

IN THE WEST VIRGINIA DEPARTMENT OF EDUCATION

DUE PROCESS HEARING CASE NO.: D20-006 (Expedited)

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I. PROCEDURAL HISTORY

This expedited disciplinary case was initiated by the student's mother on October 21, 2019 by the filing of the parent's complaint with the West Virginia Department of Education, and was assigned to this hearing officer the same day. An initial status and scheduling conference was held by telephone on October 23, 2019, with the parent participating pro se, and the LEA participating through counsel. At that telephone conference, the hearing time and location were set for November 6, 2019, (12 school days after the complaint filing), at the LEA's board office building. The petitioner expressly waived her right to a neutral hearing site, and deferred a decision as to whether the hearing would be open or closed to the public.

Also at the October 23, 2019, telephone conference, the parties discussed a Motion for "Stay Put" placement, filed by student's mother on October 22, 2019. The finding of this hearing officer was that in this expedited disciplinary hearing, the provisions of 34 CFR § 300.533 and WV Policy 2419, Chapter 7, § 3A, would apply, making the Interim Alternative Educational Setting (IAES) proposed by the school district, the appropriate "stay put" placement for this student, unless another placement was agreed to by the parties. The October 23, 2019 telephone conference was held on the 10th school day, following student's disciplinary removal from school on October 9, 2019. The parties reported that no manifestation determination had yet been held.

The "Order Confirming the Results of a Telephone Conference Held October 23, 2019; Setting Hearing Schedule, and Clarifying Student's Placement During the Pendency of This Case," was issued on October 24, 2019 and was accompanied by a copy of the

disciplinary procedure flow chart from WV Policy 2419. The parties were also directed to request any needed subpoenas in time to effect timely service on necessary witnesses.

Also on October 24, 2019, the parties did conduct a Resolution meeting, between the parent, petitioner, and the LEA's Director of Special Education. Petitioner advised me that day that the parties had agreed to review student's IEP and BIP, but that the other issues in the case were not resolved.

On October 25, 2019, the WVDE forwarded to me a copy of the parents initial complaint which was more complete and legible than what was originally provided to me. That document was then forwarded to the parties by my office, via email and U.S. Postal service, 1st class delivery.

On October 25, 2019, no manifestation determination had been conducted, in spite of the passage of 12 schools days since student's removal to what was presumed to be an IAES assignment. Consequentially an Order was prepared, sua sponte, and entered that compelled the LEA to conduct a manifestation determination "forthwith," and advise me when it [had] been accomplished."

The parent and LEA counsel exchanged their evidentiary disclosure and witness lists on October 30, 2019. LEA's counsel issued a request on October 31, 2019, to exclude parent's evidence for non-disclosure but he later discovered that he had timely received it via e-mail and had not seen it. Accordingly he withdrew his request for exclusion of evidence.

A final telephone conference was held on November 1, 2019, with both petitioner and LEA's counsel attending. At that time, the parties confirmed they each had timely received the evidence disclosures from the other. Petitioner requested a hearing closed to

the public, and the issues to be decided at hearing were finalized. Petitioner indicated a manifestation determination was scheduled with the LEA for later that day and also requested two subpoenas for hearing witnesses. An "Order Confirming Results of a Telephone Conference Held November 1, 2019," was issued on November 24, 2019, along with the two subpoenas requested by Petitioner.

On November 1, 2019, a manifestation determination meeting was held at which the team found that the non-violent misbehaviors of the student were manifestations of student's disability. LEA Ex. 3.

At Hearing, the LEA indicated at the closing statement that the incidents on September 19, 2019 and October 9, 2019 were violent and therefore not manifestations of student's ADHD. Consequently, student was still assigned to the Alternative Learning Center at the time of hearing.

The hearing was held and completed on November 6, 2019, at the LEA's Board Offices. The Petitioner failed to contact or request a subpoena for several of her named Witnesses, but the LEA produced all but one of them during their case presentation. A court reporter was present and created a verbatim record of the hearing.

The due date for issuance of the final decision is 10 schools days following the close of hearing, November 21, 2019. Given the short timeline on this expedited hearing request, the parties were directed to give closing statements, in lieu of post-hearing briefs, which they both did.

The verbatim hearing transcription was not made available in time to be used in the writing of this opinion.

II. ISSUES PRESENTED

1) Was student's IEP followed prior to the disciplinary event at question – specifically, was his Behavior Invention Plan (BIP) implemented, and was a “cool-down” period offered?

2) Was student's assignment to an alternative middle school a change of placement as defined by the provisions of the Individuals with Disabilities Act (IDEA) and West Virginia Policy 2419; Regulations for the Education of Students with Exceptionalities (WV C.S.R. § 126-16-3)?

3) Was student's assignment to an alternative middle school done in a procedurally and substantively appropriate manner?

III. FINDINGS OF FACT

1. Student is an eleven year old boy enrolled, as of August 20, 2019, in the 6th grade at the Local Education Authority's (LEA) middle school most proximate to student's home. Ex LEA 3, p3.

2. He has been recognized as eligible for special education under the IDEA since April 2019, with his first IEP bearing the date May 3, 2019. Parent's Ex. 6, p46-60 (hereinafter in the form Ex. P6, pg 46-60)

3. Student is identified as IDEA eligible under the category of "Other Health Impaired," and has a diagnosis of ADHD, with a predominatly hyperactive/impulsive presentation. Ex LEA 8, at pg 24. Student's mother indicates he also has Oppositional Defiance Disorder (ODD). Parent's opening and closing statements.

4. In the IEP of May 3, 2019, it is noted that this student's behavior impedes his learning and the learning of others. Ex. P6, pg 50. Student's challenges in the classroom were stated as some "reading difficulty" "difficulty maintaining attention in class" and "occasional class disruptive behavior." Also noted were "task completion and problem solving difficulties", "difficulties with transition from one learning environment to another," and anger issues which impede him from "identifying alternative[s] to acting out behavior and anticipating consequences of behavior." Ex. P6 at pg. 52.

5. A behavior intervention plan (BIP) was attached to the back of that IEP, Ex. P6 at pg. 60. The BIP dated May 3, 2019 indicated student was to be given "verbal prompts, modeling, and social skills instruction" so he would "demonstrate positive social interactions with his peers and teachers." Undesirable target behaviors included "insults, arguing, profane language, loud voice, and threats." Interventions to be provided

included, “close proximity to teacher / staff, verbal reminder / cues non-verbal prompts, time out (brief removal from environment,)” and “social skills instruction.” The Parental role in the BIP included “reinforcement of school program, reteach replacement behaviors, and continue medication.”

6. In the time between August 20, 2019, and October 24, 2019, student was on out-of-school suspension for 9 full days, plus an early dismissal on September 19, 2009 due to disciplinary breaches at school. Ex. P8, pg 78. In addition, student had in school suspension on August 30, 2019. Ex. P13, pg. 98 and after school detention assigned on October 9, 2019 for another offense Ex. P13, pg. 110. The second chance (ISS) teacher stated he was never given student’s IEP. The Out-of-School Suspension (OSS) which student was assigned on September 24, 2019, occurred after he had been assigned to the In School Suspension (ISS) (Second Chance) classroom, and student became upset about a comment by the teacher. When student became upset, he didn’t want to work and was considered insubordinate. Ex P13, at p99. If that teacher had known of, and used the interventions prescribed in student’s BIP, it is quite possible the situation might not have escalated and the consequent assignment of two additional days of OSS would not have happened LEA Ex. 39, p4 and Ex. P13, p99, Testimony of Student.

7. Documentation of the disciplinary actions reflect that student’s problem behaviors on August 30, 2019, included, “constant disruptions in class,” “flipping his pencil,” continued disruptions after warnings and reprimands, speaking out in class, and verbally protesting the agreed upon sanction of a “signature.” (Ex. P13, pg 98).

8. On September 30, 2019, student was assigned two days of out of school suspension, because he continuously disrupted his science class after three warnings by the

teacher. The Assistant Principal was called to the room, and she found a majority of the students there attending to this student's disruptive comments rather than to the teacher. When he was removed from the classroom by the Assistant Principal he "stomped down the stairs," and when told not to do that, responded by denying he was doing it. He also mumbled about how "horrible this school is, [the vice principal] is a joke, and said "multiple warnings is a lie." For these offenses of insubordination, and disruptive/disrespectful conduct, student was given 2.5 days of out of school detention after refusing to go to in school suspension. Ex. P13, at pg 101.

9. On October 8, 2019, student had "lunch detention", for undisclosed conduct. Ex. P13, pg 102.

10. On October 9, 2019, student was twice disciplined. At 10:40 a.m., student was talking repeatedly while his teacher gave instruction. He was talked to, and an agenda notebook signature entered. The disruption continued. He refused to open his notebook and work, and an additional teacher warning was given. His conduct resulted in "total classroom disruption – other kids were laughing and class [became] tough to manage." He was assigned to after school detention for one day for this offense." Ex. P13, pg 103.

11. The behavior which triggered his assignment to an ALC was a second misconduct on October 9, 2019, which took place in the cafeteria at lunchtime, and was witnessed by his school's vice principal. Student had just cleared off his lunch tray and then turned, ran toward a friend of his, approaching him from behind. When he got to his friend, he smacked him on the back of the neck. Student testified that he did do it, but meant no harm to his friend, hitting him only lightly. Testimony of student. He said it was something all the kids did and it was called "necking." Opening statement mother. The

vice principal account made the blow sound more substantial, but also gave no indication of malicious, angry, or aggressive intent by student. Testimony of vice principal. Student was given 3.5 days of Out of School Suspension for this infraction as a primary action, but also assigned student to an ALC for 45 days as a secondary action. Ex. P13, pg 104.

12. The LEA's Supervisor of Student Services agreed that although this behavior was an inappropriate act, it was not a full blown fight, but rather rough play. He further indicated that this infraction, which was labeled a "fight without injury, and an earlier offense on September 19, 2019, where student pushed another child against a locker (LEA Ex. 39, p.5), were not severe behaviors.

13. In spite of the non-malicious nature of these two physical events, and the lack of any injury to the other students involved, the decision of the Principal and Vice Principal, was that student should be removed from his home middle school and placed in the LEA's alternative middle school. Ex. P.13, pg. 104; and testimony of School's Principal. The Vice Principal testified that student's behaviors were escalating, repetitive, and student isn't taking responsibility.

14. On the same day, October 9, 2019, the LEA's intent to relocate student to the alternative school was communicated to student's mother via a brief form letter indicating, erroneously, that student would be expelled, that a meeting would be held on October 15, 2019, and that the time of the meeting would be the subject of a future phone call. Ex. P13, pg. 111. A second corrected notice indicating that student was recommended to be placed in a "Transitional School," was sent out on October 10, 2019, "regarding this placement." Ex. P13, p. 112. This placement in the "Transitional School" or Alternative

Education Center, was stated to be for a period of 45 days. Ex. P13, pg. 106. Testimony of Supervisor of Student Services.

15. Student's principal, in her notice of student's removal to the alternative middle school (AMS) (Ex. P14, pg. 112) indicated that student's conduct violations put him at a level III (3) of the LEA's Disciplinary Policy. Level 3 violations are defined as "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's Policy Manual for Expected Behaviors in Safe and Supportive Schools, Section 4103.6, Level III Violations and Intonations / Consequences, at pg. 34.

Given student's impulsivity, and difficulty appreciating consequences of his acts, together with his statement that he meant no harm to the friend he hit on October 9, 2019, I find it unlikely that student "willfully committed" an act "known to be ... harmful to ..." his friend. Rather I find it was an over exuberant act, impulsively committed as "horseplay", without thought of petential harm. Consequently, I find the principal overstated the severity of the violation in the notice dated October 10, 2019, (Ex. P13, pg. 112) and also in the incident summary where the infraction is characterized as a "physical fight without injury." The action by student seems closer to the definition of "physical altercation" at 4103.6.7.6, a level II (2) offense, but even that seems overstated as the "blow" struck by student was not an "attempt to harm or overpower another person," and was not a "fight" in the usual sense of the word.

16. The LEA's effort to put student in the alternative middle school was a "removal ... to an Alternative Education Placement." Ex. P16, pg 104. The LEA's Supervisor of Student Services indicated that the action to move Student to the Alternative

Middle School (AMS), was a disciplinary change of placement. This was also tacitly expressed by the LEA's counsel when he admitted the LEA had committed a procedural error when it failed to perform a manifestation determination review (MDR) within 10 days of student's October 9, 2019 suspension. MDR's are required only where there is a disciplinary removal which amounts to a Change of Placement within the meaning of IDEA / WV Policy 2419 as stated at 34 C.F.R. §§ 300.530 (e) and 300.536(a)(1).

17. An MDR was performed on October 31, 2019, 16 school days following the student's removal from his school, and was performed pursuant to my interlocutory "Order Mandating Conduction of Manifestation Determination" entered on October 25, 2019. The MDR found student's disciplinary violations, when looked at as a whole, were manifestations of his disability of ADHD. See Ex. LEA 39 at internal page 3. At hearing, the LEA took the position that an intentional hitting of another child could not be a manifestation of this student's ADHD designation. See LEA opening and closing statement. However, as previously stated, neither of the "fighting" incidents were severe and no one was hurt. Testimony of Supervisor of Student Services.

18. A psychoeducational evaluation of student was performed by the LEA's Nationally Certified School Psychologist in March and April 2019. She found, and made recommendations, for his identified problems in the areas of attention, hyperactivity, and aggression. The final report presented several strategies for addressing each of these challenge areas. Ex. P5, pp 43-44. Yet an examination of student's IEP documents dated May 3, 2019, and September 13, 2019, do not reveal the incorporation of those recommendations into the IEP. See Ex. P6, and P7, pp 46-77.

19. Student was offered psychological counselling by an outside provider, at LEA expense, but student's mother has not chosen to avail her son of those services. Ex. LEA 38,

20. Student received his report card from the alternative middle school, for the period ending October 28, 2019. It reflected he had a B in math, but was failing English. It is not known if the prior grades from his home middle school were reflected in these grades. Student had attended the alternative high school for only 1.5 school days. Ex. P20, p143.

21. In the day and a half that student was at the alternative middle school, threats were made against him. A group of boys said they would "hold [him] down and beat [him] up." Also a girl told him she would "beat [him] in his face." Testimony of Student's Grandmother. Given that all the student's at the AMS are there for behavior too unmanageable for them to attend their home schools, I believe it likely that these reported threats occurred, and that student's resultant fear is not unreasonable.

22. The Principal of the Alternative Middle School described the program to which student has been assigned by the LEA.

- There are teachers there certified in Mathematics and English, only.
- Social Studies and Science topics have to be embedded into the Math or English curriculum and are not separately taught.
- At the hearing date, sixteen students in grades 6 to 8 attend the AMS.
- There is an on-site social skills instructor, and class periods assigned each day for that instruction
- There is Physical Education instruction offered.

- Individual counselling is offered there during the school day
- No electives are offered so student would lose his Ed. Tech. class and Art classes.
- No extra curricular activities are offered there.
- The student body at the AMS may be Regular Education or Special Education students, but they are all there due to severe conduct violations.
- There is a social worker on staff at the AMS.
- The AMS is physically located inside of a High School building.
- Alternative High School and Alternative Middle School students do not attend the same classes together, but may pass in the same hallway
- At breakfast and lunch, high school and middle school students share one cafeteria but are not close to each other.
- The goals for students at the AMS include
 - o Regular attendance
 - o Passing grades
 - o Behavior within the conduct code.

Testimony of Principal, Alternative Middle School

23. The LEA's recommendation for students placement at the Alternative Middle School would put him a school populated exclusively by students with behavioral issues so severe they are deemed too disruptive to go to school with ordinary school children. While this may be "regular education" in terms of the manner in which the core

subjects of Math and English are presented, it is in reality a Special School for behaviorally disruptive children.

24. It appears likely that Out of School Suspension is actually a reward for student rather than a punishment. On at least two occasions, on September 9, 2019, and October 9, 2019, an in school suspension (ISS) order was changed to out of school suspension (OSS) after student refused to comply with the rules or to attend the ISS (also called “second chance”) classroom. Ex. P13, pg 99 and 104.

25. In the characterization of student’s misbehaviors as Level three by the school’s principal, she indicated her conclusion that there have been “continued violations of [rules] and regulations. . . of the [LEA] Disciplinary Code. Ex P. 14, pg. 112 and also see Ex LEA 25, at pg. 75. However, the manifestation determination review held October 31, 2019 found that, examined as a whole, student’s misbehaviors were primarily manifestations of his disability. Therefore, those behaviors may not be used as a justification for his removal to an ALC.

26. On October 11, 2019, student’s home school principal acknowledged that student was removed from his current school placement for more than 10 days, and that a Manifestation Determination Review was required. Ex. LEA 25, pg 75. So the LEA knew then it would be a change of educational placement.

27. Student’s attendance this school year has been abysmal. Between August 20, 2019, and October 22, 2019, a period of just over two months duration, he has had 10 unexcused and three excused absence days, for a total of 13 days he has not at school at all. There were also seven days when he was tardy arriving at school. Nine of the missing

days were due to Out of School Suspension. Ex. LEA 1, pg 3. Student cannot succeed this school year if he does not attend classes.

28. The efforts of the LEA alone will not be sufficient to educate this child without the full cooperation of student's mother. She alone can provide his medication, see that it is taken to school, make sure that he goes to school each day, and arrives there on time. It is also important she model respect for the school district in front of her son, since his attitude there is greatly influenced by her.

29. In the preceding 2018-2019 school year when he was in the 5th grade, student received grades of "A," or "B," or rankings of "Satisfactory," in all subject areas. Ex. LEA 3, at pg 10.

IV. CONCLUSIONS OF LAW

1. “The IDEA was enacted ‘to throw open the doors of Public Education and heed the needs’ of students with disabilities who had for too long been ‘either completely ignored or improperly serviced by American public schools’ In re Conklin, 946 F.2d. 306, 307 (4th Cir. 1991).” Cited by T.B. Jr. v. Prince George’s County Board of Education, Case No. 17-1877, ___ F. 3d. ___, (4th Cir., July 26, 2018).

2. A plaintiff in a Due Process Hearing must demonstrate a violation of the LEA’s responsibilities under IDEA occurred and that the violation actually interfered with the provision of FAPE, to the student. See, DiBuo v. Board of Ed. of Worchester County, 309 F. 3d., 184, 190 (4th Cir. 2002).

3. The IDEA cannot and does not promise “any particular [educational] outcome.” Endrew F. v. Douglas County School District, Case No. 15-827, 580 US ___, 137 S. Ct 988, 197 L.Ed.2d 335 (March 22, 2017); Citing: Board of Education of Hendrick Hudson Central School District v. Rowley, 458, US 176. However, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F., at 580 US ____ 137 S. Ct. 988, at 999.

4. When a student’s IEP fails to address behavior problems that interfere with the student’s ability to benefit from their educational program, the LEA may be found to have denied the student a FAPE. See, A.W. & N.W. ex rel B.W. v. Board of Ed. Of Walkill Central School Dist., 68 IDELR 164 (NDNY 2016), also see generally; E.H. ex rel M.K. v. N.Y.C. Dept. of Ed., 67 IDELR 61 (S.D.N.Y. 2016), and Paris S.D. v. A.H. by Harter, 69 IDELR 243 (W.D. ARK 2017).

5. 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 to be placed in an alternative middle school, due to disciplinary violations, for a period identified as 45 days, and possibly longer than that.

6. A "change of placement" based on disciplinary removals is defined as:

- (1) removal for more than 10 consecutive school days; or
- (2) a series of removals during the same school year that constitutes a "pattern." 34 C.F.R. 300.536.

7. 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 Behavioral Intervention Plan. 34 C.F.R. §300.530(f)(1)(i-ii).

Even if the misbehavior is determined to be unrelated to the child's disability, the LEA 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).

8. To the extent that violations of IDEA are procedural violations, they are actionable as a denial of FAPE only when they affected the student's substantive rights. TB v. Prince George's County BOE, (4th Cir. 2018) 72 IDELR 171, ___, citing Leggett v. Dist. of Columbia, 447 F.3d 59, 67 (DC Cir 2015). The procedural fault must cause educational harm to the student or seriously impede the parent's right to participate in the IEP process. A.L., 194 Fed. Appx. at 180 see also Deal, 392 F.3d at 854; DiBuo, 309 F.3d at 190; MM, 303 F.3d at 533; Attleboro, 2013 U.S. Dist, LEXIS 35427 at *19.

9. 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.

10. "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.

11. 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).

12. WV Code § 18-5-19 authorizes County boards to establish and maintain alternative schools and may admit school-age children and youth to these classes or schools under the circumstances prescribed by a State Board of Education policy governing alternative education programs. This LEA has created an alternative middle school for students with severe or chronic disciplinary problems pursuant to this authority. See LEA's Manual for Expected Behavior in Safe and Supportive Schools, 4103.12 (hereinafter LEA Policy 4103)

13. The LEA's Policy 4103 at subsection 4103.6, pg 29,33 defines Level 2 violations: "Disruptive and Potentially Harmful Behaviors – Disrupt the educational process and/or pose potential harm or danger to self and/or others. The behavior is committed willfully but not in a manner that is intended maliciously to cause harm or danger to self and/or others. Level II offenses shall include but not be limited to any habitual violations of Level I misconduct or any of the following: ... § 4103.6.7.6 "Physical altercation: Regardless of the reason, fighting between students will not be tolerated, and is defined as engaging in a physical altercation using blows in attempt to harm or overpower another person(s)." Principals are generally authorized to place students in an alternative education program after two violations of this provision. While this description of misconduct is the closest to what student did, of any described misconduct category contained in the LEA's Discipline policy, the student here was not attempting to "harm or overpower" anyone on October 9, 2019.

14. The LEA's Policy 4103 at subsection 4103.6, p.34, defines as level 3 violations: "Imminently Dangerous, Illegal and/or Aggressive Behaviors-Are willfully committed and are known to be illegal and/or harmful to people and/or property. The principal shall address these inappropriate behaviors in accordance with West Virginia Code 18A-5-1a, subsections (b) through (h)."; and indicates at p. 37 "A student will not attack or instigate a battery upon another student." At a second violation of this provision Principals generally have discretion to place students in an alternative education program. This section described conduct much more severe than any that student did.

15. Programs such as the Alternative Middle School at this LEA are authorized generally by WV Code § 18-5-19, to provide a free appropriate public education (FAPE) to student's whose disruptive behavior has caused them to be removed from the classroom setting. (See WV Policy 4373: Expected Behavior in Safe and Supportive Schools, Chapter 5, Introduction) LEA's have flexibility to develop alternative programs for disruptive students, but "[p]rograms flexibility does not extend to modifying the provisions of Policy 2419 in providing alternative education programs for students with exceptionalities or section 504 of the Rehabilitation Action of 1973." (WV Policy 4373, Chap. 5 Introduction). This policy further states at section 2, that "[u]pon placement [in an alternative education program], the Student Assistant (sic) Team shall develop a student's written plan which includes academic courses and behavioral components, criteria for re-entry to the regular program, and provisions for periodic review of the student's progress at least on an annual basis. The team for all students with disabilities shall be the IEP team and the written plan shall be the IEP." WV Policy y4373, Chap 5 § 2, final paragraph. (emphasis added)

This provision makes clear that assignment to an alternative education program is a "Placement," and further requires that for IDEA / Policy 2419 eligible students, the IEP team must meet and develop a new IEP with specific components. This was not done before student was assigned to the alternative middle school.

V. DISCUSSION

A. OVERVIEW OF THE CASE

B. ISSUES PRESENTED

Issue 1 – Was Student’s IEP followed, specifically was his Behavioral Intervention Plan (BIP) implemented and was a cool down period offered?

Student’s mother, who represented her son pro se in this hearing, contends that the student’s incidents of misconduct are largely attributable to a failure of the LEA’s teachers and staff to properly implement his IEP.

The BIP included in student’s IEP documents of both May 3, 2019, (Ex. P6, pg 60), and September 13, 2019 (Ex. P7, pg 73) indicates the strategies and interventions (“proximity to teacher, verbal reminder / cues, nonverbal prompts, time outs [parent’s “cool down” period], social skills instruction” which should be used to “increase desirable behavior.” The BIP document indicates “One or more of the following shall be implemented,” but it does not mandate every intervention be used every time. Additionally, the “Undesirable behaviors” to be targeted by these strategies are “insults, arguing, profane language, loud voice, [and] threats.” Exs. P6 and 7, at pp. 60 and 73. None of these strategies are calculated to prevent or interrupt any inappropriate physical contact with another student. Indeed the October 9, 2019, incident where student struck another boy on the back of the neck, was too sudden to permit any staff member/teacher to intervene. For this reason, I do not find that any failure or inaction by LEA staff was to blame for the cafeteria incident on October 9, 2019, which was the catalyst for the Alternative Learning Center (ALC) recommendation.

The one incident where student's behavioral plan was demonstrated not to have been implemented was in the Second Chance Classroom (ISS) on September 24, 2019. There the student became upset and wanted to leave ISS after he was unable to do a homework assignment and the ISS teacher was unable to help him. The teacher told him if he couldn't do the work, he'd have to take an "F." Concerning that incident, the teacher stated that he was never given student's IEP. Testimony of Second Chance Classroom teacher. Consequently, he wouldn't have known strategies to take for student, such as the "cool down" period. Use of the cool down strategy might have reduced the total number of days suspension, but it would not have impacted the LEA's ultimate decision to move the student to the Alternative Middle School (AMS), which was largely based on two incidents involving physical contact on September 9, 2019 and October 9, 2019.

This conduct was found to be a manifestation of student's disability so is not a basis for placement at an alternative school.

Issue 2 – Was student's assignment to an alternative middle school (AMS) a change of placement as defined by the provisions of the IDEA and West Va Policy 2419? and

Issue 3 – Was student's assignment to an AMS done in a procedurally and substantively appropriate manner?

Issues Two and Three overlap and are therefore discussed together here. This action arises as a consequence of a decision by the LEA to remove student from his home school to an Alternative learning center, due to multiple conduct code violations including two incidents of inappropriate physical contact (one of shoving a child against a locker, and a second smacking a friend in the neck, as a gesture called necking). Neither of these physical infractions caused injury but were labeled "fights" by the school. The removal

was stated to be for 45 days. Testimony of the Supervisor of Student Services indicated actual placement time might be longer or shorter than that. No specific criteria, or benchmarks, for student's return to his home school were disclosed.

This student is an eligible student under IDEA and WV Policy 2419, and therefore eligible for the protections afforded by those laws. Whenever a student is to be subjected to disciplinary removal for more than 10 days it is considered a change of placement. 34 C.F.R. § 300.536(a)(1). Here the LEA wants to put student in an ALC for as long as 45 days or longer. The Supervisor of Student Services admitted this was a disciplinary removal. And LEA's counsel also suggested it was a disciplinary removal of more than 10 days by admitting the LEA failed in their procedural duty to do a timely MDR. In this fact pattern, a manifestation determination is called for. 34 C.F.R. § 300.530(e)(1). An MDR was performed by the LEA, but not in a timely manner and pursuant to an interlocutory order from this hearing officer, on October 31, 2019.

The results of the manifestation determination hearing were that student's multiple misconducts were largely manifestations of his disability. LEA Ex. 39, at p. 3. The two physical altercations on September 19, 2019 and October 9, 2019 were found not to be manifestations of his disability, but the LEA's Supervisor of Student Services indicated that neither of these events were severe.

He also indicated that these misbehaviors were predictable, taking place much more often when student's ADHD medications were wearing off. This would tend to indicate that even these behaviors might be strongly influenced by his ADHD condition.

Where conduct has a direct and substantial relationship to the student's disabilities, the IEP team must conduct an FBA and develop a BIP to address the behavior at issue.

Where conduct has a direct and substantial relationship to the student's disabilities, the IEP team must conduct an FBA and develop a BIP to address the behavior at issue. 34 C.F.R. § 300.530(f)(1)(i-ii). Here an FBA has been done considering only the behaviors for which student was disciplined this school year. LEA Ex. 39. However, no comprehensive, data based, FBA has been performed following the last conduct infraction on October 9, 2019.

Therefore, a comprehensive, data based FBA remains to be performed and a BIP needs to be created which addresses these aggressive behaviors. Finally the student needs to be returned to his home school. 34 C.F.R. § 300.530(f)(2).

Student's mother alleged procedural failures of the LEA but the record reveals she received prior written notice of the LEA's intent to remove student to the AMS (Ex. P14 at pg. 111, and 112) and the LEA's Supervisor of Student Services testified that he provided her with the Procedural Safeguards brochure as required by 34 C.F.R. § 300.530(h).

For these reasons, I conclude that student's removal from his home school for a period of 45 days was a disciplinary removal constituting a change of placement pursuant to 34 C.F.R. § 300.536(a)(1).

Procedural safeguards and prior written notice were delivered to the parent as required by 34 C.F.R. § 300.530(h).

The Manifestation Determination was performed late, but was performed prior to this decision, so the procedural defect is therefore, moot.

Since the majority of student's infractions are manifestations of his disability, and the physical altercations committed were not severe and also possibly impacted by the

timing of this medication, student should be returned to the placement from which he was removed. See C.F.R. § 300.530(f)(2).

Although an MDR and an FBA were performed (Ex. LEA 39), there is little in those documents to support and improve student's behavior going forward. Therefore, a new more comprehensive FBA should be performed and a new BIP created to address the behaviors which have been problematic to date. Further, the student's IEP should be reexamined to establish behavioral goals, objectives and measuring methods, and to consider including services, such as counseling (already in present IEP), behavior contracts, behavior modification techniques, or other strategies and modifications designed to help student stay in school without disrupting the learning of himself or others.

VI. DIRECTIVES FOR IMPLEMENTATION

1. In accordance with the LEA's findings in its manifestation determination review on October 31, 2019, that the majority of student's act of misconduct were manifestation of his disability, and since his conduct on October 9, 2019, was not severe and not a level 3 offense as defined by the LEA's Disciplinary Policy, student should immediately be returned to his home school pursuant to the requirements of 34 C.F.R. § 300.530(f)(2). Student's most recent IEP and BIP should be used until new ones are completed.

2. Since student has already been subjected to 9 days of Out of School Suspension, any future OSS assignments beyond 10 total days will immediately create a change of placement, per 34 C.F.R. § 300.530(b). Consequently, if OSS should be imposed for more than a day going forward this year, a manifestation determination review will be required. If the behavior in question is not a manifestation, student may be disciplined according to the LEA's Disciplinary Code, for that particular infraction. Infractions should not be viewed cumulatively to include others that are manifestations, so as to increase discipline severity.

3. For the remainder of this school year, if ISS is imposed on student for conduct, and he does not agree to serve the ISS time, he should be requested to sign a statement indicating his refusal. In such case, the resultant time imposed in OSS will be served at the alternative middle school.

Should he refuse to serve ISS, and attempt to walk out of the building, without signing the refusal, the school security staff will handle the matter as with any student who tried to leave the school without permission.

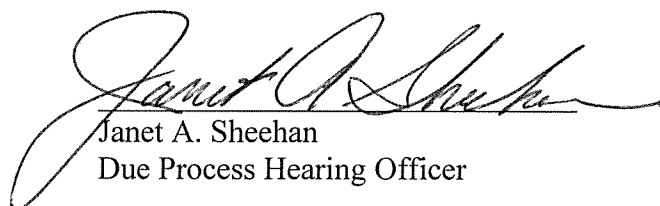
If Student should be given ISS for infractions, the LEA staff shall make sure his assignments are available to him, and he has the necessary resources to complete them in the ISS setting.

4. While the LEA did complete an FBA on October 31, 2019, following his most recent misconduct, only the negative behaviors causing disciplinary action were examined, and those were viewed only from the short written description of the events. No comprehensive, data based FBA has been performed, as requested by the Parent. Therefore, Parent shall be entitled to have an Independent FBA Evaluation performed by a provider recognized as credentialed by the LEA. Within 10 school days of this decision the LEA will supply the parent with a list of appropriately credentialed professionals who can perform a comprehensive data based FBA, with behavioral recommendations and a written report. Such evaluation and report will be at LEA expense. Once the report is issued, the LEA shall promptly schedule an IEP meeting to review the report and revise the behavioral intervention plan as appropriate. The newly created BIP shall be added to, and considered part of the IEP. At this same meeting, the IEP document should be re-examined and amended to establish behavioral goals and objectives and measuring methods, and to consider including services of counseling (presently in IEP but not being utilized by the parent), behavior contracts, behavior modification techniques, behavior replacement training, and other strategies designed to keep student in school without disruptions. An IEP facilitator should be utilized to assist in the IEP reexamination process. Student's psychoeducational evaluation of April 10, 2019 (Ex LEA 9) shall also be reviewed at this meeting, and used as a resource for potentially useful behavioral strategies [See Ex LEA 8, pp 25-26, (Report internally paginated as pp 10-11, "Recommendations")].

VII. 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 13th day of November, 2019