

DOCKET NO. 166-SE-0216

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

**DECISION OF HEARING OFFICER
ON EXPEDITED COMPLAINT**

*** (Student), by next friend *** (Mother)(collectively, Petitioner) requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Allen Independent School District (Respondent or the District) is the respondent to Petitioner’s complaint. Petitioner’s allegations include that the District failed to consider that Student was bullied with FAPE not provided due to changes of placement, that Student’s actions were a direct result of Student’s disabilities, and that the incident resulted from the District’s failure to implement Student’s Individualized Education Plan (IEP) outside the classroom. The District responded that Student was the aggressor and that it had taken appropriate actions. The Hearing Officer finds that Petitioner failed to prove the necessary elements for any of its claims. Therefore, Petitioner’s requested relief is denied.

I. DUE PROCESS HEARING REQUEST

Petitioner filed a Request for an Expedited Due Process Hearing (Complaint) on February 23, 2016. In its First Amended Complaint, filed on March 8, 2016, Petitioner clarified the issues, without adding any issues not previously alleged. Petitioner’s allegations included the following, with one issue subsequently struck by the Hearing Officer and one issue withdrawn by Petitioner.

1. Whether the Respondent incorrectly found that Petitioner had violated the District’s Student Code of Conduct;

2. Whether Respondent incorrectly determined pursuant to IDEA that Petitioner's action or conduct in defending ***self from a student whose actions constituted bullying pursuant to the District's policy, was not a manifestation of Petitioner's disability;
3. Whether Petitioner's removal from Petitioner's current educational placement to in school suspension (ISS), off-school suspension (OSS) and the disciplinary alternative education program (DAEP) constituted a "pattern" of removals.
4. Whether Respondent violated Federal or State Special Education requirements when Respondent removed Petitioner from Petitioner's current educational placement when Petitioner's conduct on *** 2016, was a manifestation of Petitioner's disability;
5. Whether Respondent violated Federal or State Special Education requirements when Respondent failed to hold an Admission Review and Dismissal (ARD) Committee meeting prior to assessing Student's punishment;
6. Whether Respondent failed to properly assess Student's IEP insofar as Respondent did not assess any special factor including any behavioral components of Student; and
7. Whether Respondent incorrectly found that Student's IEP only applied to Student's classroom setting.

For relief, Petitioner sought:

1. A finding that the District violated Student's rights as a student with disabilities under IDEA by improperly determining that Student engaged in ***;
2. A finding that the District violated Student's rights as a student with disabilities under IDEA by determining that the incident was not a manifestation of Student's learning disabilities; and
3. An order that any reference to Student being sent to the DAEP be expunged from Student's records.

II. PROCEDURAL HISTORY AND BURDEN OF PROOF

Petitioner filed Petitioner's request for a due process hearing on February 23, 2016, and it was identified as an expedited due process case. Accordingly, the schedule was set and no

continuance was granted. The hearing was held on March 29-30, 2016, in Allen, Texas. Petitioner was represented by attorney Renee Crenshaw, and the District was represented by attorneys Gigi Maez and Jan Watson. The Decision was timely issued on April 13, 2016.

Prior to the evidentiary hearing, Petitioner withdrew issue number six, “[w]hether Respondent failed to properly assess Petitioner’s IEP insofar as Respondent did not assess any special factor including any behavioral components of Petitioner.” The Hearing Officer granted a motion to dismiss issue number one, “whether the Respondent incorrectly found that Petitioner had violated the District’s Student Code of Conduct.”¹

The IDEA creates a presumption that a school district’s decisions made pursuant to the IDEA are appropriate and that the party challenging the decisions bears the burden of proof at all times.² To prevail, Petitioner must, therefore, establish that the District’s decisions were not made in accordance with the applicable rules and regulations.

III. FINDINGS OF FACT

Based upon the evidence and argument of the parties, the Hearing Officer makes the following findings of fact:

1. Student resides with Mother within the boundaries of the District.
2. The District is a recipient of federal funds and must comply with the IDEA.
3. Student is a ***-year-old student enrolled in *** grade at ***.
4. Student is eligible for special education services under the IDEA as a student with a learning disability in the areas of basic reading skills, reading comprehension, written expression, mathematics calculation, mathematics problem solving, and a speech impairment.

¹ The Student Code of Conduct continued to possibly be relevant to the matter of bullying and providing FAPE.

² *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005); *see also White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d. 373, 377 (5th Cir. 2003); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

5. On *** 2016, Student was *** ***, Student was assigned to OSS for *** days.
6. The District convened a Disciplinary Review Conference (DRC) on *** 2016. The DRC assigned Student to DAEP, at ***, for *** days.
7. Upon return to school, Student was assigned to ISS. The DRC decision was addressed in a Manifestation Determination Review (MDR). During this interim time, Student was sent to DAEP.
8. On *** 2016, the MDR was completed and the ARD Committee, with Mother in attendance, determined the Student's behavior of *** was not a manifestation of Student's learning disability and speech impairment.
9. Mother disagreed with the MDR decision.
10. The ARD committee reconvened on *** 2016, to address Mother's proposed changes for Student's IEP.
11. On *** 2016, Petitioner filed a Level I grievance appealing Student's assignment to DAEP and requesting that this matter be removed from Student's educational records.
12. The District granted Petitioner's request, in part, returning Student to campus on *** 2016, and changed Student's reason for the DAEP from "****" to "****."
13. Student returned to campus on *** 2016.
14. The *** 2016 incident/*** was videotaped by a District's camera and the video is the best evidence of what happened on that day.³
 - a. ***
 - b. ***
 - c. ***
 - d. ***
 - e. ***
 - f. ***
 - g. ***
 - h. ***
 - i. ***
 - j. ***
15. The incident was initially a bullying situation with ***.

³ The Hearing Officer does not have jurisdiction over the disciplinary committee decisions. Findings of Fact referring to these matters are included for a full review of the incident and are related to making a determination as to whether Student's actions were significantly related to Student's disability and whether the District failed to implement Student's IEP.

16. Student did not ***.
17. The preponderant evidence establishes that *** prior to the incident.
18. Student was not bullied in the sense that is applicable to the IDEA nor in accordance with the District's bullying policy.
19. ***.
20. ***.
21. ***.
22. No expert testimony was offered establishing that Student's behavior *** was a manifestation of Student's learning disability and speech impairment.
23. Petitioner failed to prove that Student's *** was a manifestation of Student's learning disability or speech impairment.
24. The best evidence of Student's IEP is the document itself; Student's IEP does not extend beyond the classroom setting. Student's disabilities are not behavioral in nature but rather are related to specific learning accommodations.⁴
25. Petitioner failed to prove that Student's removal from Petitioner's current educational placement to OSS, ISS and the DAEP constituted a "pattern" of removals.
26. The District made several mistakes on its notices, paperwork, and information given to Mother, causing confusion and frustration.
27. The District's mistakes do not rise to the level of denying parental involvement in the ARD Committee decision.
28. Petitioner failed to prove that *** and Student's actions arose due to the District's failure to implement Student's IEP.
29. The ARD Committee meeting considering the MDR was timely held.
30. In this instance, there is no IDEA remedy for removing documentation from Student's records.
31. At all times relevant to this proceeding, the District provided Student a FAPE.

⁴ This finding of fact is made without discounting Mother's reasonable misunderstanding that student's IEP was applicable in the school ***.

IV. APPLICABLE LAW

As a local educational agency responsible for complying with IDEA as a condition of the State of Texas's receipt of federal education funding, the District is required to provide each disabled child in its jurisdiction with a FAPE,⁵ and ensure that such education is offered, to the greatest extent appropriate, in the educational "mainstream," or side-by-side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs.⁶ The FAPE provided to a disabled student must be tailored to the child's particular needs via an IEP, a written statement prepared at a meeting attended by a number of specified participants, such as a qualified representative of the District, a teacher, and the child's parents.⁷ In Texas, the team charged with preparing an IEP is known as an ARD Committee.⁸

The FAPE tailored by the ARD Committee, as expressed in the IEP:

need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child 'to benefit' from the instruction. In other words, the IDEA guarantees only a 'basic floor of opportunity' for every disabled child. . . . Nevertheless, the educational benefit . . . to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.' In short, the educational benefit that an IEP is designed to achieve must be 'meaningful.'⁹

⁵ 20 U.S.C. §§ 1400(c) and 1412(a)(1).

⁶ 20 U.S.C. § 1412(a)(1), (5); *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997).

⁷ 34 C.F.R. § 300.321.

⁸ *Michael F.*, 118 F.3d at 247.

⁹ *Michael F.*, 118 F.3d at 247-48 (citations and footnotes omitted).

IDEA creates a presumption in favor of the IEP proposed by the District and places the burden of proof on the party challenging the plan.¹⁰ Petitioner must, therefore, overcome the presumption in favor of the District's IEP and establish that the District failed to provide Petitioner with a FAPE, by establishing that: (i) the District failed to comply with the procedures set forth in IDEA; or (ii) the IEP developed by the District through the IDEA's procedures was not reasonably calculated to enable Petitioner to receive educational benefit.¹¹

Pursuant to IDEA, a district may, under certain circumstances, change the placement of a student with a disability (such as by assigning student to attend school at an off-site, disciplinary location) if that student violates the district's code of student conduct.¹² However, for a change of placement lasting more than 10 school days, within 10 days of the school's decision to change the placement of the student, the ARD Committee must meet to conduct an MDR. The two questions to be asked in an MDR are:

- (1) whether the conduct for which the student is being disciplined "was caused by, or had a direct and substantial relationship to, the child's disability"; and
- (2) whether the conduct for which the student is being disciplined "was the direct result of the [District's] failure to implement the IEP."¹³

If the ARD Committee answers both questions in the negative, then the District may proceed with the discipline against the disabled student in the same manner that it would be applied to a student without a disability.¹⁴ If either question is answered in the affirmative, then the disabled student must be returned to student's normal school placement.¹⁵

¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 536-537 (2005); *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1010-11 (5th Cir. 2010).

¹¹ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206-208 (1982).

¹² 34 C.F.R. § 300.530(b).

¹³ 34 C.F.R. § 300.530(e).

¹⁴ 34 C.F.R. § 300.530(c) (the disabled student must, however, continue to receive the educational services specified in Student's IEP while at the alternative placement).

¹⁵ 34 C.F.R. § 300.530(f).

V. DISCUSSION

A. Evidence Presented

1. Mother's Testimony

Mother testified that, after reviewing the video, she determined that *** bullied Student.¹⁶ ***.¹⁷ She believes that ***, and Mother does not understand why the school labeled it ***.¹⁸ Mother further complained that ***.¹⁹

It is Mother's opinion that Student *** was the victim of a bully as defined by the District's definition of bullying. She repeatedly raised this to the ARD Committee members but was ignored. Mother testified that the victim of a bully is specifically not to be punished.²⁰

Mother was advised of the incident and told by a principal that Student was sent home for a ***-day suspension.²¹ However, upon Student's return to school on the *** day, another principal said a mistake was made and Student should have received a ***-day suspension. So, Student was sent to ISS on day ***. Mother testified that she was also inaccurately told that a suspension to DAEP *** was mandatory, when it was discretionary.²²

On *** 2016, Mother and Student met with Principal *** who was to hear Student's side of the story, and it would be Mother's first time to see the video. However, upon arrival at the principal's office, the principal already had her decision letter prepared and handed it to Mother

¹⁶ Tr. at 53.

¹⁷ The video does not support this last allegation.

¹⁸ Tr. at 36. This allegation is beyond the jurisdiction of IDEA matters.

¹⁹ Tr. at 38.

²⁰ Tr. at 94.

²¹ Tr. at 40.

²² Tr. at 48.

without ever leaving her office. Thus, Mother believes, the decision was made prior to the principal hearing Student's side of the story.²³

Mother added up the days that Student spent out of Student's current IEP educational placement and arrived at *** days.²⁴ She also testified to various documents that were changed, had white out changes, and misstatements, all prepared by the District.²⁵ The confusion continued during the ARD Committee meeting when Principal *** took back the initial placement order given to Mother and scratched it out. On that same document, Mother pointed out another student was referred to rather than Student. At this point, Mother was concerned because she had been provided documentation saying the decision was made based on certain criteria that did not support what the District had determined. Then, the principal returned and simply said her decision was based on the Student Education Code and that the citations previously given to Mother were all mistakes.²⁶ Another mistake included information indicating that Student had ***.

Mother noted that there were additional similar behavioral incidents with Student outside the classroom and she tried to vocalize these to the ARD Committee but they were unwilling to hear her concerns.²⁷ According to Mother, Student was *** ***, and this continued a pattern she had seen at previous schools with Student over many years. She testified that the entire time Student has been in school Student has had difficulties outside of the classroom setting. Nevertheless, and to Mother's dismay, the ARD Committee during the manifest determination indicated that Student was never before engaged in this type of behavior.²⁸

²³ It was later explained that the principal had two letters already prepared and handed the letter to Mother stating that Student was *** and was sent to DAEP. However, there is some testimony to support Mother's assertion as Principal *** testified that she watched the video and made her decision with two other administrators that Student was ***. In any event, this issue is not within the jurisdiction of the Hearing Officer but is included due to the number of mistakes and or improper actions allegedly performed by the District and the issue concerning a pattern of removals and provision of FAPE.

²⁴ Tr. at 54.

²⁵ Tr. at 57-63.

²⁶ Tr. at 75.

²⁷ Tr. at 77.

²⁸ Tr. at 78; 88. Petitioner pointed out that Student was noted to have "oppositional behavior and verbal aggression." However, this information was from 2007 and not relied upon by the Hearing Officer as too far in the past to be relevant to the matters at issue today.

Mother is concerned that Student's past district had a Behavioral Implementation Plan (BIP) in place and it continued at the District for the first year. Then, against her desires, the ARD Committee discontinued Student's BIP but added accommodations from the BIP to Student's IEP. However, the District maintains that the IEP is only applicable inside the classrooms. Mother pointed out that in Student's IEP it states Student is "to make informed decisions within and outside the classroom."²⁹ Mother asserted her understanding that the IEP was in effect inside and outside the classroom. Thus, the District, Mother concludes, failed to adequately implement Student's IEP.³⁰

Mother testified:

My position is that this is clearly one of the areas that [Student] has had impairments. [Student] has always had impairments being in an unstructured environment where there's a new situation that [Student]'s confronted with and [Student] has to figure out what it is that [Student] needs to do and how best to behave in a – this would be deemed a social setting where there isn't a specific leader or authoritative figure nearby, and [Student] has to make the best decision [Student] can without that additional support in a short amount of time. This is something that (Student) has always struggled with, and I don't see how that's – I don't understand why that is ignored.³¹

On cross-examination, Mother admitted to signing a document after deliberations from a 2008 ARD Committee meeting stating, "(Student) no longer demonstrates a need for a behavioral intervention plan. [Student] now understands expectations and is able to comply with them. Some strategies from [Student's] previous plan will be included in [Student's] accommodations."³² Mother admitted that she was proud of the improvements she had seen with Student once Student entered the District. Nevertheless, she believes Student's actions concerning *** are a re-

²⁹ Tr. at 98 citing to R-11 at page 7 (Bates 529). The IEP states, "Given segmented directives, graphs, charts, select vocabulary, work samples, and reference material, (Student) will analyze information to effectively problem solve in order to make informed decisions *within and outside the classroom* with the following level of prompting." Italics added.

³⁰ Tr. at 100.

³¹ Tr. at 101.

³² Tr. at 104.

manifestation of the same behavior issues Student has had in the past.³³ More specifically, she believes Student's disability prevented Student from knowing how to best respond when ***.³⁴

Mother's understanding was that when Student's BIP was discontinued, some strategies from the BIP were included in Student's IEP accommodations and that these included Student's behavior outside of the classroom.³⁵ It is frustrating to Mother that the District suggests the first time she brought up behavioral concerns related to Student's disabilities was after ***. Rather, Mother maintains that she has always understood the accommodations in Student's IEP to include time outside of the classrooms and it is the District that has "morphed" over time to this understanding that Student's IEP does not cover Student's conduct outside the classroom.

Agreeing with Student's teachers, Mother testified that Student does not have a problem with behavior inside the classroom. Rather, it is outside the classroom, without structure when Student has difficulty, insist Mother. For this reason, Mother is certain that the original intentions of the IEP accommodations included Student's behavior outside the classroom as they came from Student's BIP.³⁶

Additional concerns were raised by Mother about what the second ARD Committee meeting, on *** 2016, should have discussed. Mother wanted to again address the manifestation issue but, according to Mother, the Committee was only interested in whether changes were needed to Student's IEP while Student was in DAEP. Mother disagrees then that a second ARD Committee ever occurred to consider her concerns about the MDR.

Overall, Mother is concerned with the number of errors from the District that occurred throughout what Mother calls a "fiasco." Mother has lost the good faith she had in the District's

³³ Tr. at 116.

³⁴ Tr. at 127.

³⁵ Tr. at 412-413.

³⁶ Tr. at 413.

actions, and now she questions many of their actions, including the grades assigned to Student while Student was in DAEP.

2. *, Principal at *****

Principal *** testified that she made the decision to send Student to DAEP. In her opinion, Student was ***. After reviewing the video, she believes ***.³⁷ She admitted that ***.³⁸ Principal *** characterized ***.³⁹ She testified, however, that *** all the time and without incident.

Prior incidents involving Student include ***, several occasions of tardiness to class, and a disruption of the classroom in school. Principal *** testified that the number of prior incidents was not a significant amount of disciplinary problems for a typical *** ***.⁴⁰ She explained that most of the incidents resulted in mere administration counseling and that this is a common practice. Principal *** further explained that ***, ***. For this reason, OCS was the punishment. The disruption of a classroom came when Student ***. None of the prior incidents were of significant concern to Principal ***, and the overall report is not one that would cause her to call an ARD meeting in order to address the behavior.⁴¹

After watching the video numerous times and collecting statements ***, Principal *** confidently stated that she did not observe bullying by ***. Rather, Student continued ***.

Principal *** read Student's statement and commented that it was not accurate. Student wrote that *** "****." The video is inconsistent with this account. ***.

During the ARD Committee meeting considering the event, Principal *** agreed with the consensus of the committee that Student's learning disability or speech impairment did not cause

³⁷ Tr. at 152.

³⁸ Tr. at 152.

³⁹ Tr. at 197.

⁴⁰ Tr. at 232.

⁴¹ Tr. at 233.

nor have any substantial relationship to ***.⁴² Prior to the MDR, no teacher shared concerns with the principal that Student does not comprehend what is happening socially and therefore misbehaves or acts aggressively.⁴³

Clarifying the second ARD Committee meeting, Principal *** understood from the MDR meeting that Mother wanted to look at Student's IEP and perhaps make adjustments or ask for additional testing. That was why the second ARD Committee meeting was set up. The District offered a functional behavior assessment (FBA), even though Principal *** did not believe one was necessary.⁴⁴

Principal *** also clarified that *** is a discretionary DAEP offense.⁴⁵

3. *, District's Lead Educational Diagnostician**

Ms. *** participated in the ARD Committee meetings. She testified that at the *** 2016 ARD Committee meeting, Mother continued with concerns about the disciplinary placement. At this point in the process, Ms. *** explained, the ARD Committee had already determined at the *** 2016 MDR meeting that Student's action was not a manifestation of Student's disabilities. As such, Ms. *** further explained that the disciplinary placement was the administrator's decision and was not a decision that the ARD Committee could have any further involvement in.⁴⁶

The *** 2016 ARD Committee meeting was held to consider revisions to Student's IEP. One result of this meeting was the additional accommodation stating that teachers remind Student when Student leaves the classroom to ***. Ms. *** noted that this was exactly how Mother wanted

⁴² Tr. at 238.

⁴³ Tr. at 239.

⁴⁴ Tr. at 241.

⁴⁵ Tr. at 215.

⁴⁶ Tr. at 289.

the accommodation worded and that the Committee was assured by Mother that Student would know what the teachers were referring to.⁴⁷

When asked, Ms. *** clarified that the processing speed deficit identified in Student's evaluation was related to Student's ability to timely complete academic tasks in the classroom.⁴⁸ Student's accommodation is to have the classroom rules and regulations clearly defined, possibly posted in the classroom. This is a reminder to Student to stay on task.

Ms. *** reviewed the testing performed with Student, including a speech evaluation and achievement and cognitive assessments.⁴⁹ She found no concerns noted on the evaluations about Student's physical and motor abilities. Moreover, the emotional behavioral assessment revealed no concerns about Student's ability to follow verbal directions, stay organized, produce written work or stay self-motivated to attend ***. Input in the form of a questionnaire was requested from Mother but it was not returned.⁵⁰

The Woodcock-Johnson III Test of Achievement and the Woodcock-Johnson III Test of Cognitive Ability were given to Student in 2015 and difficulty in basic reading, reading comprehension, math calculation, math reasoning, and written expression were identified. This was not surprising to Ms. ***, as a student with specific learning disabilities is more than likely also going to have academic deficits. The tests also indicated that Student has "low-average" cognitive ability. Moreover, Student's adaptive behavior skills are in the normal limits for Student's age, and Student's teachers do not indicate that Student has any difficulty in the areas of personal independence or social responsibility.⁵¹

⁴⁷ Tr. at 292.

⁴⁸ Tr. at 294.

⁴⁹ Tr. at 305

⁵⁰ Tr. at 308.

⁵¹ Tr. at 313-314. Ms. *** explained that adaptive behavior is a measure of Student's self-help skills, communication, functional academics, social interactions in the community, but not emotional behavioral functioning.

Ms. *** concluded that reviewing Student's testing and information, there is nothing to suggest that Student was at any risk of *** due to Student's learning disabilities.⁵² In fact, it is Ms. ***'s conclusion that Student's behavior *** is not a manifestation of Student's disabilities in any way.⁵³

4. *, District's Special Education Case Manager**

Ms. *** testified that, as Student's case manager, she is a part of Student's ARD Committee. She provides input regarding Student's IEP and testified that all Student's IEP accommodations relate to in the classroom.⁵⁴ Ms. *** explained that when a student needs to be escorted from classrooms, the IEP will specifically state, "student needs to be escorted in the hallways."⁵⁵

5. *, Teacher**

Ms. *** testified that Student has always been compliant in her classroom.⁵⁶ Student has not demonstrated any behavioral issues and Student is passing her class.

6. *, Resource Special Services Math Teacher**

Ms. *** testified that Student is a sweet *** and she enjoys having Student in her class. Student is appropriately placed educationally. She continued that Student has never been disrespectful to her in any way. Over the year, Ms. *** has observed Student to mature at a significant rate; Student is less immature now than when Student started the year. She has not seen any type of emotional disturbance with Student and from her experience while working with

⁵² Tr. at 321.

⁵³ Tr. at 322.

⁵⁴ Tr. at 371; 382.

⁵⁵ Tr. at 386.

⁵⁶ Tr. at 424.

children with *** “***,” Student is far from that. At the most, Student simply needs a verbal or nonverbal prompt to get Student to refocus occasionally in class, according to Ms. ***.

On one occasion Student did get into a verbal exchange with another student but upon redirection, Student turned off the chatter, sat right down, and finished Student’s work. Ms. *** opined that this demonstrates Student has control to stop what Student says and to stop Student’s behavior.⁵⁷ She has not observed Student to exert any type of physical aggression.⁵⁸

Ms. *** testified that having a “shadow” walk Student from classroom to classroom would be very embarrassing to Student and is not needed.⁵⁹ She added that Student *** when Student was in DAEP and this lead to an “A” in her class.

7. * , District’s Speech Therapist**

Ms. *** testified that Student’s results from Student’s pragmatic language test do not indicate any disabilities associated with social development.⁶⁰ Rather, she testified that Student maintains topics, taking-turns, and has a good eye gaze. She stated that Student is a pleasant young *** to work with.

Ms. *** opined that *** was in no way a manifestation of Student’s speech impairment. Rather, she stated that it is not associated with any behavioral disorder but “kids just *** sometimes.”⁶¹

8. * , Associate Principal at the District**

⁵⁷ Tr. at 452.

⁵⁸ Tr. at 458.

⁵⁹ Tr. at 460.

⁶⁰ Tr. at 480.

⁶¹ Tr. at 481.

Mr. *** testified that *** was not an incident of bullying. He added that there was ***. Referring to the instance when Student ***, Mr. *** observed that Student was *** “***.” ***. In his opinion, ***.⁶²

Mr. *** testified that *** and that there was no way for *** to know of Student’s disabilities. Principal *** was involved in the DRC and met with Mother for some time. He recalled her greatest concern was with all the errors on the forms given to her. The errors were corrected and new forms were sent to Mother.

Principal *** testified that Student’s number of days in DAEP was reduced, but Mother also wanted Student’s education records *** expunged. He testified that he is uncomfortable manipulating educational records, beyond that of providing Student with a lesser offense. In his opinion, deleting the records would be immoral, and perhaps even illegal.⁶³

9. *, District’s Licensed Specialist in School Psychology (LSSP)**

Ms. *** testified that her first involvement came after the MDR when an FBA was requested. She performed the FBA for Student with the purpose of problem-solving any problematic behaviors that might be occurring in the school setting. She collected data from teachers, interviewed Student, and identified some target behaviors such as ***.⁶⁴

Ms. *** noted that Student does have poor emotional regulation and is attention seeking. However, neither of these issues arise from Student’s disabilities but rather this is how the behavior is labeled, regardless of its prevalence. She explained that making recommendations after this FBA was difficult because she is accustomed to conducting FBAs for students who have daily

⁶² Tr. at 494.

⁶³ Tr. at 505.

⁶⁴ Tr. at 552.

incidents. Student's *** incidents and Student's off-task behaviors occur at a very low rate, according to Ms. ***.⁶⁵ For this reason, they are not significant to her.

Nevertheless, Ms. *** recommended teaching Student certain words or phrases that Student can use in response to situations that Student perceives as ***. The goal is to replace the *** behavior with strategies such as using certain words. She further recommended that the behavioral expectations be clearly defined for Student with consequences for Student also made clear. These should be made clear on a daily basis.⁶⁶ Additionally, Student should be taught to ***. Ultimately, Ms. *** recommended a BIP to address *** through positive supports for Student.⁶⁷ She testified that BIPs may be created for students who do not have any disability and she does not consider these issues related to Student's disabilities.

Ms. *** testified that in all her years of experience, she has never seen research indicating that learning disabilities cause ***.⁶⁸ Rather, Student's cognitive profile suggests Student has adequate intellectual capacity to understand the difference between right and wrong, including that a consequence will follow a poor decision. She further indicated that if Student had a disability leading to ***, Student would be *** much more frequently and in all situations, including ***, in the classroom, in the halls, etc. Ms. *** does not find a pattern of *** for Student across settings, and thus she concluded that *** was not a manifestation of Student's disabilities.

B. Arguments Presented

1. Petitioner's Position

⁶⁵ Tr. at 561.

⁶⁶ Tr. at 562.

⁶⁷ Tr. at 563.

⁶⁸ Tr. at 565.

Petitioner essentially argues that either Student was bullied and *** or Student was ***. But in either case, Student already had behavior accommodations in Student's IEP, so there is no question that Student's conduct was in fact a manifestation of Student's disabilities.

More specifically, Petitioner urged that the District failed to act in response to its own bullying policy, failed to include all the requisite documentation in making its manifestation determination, initiated a change in placement with a pattern of removals, violated Petitioner's due process rights in clerical errors and intentional changes to forms, and incorrectly applied Student's IEP as only applicable to in-classroom settings. Thus, argues Petitioner, the MDR decision was incorrect and Student was denied FAPE with the changes in placements. Petitioner requested that the District be ordered to pay for an Independent Educational Evaluation (IEE) and convene another ARD Committee meeting to develop a new IEP that provides an appropriate education for Student.

Citing to the District's bullying policy, Petitioner maintains that *** that harmed Student or placed Student in fear of harm. ***, Petitioner insists that ***. From the video ***, Petitioner notes the incident obviously and substantially disrupted the operation of the school and negatively impacted Student's education when Student was sent to DAEP. Petitioner urges this amounts to a violation of FAPE. Petitioner further argues that the several placements of Student are indicative of a pattern of removals.

Petitioner notes that the IDEA states that an MDR may find that a child's behavior was not a manifestation of the student's disability only if the IEP Team considers all relevant information, including consideration of all relevant information presented by Mother. In this instance, Petitioner insists this includes consideration of past school performance and findings from when the Student was ***. Thus, Petitioner insists the MDR was not appropriately performed. Petitioner further asserts that the ARD Committee consideration of MDR should have occurred before assessing any punishment, including the immediate referral to OCS for 2 days, to ICS for another day, and then to DAEP.

As explained in Mother's testimony and evaluated below, Petitioner maintains that the District incorrectly determined that Student's IEP applied only to Student's classroom settings. Moreover, in closing briefs, Petitioner urges that while in DAEP, the District had an obligation to develop a new behavioral plan but that it failed to do.

2. District's Position

The District asserts that Petitioner failed to meet Petitioner's burden of proving any of the allegations made, that Student failed to show that the District violated the IDEA in any way, and that Student failed to show that Student suffered any denial of FAPE. Instead, the District insists that the evidence establishes the District conducted an appropriate evaluation for Petitioner and thus that all relief sought must be denied.

Since 2008, the ARD Committee has agreed that Student's behavior does not impede Student's learning. It is significant to the District that these decisions were oftentimes made with Mother's agreement. In October 2009, a Full Individual Evaluation (FIE) was conducted with no mention of any reported concerns regarding Student's behavior, ***, or ***. Specifically, the evaluators determined that Student's behavior, as manifested when in-school and out-of-school settings do not appear to influence Student's ability to follow the school's disciplinary rules. No emotional or behavioral disorders were identified. Over the 2008 – 2009 school year, the ARD Committee, with Mother's agreement, determined that Student's behavior did not influence Student's learning nor Student's ability to follow the schools disciplinary rules.⁶⁹

Another FIE was conducted on Student in April 2012, with essentially the same results. Student's social interactions and frustration level were within average range. No discipline concerns were reported. Instead, all of the implications of Student's disability related to academic tasks. Student's cognitive ability was within the low-average range.

⁶⁹ Tr. at 106.

Ms. ***, LLSP, testified that Student did not demonstrate a pattern of *** across time and settings. Moreover, she opined that Student's *** behavior *** was not a manifestation of Student's disability, because if it was, Student would have demonstrated a pattern of *** behavior on a more frequent basis and in other settings. The District asserts that Student's social interactions with peers are not impaired at all and that Student does know how to appropriately respond in social environments.

Turning to the incident in question, the District administrator found the first *** to be when ***. This then led to ***. In the District's opinion, Student then ***. The District asserts that Student was ***.

Contradicting Student's account of the incident, the District notes that the video does not show ***. Moreover, the video contradicts Petitioner's assertion that ***. Rather, the Student ***.

For these reasons, the District insists that Student was not the victim of bullying. ***. According to the District, Student was not targeted. Rather, Student ***. ***.

In any event, the District urges that Petitioner wholly failed to prove that Student has suffered any educational harm. Neither Student's academic nor non-academic development, insists District, has been affected. The District noted that Student is passing all of Student's classes and that Student is functioning within normal limits emotionally and socially with Student's peers.

Moreover, the District insists that Student was not ***. While noting that this issue is not properly before the Hearing Officer, the District urged that the above described acts do not demonstrate that Student was without fault and was not ***. Nor does the video show that Student used the minimum force required to remove ***self from any immediate danger of harm.

Turning to the MDR decision, the District details that the ARD Committee made the correct determination and that Petitioner failed to prove that Student's *** was caused by or had a direct and substantial relationship to Student's disability. According to the District, Petitioner also failed

to prove *** directly resulted from the District's failure to implement Student's IEP. The District urges that Student's IEP was correctly and fully implemented and that the MDR committee reviewed all relevant information in the Student's file, including any relevant information provided by Mother. While Mother testified that the Committee failed to consider information that she presented from 2007, a fact the District is unwilling to concede, the District argues that the 2007 information is too dated to be relevant.

In the District's opinion, the only evidence indicating Student's conduct had a direct and substantial relationship to Student's disabilities is Mother's testimony insisting that Student does not know how to respond in social situations like an unimpaired student would. However, the remaining evidence in this hearing, according to the District, establishes just the opposite. Student social interactions with peers are not at all impaired and Student does know how to respond in social situations. Referencing a 5th Circuit Decision in 2016, the District maintains that if a mere conclusory statement were enough to plead discrimination, any plaintiff with a disability could attribute any misconduct, no matter how severe, to the disability.⁷⁰

Turning to other specific allegations, the District acknowledges clerical errors were made. However, the District maintains these errors were not relevant to the MDR determination, the development of Petitioner's IEP, or Mother's participation in the MDR. The District notes that Mother fully participated in the MDR, and presented her opinion that the incident was a manifestation of Student's disabilities because the District failed to implement Student's IEP in ***.

As noted above, the District disagrees that accommodations in Student's IEP were applicable in *** and notes there were no accommodations specified or behavioral limits defined for outside of the classroom settings. Rather, the IEP accommodations clearly are not implemented in *** of the school. Therefore, argues the District, there can be no finding of failure to implement the accommodations in the ***.

⁷⁰ *C.C. v. Hurst-Eules-Bedford ISD*, 67 IDELR 111, (5th Cir. 2016).

Finally, the District disagreed with Petitioner's assertion that there was an improper change in placement or pattern of changes in placement. The District asserts that the requirement to convene an MDR was not triggered until a disciplinary change of placement occurred after Student's tenth consecutive day of removals. According to the District, this requirement was met when the District convened the MDR on Student's ninth consecutive day of removal.

The District explained that, given Mother's disagreement with the MDR and its interpretation of Student's IEP, the ARD Committee offered a 10-day recess meeting to discuss Mother's concerns with the IEP and to attempt to address some of her concerns. The District explains that the 10-day recess meeting was not to reconsider the MDR decision. At this reconvened meeting, the ARD Committee agreed with Mother's proposal that Student be given verbal reminders *** before transitional times. The ARD Committee further agreed to conduct an FBA and a pragmatic language evaluation for Student. At the time of hearing, both had been performed, despite the LSSP noting that an FBA was difficult to perform because Student did not present the frequency or severity of behavioral issues typical of students requiring an FBA.

In a separate action, the District notes that Mother filed a grievance concerning Student's placement in DAEP for *** days. The District acknowledged the mistakes made in the DAEP placement paperwork and, in order to compromise with Mother, the District removed Student from DAEP after only 11 days and changed the coding in Student's records from a "****" to a "****."

For the above reasons, the District insists that Petitioner failed to meet its burden of proof on all complaints.

C. Hearing Officer's Decision

Even while addressing the five issues raised by Petitioner, the Hearing Officer notes they may be addressed in essentially three relevant questions to this case:

1. Was Student subject to bullying and denied FAPE?

2. Was the conduct for which Student was disciplined “caused by, or had a direct and substantial relationship to, the child’s disability?” and
3. Was the conduct for which Student was disciplined “the direct result of the [District’s] failure to implement Student’s IEP?”⁷¹

The Hearing Officer finds the questions are answered in the negative. Student was not the victim of bullying as evaluated in IDEA FAPE proceedings, Student’s *** was not a manifestation of Student’s disabilities, nor was Student’s conduct the direct result of the District’s failure to implement Student’s IEP.

1. Bullying and Provision of FAPE

In order for bullying to be applicable in the IDEA regulatory scheme in this case, it must be shown that Student was placed in a more restrictive setting to avoid bullying behavior or that Student otherwise was not receiving a meaningful educational benefit under the IDEA. To be clear, the Hearing Officer does not consider the bullying issue in the context of an MDR. Rather, it is properly considered as a FAPE issue. Petitioner urged that Student’s placement in ICS, then OCS, and then to DAEP resulted in a failure to provide FAPE.

However, the greater weight of evidence establishes that Student was not placed in a more restrictive setting to avoid bullying but rather in accordance with disciplinary guidelines. While this triggers the question of whether the actions of Student were a manifestation of Student’s disability, it does not in this forum lead to an inquiry into the District’s bullying policy.

Moreover, there was no evidence to prove Student was in a hostile environment or that Student did not receive FAPE while in DAEP. Rather, the evidence establishes that Student’s grades got better while in DAEP, with one teacher explaining that she provided one-on-one tutoring for Student and that Student made substantial progress with this type of instruction.

⁷¹ 34 C.F.R. § 300.530(e).

The Hearing Officer agrees with Mother in that ***. It is not helpful in this situation for Principal *** to name Student as ***, as the Hearing Officer understands she believes. Rather, the video and testimony establish ***, ***,” as the testimony established, ***.” Administrators should be able to understand these signals and it is unhelpful to refer to *** in this case as equal to someone ***. Again, this leads to mistrust and is not helpful to build a healthy student-school-parent relationship all looking towards the Student’s success. Moreover, ***.

But returning to the issues at hand, when taking into consideration the District’s rules on bullying, even just for the sake of Petitioner’s arguments in this hearing, Student does not meet the elements of one bullied. Unmistakably, ***. But the evidence establishes that Student did not simply ***. For these reasons, Student was not bullied. Even if one assumes Student was bullied ***, it had no effect on the District’s provision of FAPE to Student. Throughout all the placements, the evidence indicates that FAPE was provided.

2. MDR Consideration

The evidence also establishes that Student’s involvement in the *** 2016 *** was not a manifestation of Student’s disabilities. Learning disabilities do not cause ***. Rather, Student’s *** was a manifestation of Student’s poor emotional regulation. To be clear, Student’s poor emotional regulation is not a disability, as proven by the FBA and Student’s generally good behavior. The testimony established that Student’s emotional regulation is not significantly different than that of other students Student’s same age with maturing emotional responses. For Student’s disability to affect whether Student should have been sent to DAEP, the evidence would have to suggest Student’s disability was substantially related to Student’s ***; in other words, that Student’s *** was something Student could not stop doing because of Student’s disability.⁷²

To the contrary, the evidence establishes that Student is a well-behaved *** *** with a few incidents of significance this year on Student’s disciplinary record.⁷³ These include ***. These

⁷² Tr. at 248.

⁷³ The Hearing Officer does not consider *** to be of significance.

are greatly outweighed by the praise Student's teachers gave Student's in-classroom behavior. They described Student as very respectful, with good social skills, easily re-directed with a verbal or non-verbal prompt, and as a sweet ***. Generally, the teachers, counselors, and administrators all testified that Student is a typical *** ***.⁷⁴

3. IEP Implementation

Student's disabilities are speech impairment, learning disability, basic reading skills, math calculation, reading comprehension, math problem solving, and written expressions.⁷⁵ Student scored within the average range on a pragmatic language test that related to Student's ability to communicate in social situations.⁷⁶ Student scored in the average range in being able to understand and communicate socially. The evidence establishes that the District has tested and considered the potential for Student to have disabilities beyond those previously found but none exists. Given Student's disabilities, Student's IEP was fully implemented.

Mother indicated that the level of disciplinary issues Student has experienced this year is unacceptable to her and in her family setting. While that may certainly be true, behavioral disabilities are not established by each family's expectations but rather by testing based on peer reviewed and established analysis and by the opinions of experts who review the testing and actions to make such determinations. In this case, Mother's expectations and opinions as to the level of conduct that constitutes a behavioral disability differ greatly than that of the administrators, teachers, and school psychology experts.

Moreover, Student has not shown a change in academic performance or behavior that was necessary for the District to convene an ARD Committee meeting, such as a sudden decline in grades, the onset of emotional outburst, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes. Mother may disagree with this determination and cite to

⁷⁴ Tr. at 455.

⁷⁵ Ex R-11 at 3; Ex. R-12 at 4.

⁷⁶ Tr. at 126.

Student's disciplinary record for the year. However, the greater weight of evidence as carried by the testimony of teachers and administrators proves that Student's conduct was not significantly different than that of other students Student's age and gender. In short, the Hearing Officer finds that Student is a "good kid" making progress in Student's academics at the school. Implementation of Student's IEP has been and continues to be successful. Student's few behavioral issues are not outside what one expects at this age for a student with no behavioral disabilities.

Turning to the misunderstanding over the application of Student's IEP, the evidence establishes that Mother and the other ARD Committee members did not agree over whether the IEP accommodations applied outside the classroom environment. Mother understood that Student's IEP included accommodations that were put in place when Student's BIP was discontinued.⁷⁷ She reasonably thought they covered Student's actions ***.⁷⁸ With her understanding, she did not bring up behavior issues as something that needed to be added during ARD Committee meetings. Mother thought they were already addressed. The other ARD Committee members who testified noted that all the disabilities were academic based, not behavioral, and for this reason they did not apply ***.

This is an unfortunate, if reasonable, misunderstanding that should be worked out through another ARD Committee meeting and that apparently has been addressed with a new accommodation, teachers reminding Student to ***. However, the issue as far as it relates to this proceeding is moot as the evidence establishes that regardless of one's interpretation of the settings for application of the IEP, it was sufficiently implemented by the District. There was no requirement in Student's IEP regarding transition times, such as that Student be shadowed from class to class, which was raised as one example. Rather, all the accommodations in Student's IEP were fully implemented.

⁷⁷ Tr. at 135.

⁷⁸ Tr. at 129.

Mother is incorrect in her opinion that, while at school, Student lacks the ability to think through situations in the same manner that other students would.⁷⁹ The teachers and administrators who actually see the “other students” find Student’s reactions and abilities to be typical. Mother states concerns that when put in the situation on *** 2016, Student did not ***.⁸⁰ However, this expectation is not one indicative of a disability. Rather, it is one for maturation and teaching of a typical student at this age. After all, ***.

Mother noted that in addition to ***, there have been several other instances concerning discipline even in this school year in which a pattern is revealed and, as such, Mother thought they were addressed in Student’s IEP.⁸¹ But the evidence establishes that Student’s *** is not indicative of a disability. Nor are the other disciplinary issues Student has been involved in this this year indicative of a behavioral disability. Moreover, Mother’s insistence of relying on Student’s behavior in *** with *** years of outstanding behavior in between is beyond that reasonably considered by an ARD Committee.

Finally, the Hearing Officer notes that a great deal of distrust exists between Mother and the District. The Hearing Officer will not go through all of them, but the evidence establishes that the District made numerous, at least five, errors on documents provided to Mother.⁸² Changing consequences and the information provided does not lead to a level of trust between a school and a parent. In addition, the above-noted misunderstanding over the IEP’s application to in-classroom situations only exacerbated the distrust. There is no right or wrong in this situation, only a misunderstanding that continued the level of suspicion on Mother’s part that she and Student were not being treated fairly by the District. It is noted that the District effectively agreed with much of this analysis and took efforts to mend the mistakes made and lack of trust created. The District greatly reduced the DAEP placement (from *** to *** days) and changed Student’s records to

⁷⁹ Tr. at 125.

⁸⁰ Tr. at 141.

⁸¹ Tr. at 130.

⁸² Tr. at 162-164.

reflect something less than *** took place on *** 2016. The District did not agree with this change in records but made the change in any event in order to attempt a resolution with Mother.

4. Other Matters

Petitioner mistakenly believed there was a requirement to reconvene the MDR after *** 2016. This is not a correct reading of the applicable rules and regulations. There is no legal requirement for a second meeting after an ARD committee has made a manifestation determination. The *** 2016 ARD Committee meeting was to consider Student's IEP. At that time, it was added to Student's IEP that teachers are to remind Student to *** before transitional times.⁸³

D. Conclusion

Petitioner did not prove the allegations at issue and Petitioner's requested relief is denied. Answering the specific issues raised by Petitioner that were not otherwise dismissed or withdrawn (numeration retained from original list of issues):

2. Student's conduct on *** 2016, was not a manifestation of Student's disability;
3. Student's removal from current educational placement to OSS, ISS and the DAEP did not constitute a "pattern" of removals under the IDEA;
4. The District did not violate the IDEA and continued to provide FAPE when Student's current educational placement was changed to DAEP and Student was not denied FAPE as a victim of bullying;
5. The District did not violate the IDEA when it did not hold the MDR meeting prior to assessing punishment on Student; and
7. The District's application of Student's IEP only to Student's classroom setting was not a failure to implement Student's IEP nor a violation of the IDEA.

⁸³ Tr. at 244; R-13 at 5.

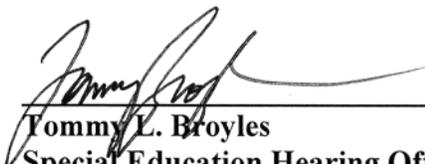
VI. CONCLUSIONS OF LAW

1. The Allen Independent School District (the District) is a local educational agency responsible for complying with the Individuals with Disabilities Education Improvement Act (IDEA) as a condition of the State of Texas's receipt of federal education funding pursuant to IDEA, 20 U.S.C. § 1400 *et seq.*
2. *** (Student), by next friend *** (collectively, Petitioner) bears the burden of proof on all issues raised in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005).
3. The District correctly determined that Student is a child with one or more of the IDEA enumerated disabilities who, by reason thereof, is eligible for special education and related services. 34 C.F.R. § 300.8(a)(1).
4. Petitioner failed to prove that Student was subjected to bullying that resulted in a denial of FAPE. 34 C.F.R. § 300.513(a).
5. Petitioner failed to prove that Student's *** 2016 conduct, subject of the MDR ARD Committee meeting, was caused by, or had a direct and substantial relationship to, Student's disability. 34 C.F.R. § 300.530(e).
6. Petitioner did not prove that Student's *** 2016 conduct was the direct result of the District's failure to implement Student's IEP. 34 C.F.R. § 300.530(e).
7. The District was not required to hold an ARD Committee meeting prior to assessing Student's punishment. 34 C.F.R. § 300.536(a).
8. Petitioner failed to prove that a pattern of educational placement removals was implemented. 34 C.F.R. § 300.536(a).

ORDER

Having considered the evidentiary record and the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer hereby orders that Petitioner's requested relief is denied.

SIGNED April 13, 2016.



Tommy L. Broyles
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision 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.⁸⁴

⁸⁴ 20 U.S.C. § 1451(i)(2); 34 C.F.R. § 300.516; 19 Tex. Admin. Code § 89.1185(n).