

IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION
DUE PROCESS HEARING CASE NO.: D20-008 (Expedited)

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I. PROCEDURAL HISTORY

This Expedited action concerning a disciplinary expulsion was commenced by the filing of the Petitioner's complaint with the West Virginia Department of Education on November 12, 2019, and was assigned to this hearing officer the same day.

An initial status and scheduling conference was held on November 15, 2019, in which the student's mother participated *pro se*, and the LEA was represented by [REDACTED]

[REDACTED] During that telephone conference the issues to be addressed at hearing were put into final form, and a hearing schedule agreed upon. The hearing was set for December 9 and 10, 2019, with evidentiary disclosures due on December 2, 2019. The hearing location was selected at the County's public library, and a Resolution session was scheduled for November 19, 2019. The parent indicated the hearing would be open to the public and student would not attend the hearing. The parties were advised to request subpoenas at the earliest possible time if they are needed. The student's mother indicated she would be seeking legal counsel but would proceed *pro se* until, or unless she could hire counsel. The mother further indicated she had not been able to acquire student's educational records from the LEA and that she had been denied a viewing of the video tape made during the bus ride that was the scene of the subject disciplinary incident. The LEA asserted that showing the video to student's mother would violate the FERPA privacy rights of other students also visible in the video.

An order was entered the same day confirming these dates and agreements, and the LEA was ordered to provide the petitioners the contents of student's written school record prior to the Resolution session on November 19, 2019. No ruling was made on

provision of the bus video and the parent's motion for its release was taken under consideration.

The Resolution session was held on November 19, 2019, and the LEA voluntarily allowed student's mother the opportunity to view the video tape of student's bus ride home on October 7, 2019. The LEA also provided to student's mother immediately before the resolution session, a packet of documents from student's file which was represented to be student's "entire school record." December 2, 2019 was the deadline for exchange of witness list and evidence between the parties. In a series of emails dated November 20, 2019, November 22, 2019, November 26, 2019, and December 2, 2019, student's mother disclosed that she intended to offer as evidence at the hearing:

"student's entire school record," the bus video of October 7, 2019, as well as the testimony of four witnesses who were the LEA's Band Director, the mother of the student who reported this student's behavior on the bus on October 7, 2019, the LEA's school psychologist, and a cousin of student's mother.

Student's mother did not make or submit a comprehensive list of witnesses, or individually identify documents before the hearing. The LEA's counsel did make a formal submission listing witnesses and documents intended for admission at hearing, and made that available on December 2, 2019.

On December 3, 2019, the LEA filed a motion to exclude all of Petitioner's evidence as not timely disclosed. In response to this motion, I reviewed the file and ascertained that the above-listed disclosures had occurred prior to the December 2, 2019, deadline for evidence disclosures.

A final telephone conference was held on December 5, 2019, with LEA attorney, [REDACTED] and student's mother. At that time, I indicated to the parties that I would allow petitioner to submit the documents (i.e. the "entire school file and video of the bus ride) and witnesses which parent disclosed in her emails, and that we would address specific documents, and determine if they were timely disclosed, at the commencement of the hearing on December 9, 2019. [REDACTED] indicated that co-counsel [REDACTED] would represent the LEA at the hearing.

On the morning of December 9, 2019, while en-route to the hearing site, I received messages from my office and WVDE personnel that I should contact Attorney [REDACTED] immediately. I called his office and he informed me that his co-counsel, [REDACTED] had been in a serious automobile accident on the way to the hearing and that there was no one available to represent the LEA that day. He indicated he could be available to represent the LEA the next day.

On entering the hearing room, both the petitioners and representatives of the LEA were present. Two witnesses subpoenaed by the petitioners were also there: the LEA's Band Director, and the mother of the student who had reported this student's behavior on the bus on October 7, 2019.

Since the LEA's counsel was unavailable through no fault on his own, the start of the hearing was continued, on the record, until the next day, December 10, 2019. The second subpoenaed witness indicated she could not return the next day since she had been summoned to the bed side of her dying grandfather, in another state, and had already delayed going in order to attend the hearing that morning. Inquiry was made to Petitioner regarding the import of this witness' anticipated testimony and whether it could be taken

by affidavit. At that time, petitioner and the subpoenaed witness agreed to prepare an affidavit in lieu of live testimony.

The next day, December 10, 2019, the hearing was held with [REDACTED] Esq., representing the LEA, and student's mother and father appearing *pro se* on behalf of their son. The LEA provided in notebook form all the evidentiary documents they had identified, together with their witness list.

The petitioners submitted five exhibits into evidence and offered the testimony of the Band Director as their lone witness. The documents submitted were the above-mentioned affidavit from a timely identified witness (Pet Ex. 1); the videotape of the bus incident on October 7, 2019 (Pet Ex 5); Petitioner's documents which were previously attached to the original complaint (Pet Ex 3); and a large packet of documents which were confirmed with the LEA's Special Education Director to be the "entire school file" which he provided to the petitioners at the resolution session, and which petitioner identified as evidence in an email to LEA's counsel on November 20, 2019 (Petitioner Ex 4); and an audio recording of the LEA's expulsion meeting (Pet Ex 2). One document Petitioner offered at the close of hearing had not been identified previously and was excluded from evidence for that reason.

The hearing was held in its entirety on December 10, 2019. Both parties gave closing statements since it was thought the expedited timeline left inadequate time for post-hearing briefs. An expedited transcription was requested.

The LEA's Special Education Director indicated that school is out of session for the Christmas and New Year holidays from December 23, 2019 to and including January 3, 2020, and December 11, 2019 was a snow day. Therefore, 10 school days

after the close of hearing will be completed on January 8, 2020. This decision is due to be issued on or before that date. The Verbatim transcript was issued on December 18, 2019, and was available for review in the writing of this decision. Both the petitioners and the respondent school district submitted post-hearing documents, via email, with proposed findings of fact and conclusions of law. There were fully considered in the writing of this decision.

II. ISSUES PRESENTED

1. Whether the Manifestation Determination review, regarding this student's conduct on October 7, 2019, was accurate in its finding that the conduct was not a manifestation of student's disability?
2. Whether student should be returned to his school?
3. Whether student is entitled to a new Functional Behavior Assessment (FBA), Behavior Intervention Plan (BIP), and a new Individualized Education Plan (IEP)?

FINDINGS OF FACT

1. Student was 15 years, 8 months old at the time of hearing, and a ninth grader in respondent's high school. LEA Ex. 12, pg 1.

On October 7, 2019, student rode the activities bus home. This late bus transports students who have participated in after school activities. During that bus ride, he became engaged in a contentious conversation with his sister and another student. Parent's exhibit 2 (bus videotape), and LEA Ex. 3

2. The bus videotape shows that student stays in the space for his bus seat throughout the bus ride, only occasionally leaning forward, apparently to remain in the conversation.

Some of the talk throughout the 21 minute ride is quite crude but this is true of most of the student's on the bus, both boys and girls. Parents Ex. 5.

There are witness statements but no other objective verification in the evidentiary record regarding the report of this student's behaviors said to have taken place at his home or elsewhere.

It is my conclusion that the statements made on the bus by this student were meant to communicate his frustration and annoyance with various people and circumstances, but I saw or heard nothing that would constitute a present threat. The statements were hyperbole, exaggerated to make a point, not statements of intent to do harm.

3. Student is eligible for special education and has received his education this year pursuant to an IEP dated August 27, 2019. Lea Ex. 12. That document indicated his Exceptionality is "BD" (i.e. behavior disorder). Further, he has been recognized /

diagnosed by a psychiatrist as also having ADHD, an anxiety disorder, and oppositional defiant disorder. Parent's Ex 3, at page 2 and LEA Ex 12 and 19.

In a neuro psychological evaluation performed in 2012, when student was only 8, he was described as having "high activity level" and "recklessly disinhibited behavior." He was also noted as having "an overlay of autistic-spectrum characteristics, including sensory defensiveness, social retardation, physical clumsiness, literalism in language usage, and obsessive thought patterns. "[E]xtreme impulsivity" and "hyperactivity" were also found, along with a reading disorder.

This evaluator opined that student presented not as a child with a damaged brain, "but rather one that is oddly wired." A diagnosis of ADHD-combined type, and reading disorder were found. Parents Ex 3 at pp 3-8.

4. Student was given a Social/Emotional Assessment as part of a Psychoeducational Evaluation, report dated May 17, 2015, when he was eleven years old and in the 5th grade. Parents Ex 4 at pp 107-115. At that time, he was receiving special education services as a child eligible under the "Other Health Impairment" category. In that testing, he received ratings on his social/emotional functioning within the Very High Clinical Range. Parents Ex 4 at pg 114. The Recommendations given to help student improve his behavior were:

- Identify [student's] special interests and hobbies. Find ways to use his present knowledge to enhance learning of new situations.
- Increase recognition and comments of [student's] personal strengths and unique talents to improve his self-esteem in academic areas.

- Provide a behavioral program with clear rules, frequent and immediate positive reinforcement for target behaviors, and immediate consequences for specified negative behaviors.
- Assist [student] to develop self-advocacy skills for his areas of weakness and to communicate his thoughts, feelings, or moods to teachers or personnel within the classroom.

Parents Ex 4 at p115. Neither the 2012 evaluation nor the 2015 evaluation were considered at the manifestation determination meeting. See LEA Ex. 4

5. Testing by the LEA occurred when student transferred there in 2018, from another state. LEA Ex 17 and testimony of school's psychologist. That testing was performed on August 24, 2018 and consisted of a WISC-V intelligence scale and BASC-2 (Behaviors Assessment System for Children 2d edition). Student received a full scale IQ score of 109, in the high-average range. LEA Ex. 17 at p7. The BASC-2 revealed clinically significant scores in the areas of aggression (99th percentile), conduct problems (99th percentile), and learning problems (96th percentile). LEA Ex 17 at p9. The school psychologist testified that these findings strengthen the conclusion that student is an eligible IDEA student in the category of behavior disordered. Transcript of December 10, 2019 (Hereinafter: "TR") at pg. 129, line 14 to pg. 130, line 6.

6. The student's most recent IEP, dated August 27, 2019, indicated that "student's behavior impede[s] his . . . learning or that of others. . ." LEA Ex. 12, p. 3. That IEP indicated that in 2018 student was "placed in the alternative school place setting" The alternative school would be where he received "all of his core classes," including English, Math, Science and History." In the 2019-20 school year Student has

been going to the regular high school for band, music appreciation, and theater. LEA Ex. 12 p.7, and testimony of Band Director. Student is assigned to the “options program due to being behind his cohorts.” LEA Ex 12, at p7. Student’s educational program was not described in testimony, and the IEP presumes the reader knows what the “options program” is. “Options” science, history, English and Math are stated as being his special education services. LEA 12, p 10.

7. The five goals in student’s IEP included one related to academic content and four related to behavior. The four behavior goals are 1) related to respectful behavior to staff, faculty and bus driver; 2) being respectful to all technical equipment; 3) refraining from fighting by walking away; and 4) being in his assigned location at all time. LEA Ex 12, at p9.

8. The only item on the list of Supplementary aids and services which student was given, was a behavior plan to be used “across all educational environments” in “all academic classes.” A comparison of student’s Behavior Plan and his list of behavior goals shows they are the same four items. That is, the four annual behavior goals were just restated and called a “Behavior Plan.” LEA Ex. 12, p9 and LEA Ex 13.

Student’s Special Education teacher and designee, admitted that the Behavior Plan was “weak.” She thought an FBA has been done but wasn’t certain. The Behavior Plan contains no information regarding behavioral triggering events, nor interventions to be used. No FBA appears in the record. TR pg. 98, lines 14-16. LEA Ex. 13.

Further, although behavior toward the bus driver is expressly mentioned at the IEP “Goal 2: Behavior”, the behavior plan was not even intended for use on the buses. See and compare LEA Ex. 12, pgs 9 and 10.

In addition to the described four behavior goals, the Behavior Plan only provides for “Consequences” of “Warning,” “In School Suspension,” and “Out-of-School Suspension up to 10 days unless and [sic] serious incident happens, then an automatic suspension will occur.” TR. pg. 93, lines 16-21.

Despite its title of “Behavior Plan,” the LEA’s document 13 is not calculated to be an effective behavior intervention plan, as it does not identify triggers nor specify interventions.

9. Seven witness statements were offered concerning student’s statements on the October 7, 2019 bus ride home that afternoon:

A. Witness statement: “Student’ was looking at [another boy] and he said kids like that make me want to shoot up the school. You’re on my kill list now.” LEA Ex. 3, pg 1.

B. The second witness indicated, that before the bus ride student told his sister he was about to snap. “I am about 40% and I might hurt someone if I get down to 20%.” She also indicated that when her friends joke with him, he sees it as being bullied.”

At home after the bus incident, the witness reported student said “he wanted to bust out a window so he could slit someone’s throat” and also said he wished he had been sitting on the front of the bus so he could wreck it.” LEA Ex. 3, pg 2.

C. A third witness reported student said multiple times that he was going to shoot up the school. Student also told this boy that he was on his “kill list.” LEA 3, pg 3.

D. Fourth witness – [Student] said “he might snap – that he might hurt someone.” [Student] said he was gonna get to the point where he wouldn’t care what happened to anyone. He said he was gonna get to the point where he didn’t feel anything.” This witness indicated they couldn’t tell if student was serious or not but they didn’t feel threatened. LEA Ex 3, pg 4.

E. The fifth witness reported student saying on the bus that “he doesn’t care anymore and how he doesn’t care if he hurts anyone or if he gets hurt.” This witness was “uncomfortable and frightened” by student’s talk about “making a list and saying “[another boy] would be one of the first ones on there.” LEA Ex 3, pg 5.

F. Witness 6 indicated student said “I’m about to break this window and take the glass and stab everyone on the bus.” This witness could not remember student’s exact words but thought he wanted to kill everyone. LEA Ex 3, pg 6.

G. The written statement of a 7th witness was offered but, as offered at hearing, was not legible, so it is not considered in this opinion.

From the above-witness statements, it appears consistently reported that student made statements on the bus that afternoon indicating he had thoughts about shooting in the school, creating a kill list, and targeting one particular student. He also indicated a desire to break a window and kill people with glass, but the exact wording was not remembered and nothing like this is audible on the videotape LEA Ex. 3 and Parents Ex. 5.

10. After carefully watching and listening to both the front camera view and the rear camera view of the LEA's videotape of the student's bus ride of October 7, 2019, I am of the opinion that the witness statement's taken, while reporting similar words to what student spoke, are not accurate quotations, and give a falsely sinister view of student's words.

In a conversation with this sister, he says, "They don't get me." . . . "[Sister's name,] don't, I'm at about 20%." [Sister says something inaudible] Hear me out what I have to say. If I get down to 0% I'm gonna break the glass. . ." Then he says to her "You're the reason why people shoot up the school. I know this because you make me want to shoot up the school." This is said laughing in the frustrated tone of a teen trying to impress his sister with the truth that she is getting on his nerves. Parents Ex 5 at approximately 3-4 minutes in. Neither of these statements communicates present intent, nor immediate threat.

It appears on the front view recording that most students on the bus are engaged in the conversation and there is frequent laughter. No one appears frightened and student does nothing overtly frightening or threatening.

11. Student's mother indicated in her opening statement that student was horribly bullied and abused by his fellow students, before student's family moved to West Virginia in 2018. That bullying involved both beatings and sexual abuse.

12. Both the Special Education Teacher / Designee and the LEA's Band Director testified that at the manifestation determination meeting they were both inclined to vote that the behaviors exhibited by student on October 7, 2019, were manifestations of student's disability. However, they were both persuaded to vote no because of their

interpretation of the Behavior Disorders category contained in W.Va. Policy 2419. TR p36, line 6-13, and pg 72, line 1-7.

13. Student's mother described her son as a musical savant. His Band Director testified that student is an extremely gifted self-taught pianist, and that student plays better than he does after many years of formal lessons. The Band Director also indicated that music is an escape and solace for student, and that it helps him when he is upset or having a bad day. TR pg 30, lines 13-21, and pg 32, lines 6-22.

14. In his closing statement, student's father indicated that October 7, 2019, was one of student's bad days. During the school day student had approached one of his teachers seeking help for his emotional state, but did not receive it. TR p.165, lines 23 to pg 166, line 6.

15. When asked if student's conduct/threats were an inappropriate behavior or feeling, within the meaning of the definition of Behavior Disorder, the LEA's school psychologist refused to answer, and instead deflected the question, stating she thought it was "dangerous." However, conduct which is dangerous could/would also be inappropriate, as evidenced by the description of the offense he is accused of. LEA Ex. 2, p1.

16. The LEA's Ex 2 reflects that student was expelled for a level 3 violation of the district code of conduct. "Imminently dangerous, illegal and/or aggressive behaviors -- are willfully committed and are known to be illegal and/or harmful to people and/or property." LEA Ex 2, p1. At page 2 of that exhibit is the LEA's Letter of Disciplinary Action. Which states, in part, that the student "has acted in a way that is not consistent with the expected behaviors, which has, resulted in a disruption in the learning conditions

for both students and staff. LEA Ex 2 at p2, top. I do not believe these statements accurately characterize student's behavior or its effects. A viewing of the bus video reveals that although much of what was said was not audible to the microphone, no one on the bus appears much troubled by it. The bus ride continued without interruption. One student got off the bus before the others and all the remaining students cheerfully called out a good-bye to her. At the last stop all the students filed off in a normal manner. No one reported anything to the bus driver, even though that person was the sole responsible adult in the setting. The videotape also shows that the student stays in his seat or within that space for the duration of the bus ride. I see nothing there that presented an "imminent" threat to anyone. Further, as stated, the bus ride proceeded without interruption, so I am not sure what "disruption" took place as referred to at LEA 2, pg 2, What I viewed on the tape reveals a group of teenagers engaged in conversation, interspersed with frequent laughter. The videotape of the actual event does not support the severity of the disciplinary charge brought against student. Parents Ex. 5.

17. The Sheriff's deputy who took the statement of the boy who reported student's statement on the bus on October 7, 2019, testified that student said: "people like him want me [the subject student] to shoot up the school." Parents Ex 2. Thus, the deputies' investigation report reflected that student's statement regarding a school shooting was not even something he wanted to do, but rather what someone else was wanting him to do. Parents' Ex 2.

18. Bus transportation is not included, or specified, in student's IEP as a necessary related service. LEA Ex. 12.

III. CONCLUSIONS OF LAW

1. The passage, which the LEA's witnesses reported convinced them that students comments were not manifestations of his disability, is found at Policy 2419, Regulations for the education of students with exceptionalities. (Hereinafter cited in the form WV Policy 2419,) Chap §4, 3.F.

There is given the definition and criteria for a finding that a student has an Emotional Behavior Disorder. Both the LEA's Special Education Teacher / Designee and the Band Director testified the manifestation review committee could not reconcile, what they perceived as a "terrorist threat" from the student, with the definition of Behavior Disorder. That definition states:

"An emotional/behavioral disorder means a condition in which a student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers'
3. Inappropriate types of behaviors or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency to develop physical symptoms or fears associated with personal or school problems; or
6. Schizophrenia.

The term does not include students who are socially maladjusted unless it is determined they have an emotional/behavioral disorder."

See, Accord, 34 C.F.R. § 300.8(c)(4).

While "terroristic threats" are not mentioned in the definition, it does include "inappropriate types of behaviors or feelings under normal circumstances." As previously stated, I believe student's statements were exaggerated expressions of

frustration, but even if the statements were meant literally in the heat of the moment, they would still be “inappropriate feelings” under “normal circumstances.” Other statements reported by witnesses (LEA Ex. 3) indicated student made comments about not feeling any more, and not caring if he hurt himself or others. These types of statements are consistent with people who are suffering from depression, which is included at part 4 of the definition.

Further, the LEA’s school psychologist reported that the BASC-2 test results for student indicated clinically significant high risk for aggression, conduct problems, and learning problems. (See LEA Ex. 17 at pg 9). She testified that the BASC 2 results confirm and strengthen student’s classification as a behavioral disordered student, the very classification that makes him eligible for special education under both IDEA (20 U.S.C. § 1400 et seq.) and West Virginia Policy 2419 (WV C.S.R. § 126-16-3.1)

Student’s statements were inappropriate, tone deaf to the feelings/perceptions of those around him, and indicative of likely feelings of depression. These are characteristics 2, 3, and 4 of the definitions of Behavior Disorder. Consequently, I conclude that student’s comments on the bus on October 7, 2019, were more likely than not, conduct with a direct and substantial relationship to the student’s disability, and therefore should be considered to be a manifestation of his disability. 34 C.F.R. § 300.530(e)

2. Whenever a child is removed from their current educational placement for a period of more than 10 days, due to disciplinary action, that removal constitutes a change of placement. See 34 C.F.R. §300.356(a)(1). The student herein was expelled from school for a period of 365 days.

3. When a disciplinary change of placement occurs, the LEA, the parent and relevant members of the IEP team must make a manifestation determination within 10 days of the decision to change the child's placement (34 C.F.R. § 300.530(e). This inquiry is to determine whether the objectionable conduct was a manifestation of the child's disability, or a direct result of a failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(i) and (ii).

If either condition is met, then the behavior is determined to be a manifestation of the child's disability, and the LEA must conduct a functional behavioral assessment and develop a behavior intervention plan. 34 C.F.R. §300.530(f)(1)(i-ii).

Even where misbehavior is determined to be unrelated to the child's disability, the child is still to "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 C.F.R. §300.350(d)(ii).

4. Students with disabilities, eligible for special education under the IDEA, are to be educated with non-disabled children to the maximum extent appropriate, and they are to be removed to separate classes and separate schooling only if the nature or severity of the disability "is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2). (emphasis added) See also, W.Va. Policy 2419, Chap 5 §2, g, requiring IEPs to contain special education, related services, supplementary aids and services to allow a student to be educated with other students.

5. "If a student's behavior, regardless of the disability, impedes his/her learning or the learning of others, the IEP team **must** consider the use of strategies,

including behavioral interventions and supports, to address the behavior” (emphasis added). W.Va. Policy 2419, Chap 7 Introductory Paragraph, citing W.Va. Code § 18a-5-1.

6. Hearing officers have broad authority to award appropriate relief for violations of I.D.E.A. See, Forrest Grove School district v. T.A., 557 US 230, 129, S. Ct. 2484, 52 IDELR 152 (June 22, 2009). However, compensatory money damages and punitive damages are not available under IDEA. Sellers by Sellers v. School Board of Manasses Virginia, 141 f.3d 524, 528 (4th Cir. 1998), Cert. Denied, 525 U.S. 871 (1998). Lewis by Lewis v. Scott County Public Schools Board of Education, 67 IDELR 211(W.D.Va. April 21, 2016).

7. In Due Process actions such as this “[t]he burden of proof will be on the party seeking relief in accordance with the decision in Shafter v. Weast, 546 US 49, 126 S. Ct. 527, 163 L. Ed. 2d 387 (2005).” WV Policy 2419, Chap 11 § 4A.

8. Where, as herein, the student’s conduct is found to have a direct and substantial relationship to the student’s disability; 1) the student is to be returned to the placement from which he was removed unless the parent and the LEA agree to a change of placement, 2) the hearing officer orders a new placement; or 3) the removal is for special circumstances pursuant to 34 C.F.R. § 300.530(G). AND See 34 C.F.R. § 300.530(F)(2).

IV. DISCUSSION

A. OVERVIEW OF THE CASE

It is a tragedy of our time that school shootings have become common and the consequences of those incidents are reported in our papers regularly. The mention of the towns of Columbine, Colorado, or Sandyhook, Connecticut, evoke images and memories of horrendous loss of life. Reading stories of such events causes both deep sadness and resolution that preventive measures must be taken at once. It is understatement to say that the topic of school shootings is one that raises near universal alarm. Therefore it is completely understandable that faced with a report that a high school student had said he would shoot up a school, law enforcement and the school district took immediate action to investigate the matter. Statements were solicited from seven children who rode the bus with student on October 7th. LEA Ex 3. The conclusions of the LEA's investigation was that:

On Tuesday, October 8th, 2019¹, [student] made threats on the after school activity bus, making direct threats to [the LEA's] High School, the students, and the bus driver. It was reported that he was going to shoot up the school and was going to sit near the bus driver the next morning so he could wreck the bus. He also stated to a student on the activity bus "you are on my hit list." These direct threats resulted in [student] being suspended for 10 consecutive days with recommended expulsion by administration.

LEA Ex 4, pg. 1

¹ Per the witness statements, the conduct of the student at issue took place on Monday night, October 7, 2019. LEA Ex 3 at pp1 and 3.

Student was subsequently found to have exhibited conduct which was not a manifestation of his disability and was expelled from school for a calendar year. LEA Ex. 4, 5, and 6. He was assigned thereafter to virtual school. LEA Ex. 6.

As previously discussed in my findings of facts, the statement I hear student make, approximately three minutes into the video recording of the bus ride, is a statement to his sister that “You’re the reason why someone would want to shoot up the school”. . . . “I know this because you make me want to shoot up the school.” He was laughing as he said it. Parents Ex. 5. While this statement has the words “shoot up the school” in it, it doesn’t appear to me to be a direct threat. Rather it sounds like a teenage boy who is exasperated with his sister. He also says, “if I get down to 0%, I’m gonna break the glass. . .” Again, this is not stated in the form of a present threat. It sounds more like a warning his patience is running out.

The statement concerning the bus driver as reported in the October 8, 2019 investigation notes that the student “said that he wished he had been sitting on the front of the bus so he could wreck it.” Per the statement taken, this was said by student at home after he had gotten off the bus. The video tape of the bus ride shows that he stayed within the space for his seat throughout the bus ride. He made no attempt to approach or threaten the bus driver even though the bus was not full and he could easily have walked to the front of the bus. Yet the LEA’s conclusion, as stated above, is that student “was going to sit near the bus driver the next morning so he could wreck the bus.” Compare LEA Ex. 3 at p.2 with LEA Ex. 4 at p1. Somehow an expression of what he wanted to do in the past, but did not do, was interpreted as a present intent to do something the next day.

I was not able to hear the comment reported by the one boy that student told him he was on his kill list. Such statements are certainly troubling and certainly should be investigated in all circumstances where they become known. But it is also important to examine all the relevant circumstances, and accurately report the phrasing of the statements made, and consider it, in the light of the disabling condition and the character of the speaker.

B. ISSUES PRESENTED

Issue 1 – Whether the Manifestation Determination review, regarding this student’s conduct on October 7, 2019, was accurate in its finding that the conduct was not a manifestation of student’s disability?

This student is eligible for special education as a student with a Behavior Disorder (BD). This is a functional category of disability based on the behaviors manifested by the eligible student. See WV Policy 2419 Chap 4, § 3F. It is the same definition as that of “Emotional Disturbances” provided for the Federal Regulations. See 34 C.F.R. § 300.8(c)(4). It is not a diagnosis.

In a neuropsychological evaluation performed when student was 8, student was diagnosed with ADHD-combined type, and a reading disorder. It was stated he also met the criteria for a diagnosis of oppositional defiant disorder. Symptoms manifested by student included “recklessly disinhibited behavior, disturbed sleep patterns,” as well as “autistic spectrum characteristics, including sensory defensiveness, social retardation, physical clumsiness, literalism in language usage and obsessive thought patterns. The doctor opined that student’s brain was not damaged, “but rather one that is oddly wired.”

It was noted that student's "emotionality appears to drive a lot of his inappropriate behavior." Parents Ex. 3 at p8.

Student was again given a neuropsych evaluation in 5th grade, at age 11. It was found after giving him the Behavior Assessment Scales for Children – 2d Ed., that the student demonstrated "significant deficits in his social/emotional functioning across setting." Parents Ex. 4 at p 114. Consistently, the Emotional Disturbance Decision Tree (EDDT), completed by student's mother in that same evaluation, rated student's "social/emotional function within the Very High Clinical Range." Parents Ex. 4 at p114. Notably, the four parameters of the EDDT are four of the same characteristics which define the "Emotional/Behavioral Disorder" Eligibility Category under Policy 2419, and "Emotional Disturbances" under Federal Regulations: "Inability to build or maintain relationships, inappropriate behaviors or feelings, pervasive mood / depression, and physical symptoms or fears." Parents Ex 4 at p112, (Compare with Policy 2419 Chap 4 § 3.F. and 34 C.F.R. § 300.8(c)(4). Neither of these evaluations were reviewed, or their contents considered, during the manifestation determination. See LEA Ex. 4, pg 1.

The most recent assessment given student was given in August 2018, when he entered this LEA's district. He was 14 years, five months old at that time. The assessments given were the WISC-V Intelligence test, on which he received a full scale IQ of 109, in the high average range, and the BASC-2 risk assessment. Student received clinically significant risk scores in the areas of aggression, conduct problems, and learning problems. LEA Ex 17. The School Psychologist, who administered this evaluation, testified these scores solidified his classification as a behavior disordered student. Tellingly, the "Summary and Recommendations" section of that evaluation

contains no recommendations at all. During testimony, she indicated that student's behaviors on October 7, 2019, were "dangerous," and refused to acknowledge that they could be "inappropriate behaviors" within the definition of the behavior disorders disability category. She seemed to believe that if an expression was dangerous it, *ipso facto*, could not be a manifestation of a behavior disorder.

I would tend toward an opposite line of thought. If a student's disabling condition is emotional / behavior disorder, and that disorder is not only consistent with, but also defined by, inappropriate behavior, my starting point would be to suspect the inappropriate behavior IS a manifestation of this disability. The distinction between "dangerous" and "inappropriate" makes even less sense when you review the infraction definition for "Imminently Dangerous, illegal and/or Aggressive Behaviors" for which he was expelled from school. Within the definition it states: "The principal shall address these "inappropriate behaviors in accordance with WV Code § 18A-5-1a. subsections (b) through (h)." LEA Ex.2 (emphasis added)

The statements made by student were certainly inappropriate, and very likely occasioned by his emotionality and problems in relationships with others all of which is consistent with his behavior disorder. The fact that the student was deeply remorseful for his statements does not indicate that they couldn't have been manifestations of his disability as suggested by the testimony of the LEA's special education teacher / designee. Rather, I believe it demonstrates that he is highly emotional, has poor social skills, he didn't really mean the statements that he made, and never intended to harm anyone. In the audio recording submitted as Parents Ex 2, a school official can be heard saying that student looked awful on October 8, 2019, when he came in to offer his

apology, and he seemed very remorseful. [See student's statement at LEA Ex. 4, p5.] When confronted to confirm or deny his actions, he was neither hostile nor withholding, which you might expect from someone angry enough to commit a school shooting.

It is my conclusion, for all the reasons stated in this decision, that student's comments/statements made on October 7, 2019, had a direct and substantial relationship to the student's disability, and therefore is a manifestation of his disability, within the meaning of 34 C.F.R. §§ 300.530(e)(1)(i) and (e)(2).

Issue 2 - Whether student should be returned to his school?

Student should be returned to school and placed in the placement / classes he was in prior to October 7, 2019, as required by 34 C.F.R. § 300.530(f)(2). Since bus travel seems to present particular problems and challenges for student, and since it is not mandated under his IEP, student should not travel on the LEA's regular school buses, at least until an FBA is performed, and it can be determined if student can ride the buses safely. If student's parents cannot transport him, in the interim, the LEA should make sure that student has an alternate means to travel to and from school. Student's transportation needs should be discussed and decided upon at the IEP meeting mandated under this decision to determine if transportation is a necessary related service for student.

Issue 3 – Whether student is entitled to a new Functional Behavior Assessment (FBA), Behavior Intervention Plan (BIP), and a new Individualized Education Plan (IEP)?

After a finding that a serious disciplinary violation is a manifestation of a student's disability. The next step to be taken is the conduction of a Functional Behavior Assessment (FBA). This is mandated by 34 C.F.R. 300.560(f)(1)(i-ii). Although

student's IEP included a document labeled "Behavior Plan," the LEA's Special Education Teacher testified that she wasn't certain whether an FBA had ever been done. Further, there is no evidence in the record indicating an FBA was ever performed. An FBA is a necessary pre-requisite to the creation of a valid behavior intervention plan (BIP), as the BIP is created around the findings of the FBA.

Therefore, an FBA should be conducted as expeditiously as possible and used as the basis for the creation of a Behavior Intervention Plan, which includes identified antecedent behaviors and behavioral intervention strategies to be used.

Following the completion of the FBA and creation of the BIP, the IEP team shall meet to finalize and incorporate the BIP into student's IEP, and review the IEP document to interpret the instructional implications of the evaluation / assessment results. See 34 C.F.R. §§ 300.321(a)(5) and 300.530(f)(1)(i).

The LEA's school psychologist indicated her competencies were in the area of interpretation of data and standardized tests. TR p.125 Also, she indicated opinions and feelings about the student which I believe could indicate a bias against him.

Consequently, an independent behavior specialist, experienced in the FBA process, should be obtained for purposes of performing the FBA, and assist the IEP team creating the BIP. This professional should also be invited to participate in the IEP meeting incorporating the BIP.

V. DIRECTIVES FOR IMPLEMENTATION

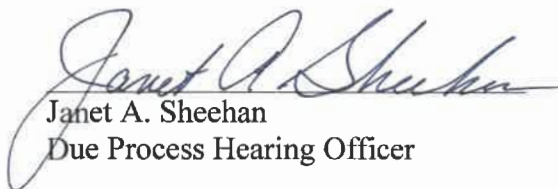
1. The School District shall readmit student to school, with services provided consistent with his IEP dated August 27, 2018.
2. At the earliest possible time, the LEA shall obtain the services of an independent behavior specialist experienced in the FBA process (preferably a Board Certified Behavior Analyst if one can be obtained) to assist the IEP team in the conduction of a Functional Behavior Analysis (FBA) for student, as mandated by 34 C.F.R. 300.530(f)(1)(i-ii).
3. When the results of the FBA are complete, the team shall use the FBA document, and any recommendations of the independent behavior specialist to create a behavior intervention plan (BIP). In creating the BIP, the recommendations of the 2015 evaluation should be incorporated to the maximum extent possible (refer to Finding of Fact #4 of this decision).
4. An IEP meeting shall be held and the BIP shall be incorporated within students IEP document. The IEP team shall also consider and document the impacts the BIP may have on other existing provisions of the IEP. Directives 3 and 4 may be accomplished concurrently if the IEP wishes. The behavior specialist shall be invited to the IEP meeting.
5. At the IEP team meeting described in paragraph 4, the team will consider students transportation needs, including his ability to safely ride the bus and the applicability of the FBA to interventions which might be effective during bus transport.

6. In accordance with the LEA's representations to the parents at the expulsion hearing (Parents Ex. 2), the LEA shall provide to student, counseling services, at public expense.

VI. APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process hearing complaint notice in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the issuance of the hearing officer's written decision.

SO ORDERED


Janet A. Sheehan
Due Process Hearing Officer

Entered this 23rd day of December, 2019