specifically, her concerns included not getting Student's accommodations met, that DAEP was the most restrictive environment possible for a student with impulsivity, the student's safety at DAEP, and that the student would not be able to participate in hands-on instruction in *** class. (Tr. 297, 300).
15. The special education director testified that the student's Individualized Education Program ("IEP") could be implemented in the DAEP and that the first part of the *** was introductory and ***, which was not hands-on, and that the student could complete the work in the DAEP. (R. 14; Tr. 390-391).

DISCUSSION

The IDEA creates a presumption in favor of the education plan proposed by the school district, and as such, places the burden of proof at the due process level on the party challenging the IEP or seeking relief under the IDEA. This presumption applies in an expedited case in which a party seeks to overturn a student's Manifestation Determination Review ("MDR") and disciplinary placement. *Cypress-Fairbanks Indep. Sch. Dist.*, Dkt. 172-SE-0318A (TX SEA 2018).

Generally, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. 34 CFR § 300.530(c). However, a disciplinary change in placement that would exceed 10 school days of a student with a disability who receives special education services may only be made by an ARD Committee after conducting an MDR, (34 CFR § 300.530(k); Tex. Educ. Code § 37.004 (a)(b)), and the child must:

- (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
- (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 CFR § 300.530(d).

In conducting the MDR, an MDR committee is required to review all relevant information in the student's educational file, including the IEP, teacher observations, and any relevant information provided by parents. 34 CFR § 300.530(e)(1).

The evidence in this case shows that the MDR committee complied with these requirements. It reviewed the student's Full Individual Evaluation ("FIE"), teacher input, information about the student's disabilities, and considered the input of the student's mother *** as required by 34 CFR § 300.530(e)(1). In sum, the evidence demonstrated that the district conducted an appropriate MDR in accordance with 34 CFR § 300.530(e).

Petitioner challenges the district's MDR committee's finding that the student's alleged conduct *** was not caused by or had a direct and substantial relationship to Student's disabilities. Petitioner had the burden to prove the student's conduct was caused by or had a direct and substantial relationship to Student's disabilities. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

Petitioner failed to carry Student's burden. The testimony of the student's mother *** that the student had an alibi and that the behavior was impulsive, without providing any information of surrounding circumstances of the alleged conduct, is insufficient to prove that off-campus *** is a manifestation of Student's disabilities.

Accordingly, Petitioner failed to carry Student's burden of proving that disciplinary placement in the DAEP was not appropriate. Because the alleged conduct was not shown to be a manifestation of Student's disabilities, the district was permitted to apply the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to a student without disabilities. 34 CFR § 300.530(c).

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 the Wimberley Independent School District is obligated to provide it to Student.

2. Petitioner failed to meet Student's burden to prove that the MDR conducted by the district regarding the student's alleged *** was improper.
3. Petitioner failed to meet Student's burden to prove that the district's MDR determination was erroneous.
4. Petitioner failed to meet Student's burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

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 that all Petitioner's claims are **DISMISSED** with Prejudice.

SIGNED on September _____, 2019

Sandy Lowe
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).