

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



DEC 05 2018

█ by and through █, and █,
Petitioners,
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:
:
v. :
HENRY COUNTY SCHOOL DISTRICT, :
Defendant. :
:
:
:

Docket No. 1912936
1912936-OSAH-DOE-CPEXP-75-
KENNEDY

Kevin Westray
Kevin Westray, Legal Assistant

FINAL DECISION

For █:
█ (Mother).

For Defendant:
Megan Pearson, Esq.
Summer Cox, School Representative

I. INTRODUCTION

Petitioner █ is a █ grade student who lives within the Henry County School District. He is eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”). █ began his █ grade school year enrolled at █ Middle School where his education was governed by an Individual Education Program (IEP). Following an incident that took place on September 12, 2018, and a disciplinary hearing held October 2, 2018, █ was expelled from █ Middle School and placed at █ Academy, an alternative school.

█ claims that his conduct was a direct result of his disability, that Defendant did not adequately consider his disability when determining his punishment, and that the incident at issue occurred as a direct result of Respondent’s failure to fully and properly implement █’s IEP through his Behavior Intervention Plan (BIP).

For the reasons set forth below, the court concludes that █’s conduct was not caused by, nor did it have a direct and substantial relationship to █’s disability, but that the conduct

in question was the direct result of Respondent's failure to implement the BIP that was a part of [REDACTED]'s IEP. 34 CFR 300.530(e)(1). Thus, the IEP team should have found that [REDACTED]'s conduct was a manifestation of [REDACTED]'s disability. 34 CFR 300.530(e)(2). Additionally, the IEP team should review [REDACTED]'s BIP and modify it, as necessary. 34 C.F.R. 300.530(f)(1)(ii).

II. FINDINGS OF FACT

1.

[REDACTED] (D.O.B. [REDACTED]) is a [REDACTED] grade student who is eligible to receive special education services from Respondent pursuant to IDEIA. Respondent has created both an IEP and a BIP to address [REDACTED]'s needs. *Respondent's Exhibits 2, 10.*

2.

[REDACTED] has been diagnosed with Autism Spectrum Disorder. *Testimony of [REDACTED] ([REDACTED]'s mother).*

3.

[REDACTED] underwent extensive and thorough psychoeducational testing in March and April 2018. The results of one test indicated that Petitioner has "clinically significant" indicators for Aggression and Anger Control. His IEP provides that, in "the event [he] becomes upset or frustrated, he should have the opportunity for a cooling-down period to help him recover." Additionally, one of [REDACTED]'s measurable annual goals specifically addresses conflict situations with peers. In those situations, [REDACTED] is expected to "verbalize feelings and choose safe alternative to resolving conflict (instead of becoming verbally or physically aggressive) without the need for direct adult intervention at least 90% of the situations presented as measured by teacher observation and data collection." *Respondent's Exhibit 2 at pp. 4, 9 and 11 of 25; Respondent's Exhibit 10.*

4.

Furthermore, a Functional Behavior Analysis completed in Spring 2018, focused on verbal and physical aggression because for such assessments “one or two behaviors that are interfering with the school setting are what are evaluated.” The assessment showed that the “most prevalent antecedent is Peer Interaction (45%)” and that the “behavior with highest frequency is Verbal Aggression (83%),” with physical aggression counting for approximately 13% of his behaviors during the week-long observation period. *Respondent’s Exhibit 2 at p. 18 of 25; Respondent’s Exhibit 3; Respondent’s Exhibit 10.*

5.

Based on the FBA, Respondent created a BIP that includes a three-step approach to handling ■■■■■’s targeted behaviors. In Step 1, when ■■■■■ displays specified behaviors, including using profanity, he will receive a prompt to engage in replacement behavior for attention. In Step 2, if ■■■■■ does not demonstrate replacement behaviors, ■■■■■ will be prompted to go to his “safe classroom” while using a neutral tone to encourage ■■■■■ to demonstrate desired behavior. Finally, in Step 3, the trained adult in closest proximity should utilize blocking techniques to ensure the safety of both ■■■■■ and another individual if ■■■■■’s behaviors become a danger to himself or others. The FBA further provides that administrative actions will be determined for each incident based on the code of conduct. *Respondent’s Exhibit 3.*

6.

T■■■■ S■■■■, the paraprofessional working with ■■■■■ on September 12, 2018, was trained regarding ■■■■■’s IEP and BIP at the start of the school year in early August 2018.
Testimony of T■■■■ S■■■■

7.

On the morning of September 12, 2018, [REDACTED] arrived at school agitated, in part, due to the 1.5-hour bus ride that he must take each morning to [REDACTED] Middle School. [REDACTED] is not zoned to attend [REDACTED] Middle School, but enrolled for [REDACTED] grade for the Autism program offered there. *Testimony of S [REDACTED]; Testimony of T [REDACTED] W [REDACTED]; Testimony of [REDACTED]'s mother; Respondent's Exhibit 2 at p. 25 of 25 (gets on bus around 6:45-6:50am and arrives at school at 8:15am); Respondent's Exhibit 10.*

8.

During the morning in question, [REDACTED] became so agitated that Ms. W [REDACTED] his teacher, and Ms. S [REDACTED] his paraprofessional, had to implement his BIP. At first, they attempted Step 1 (verbal prompts). However, when that did not redirect [REDACTED], they proceeded to Step 2 (safe place). Inasmuch as [REDACTED] was unwilling to leave the classroom to go to a safe place, Ms. W [REDACTED] and Ms. S [REDACTED] had the other students proceed to the library to allow the classroom to serve as [REDACTED]'s safe place. Once separated from the other students, and after eating lunch, [REDACTED] calmed down. Since [REDACTED] had calmed down, he went to Art class in accordance with his schedule. *Testimony of S [REDACTED]; Testimony of W [REDACTED]*

9.

[REDACTED]'s Art class is taught by Dr. M [REDACTED]. The class consists of both students receiving special education and general education students. *Testimony of M [REDACTED]*

10.

During Art class, Ms. S [REDACTED] was present with [REDACTED] as his paraprofessional. Ms. S [REDACTED] did not observe any signs of distress. In contrast, Ms. S [REDACTED] observed [REDACTED] interacting with students appropriately and even laughing. Near the end of class, Dr. M [REDACTED] asked the students

to clean up, which consists of each table performing certain tasks. During this time a fight ensued between [REDACTED] and [REDACTED]. The fight “happened in a second. There wasn’t . . . anything going on before that that was aggressive.” *Testimony of S [REDACTED]* *Testimony of M [REDACTED]*: *Respondent’s Exhibit 7 at pp. 35, 36, 41 of 96.*

11.

Dr. M [REDACTED] observed [REDACTED] grab [REDACTED] and hit him into the wall and then throw him to the ground. Once [REDACTED] had [REDACTED] on the ground, he began to repeatedly hit him. Likewise, Ms. S [REDACTED] observed [REDACTED] grab [REDACTED] and throw him to the ground. Neither Ms. S [REDACTED] nor Dr. M [REDACTED] or Ms. St [REDACTED] who was also in the classroom, were able to deescalate the situation so Ms. S [REDACTED] decided to seek assistance. Prior to leaving the classroom to seek assistance Ms. S [REDACTED] asked [REDACTED] to go to a safe place, however it was unrealistic for [REDACTED] to be able to do so while being attacked by [REDACTED]. *Testimony of S [REDACTED]* *Testimony of M [REDACTED]* *Testimony of W [REDACTED]*

12.

Ms. S [REDACTED] left the Art classroom and sought assistance from Coach S [REDACTED]. When Ms. S [REDACTED] and Coach S [REDACTED] returned to the Art classroom, Coach S [REDACTED] blew his whistle and gained the attention of both students. At that time, [REDACTED] was holding a chair above his head. Coach S [REDACTED] instructed [REDACTED] to put down the chair and he complied with the verbal directive, though [REDACTED] continued to use profanity. [REDACTED] then attempted to reengage [REDACTED] and both Coach S [REDACTED] and Ms. S [REDACTED] stepped in-between the students with Coach S [REDACTED] turning toward [REDACTED]. Inasmuch as [REDACTED] attempted to reengage [REDACTED], [REDACTED] responding by trying to swing around Ms. S [REDACTED] and Coach S [REDACTED] to strike [REDACTED], but he inadvertently struck Coach S [REDACTED] in the jaw area

instead. *Testimony of S [REDACTED]*; *Testimony of Coach S [REDACTED]*; *Testimony of M [REDACTED]*; *Respondent's Exhibit 7 at pp. 24, 25 of 96*

13.

After the unintentional striking of Coach S [REDACTED] Ms. S [REDACTED] prompted [REDACTED] to go to his safe place. [REDACTED] complied with Ms. S [REDACTED]'s prompt and left the room with Ms. S [REDACTED] at which time Ms. W [REDACTED] who was coming toward the classroom, took [REDACTED] and escorted him to the front office. As they walked down the hall away from the classroom, [REDACTED] kept turning toward the class saying, "I'm up now bitch." *Testimony of S [REDACTED]*; *Testimony of W [REDACTED]*; *Respondent's Exhibit 7 at p. 39 of 96.*

14.

Following the incident, Principal I [REDACTED] completed an investigation. Based on the results of his investigation, Principal I [REDACTED] determined that [REDACTED] had committed two Section 2 violations of the Student Code of Conduct. [REDACTED] received Out-of-School Suspension for 2 days for the first violation, that being engaging in a fight with another student. Dr. I [REDACTED] referred [REDACTED] for a disciplinary hearing for the second violation, that being the unintentional physical contact with school personnel. *Testimony of Principal I [REDACTED]*; *Respondent's Exhibit 7 at p. 8 of 96.*

15.

The Student Code of Conduct imposes a progressive disciplinary process. According to the Student Code of Conduct, any "student engaged in or attempting to commit a second or subsequent Section 2 offense during a school year will result in the student being assigned to In-School Suspension or Out-of-School Suspension with the matter being submitted to a Disciplinary Hearing Officer." If the Disciplinary Hearing Officer determines the student

engaged in or attempted a second or subsequent Section 2 offense, he or she will issue either a long-term suspension or expulsion from school. *Testimony of Principal I [REDACTED]; Respondent's Exhibit 8 at pp. 22, 27, 28.*

16.

On October 2, 2018, a Disciplinary Hearing was held. In Phase 1, the Hearing Officer (V [REDACTED] B [REDACTED]) and the IEP Manifestation Committee heard all of the evidence from both parties. In Phase 2, the IEP Manifestation Committee, consisting of Dr. H [REDACTED], [REDACTED]'s mother, [REDACTED]'s teacher T [REDACTED] W [REDACTED] and the Art teacher Dr. M [REDACTED], considered whether [REDACTED]'s conduct was a manifestation of his disability and/or whether his conduct was the direct result of a failure to implement [REDACTED]'s IEP. Dr. H [REDACTED], Ms. W [REDACTED] and Dr. M [REDACTED] decided that [REDACTED]'s conduct was not a manifestation of his disability and was not the direct result of a failure to implement [REDACTED]'s IEP. [REDACTED]'s mother dissented from the IEP Manifestation Committee's findings. Finally, in Phase 3, the Hearing Officer imposed punishment for the conduct violation. *Testimony of Dr. T [REDACTED] H [REDACTED]; Respondent's Exhibits 5, 7.*

17.

The IEP Manifestation Committee only considered [REDACTED]'s second Section 2 violation, the unintentional physical contact with school personnel. The Committee reached its determination that this specific rule violation was not caused by [REDACTED]'s disability, and that his conduct was not the direct result of a failure to implement [REDACTED]'s IEP, based on finding that "there were opportunities for [REDACTED] to make a better decision when the coach was attempting to break up the fight but [REDACTED] chose not to comply." At the time of the determination, based on the evidence presented at the disciplinary hearing, three of the four IEP Manifestation Committee members were unaware that [REDACTED] had attempted to reengage the fight, and the same three members were

unaware that Ms. S [REDACTED] had not yet directed [REDACTED] to go to a safe place once he showed an ability to regulate his behavior by complying with verbal directions in placing the chair down. Instead, due to the time lapse in following the BIP and directing [REDACTED] to go to a safe place, [REDACTED] had an opportunity to reengage [REDACTED] and Coach S [REDACTED] had to step in-between the students at which time [REDACTED] responded to the threat from [REDACTED] by swinging at [REDACTED] but inadvertently striking Coach S [REDACTED]. *Testimony of H [REDACTED]; Testimony of W [REDACTED]; Respondent's Exhibit 5; Respondent's Exhibit 10 at p. 26 of 28.*

18.

Based on the determination there was no manifestation, the hearing proceeded to Phase 3. In Phase 3, the Disciplinary Hearing Officer determined that [REDACTED] should be expelled from [REDACTED] Middle School from October 2, 2018 through February 15, 2019. Furthermore, [REDACTED] would be permitted to enroll at [REDACTED] Academy during this period, which is Respondent's Alternative School. [REDACTED] is currently placed in a self-contained classroom at [REDACTED] Academy that serves students from 6th grade through 12th grade. *Respondent's Exhibit 5.*

19.

[REDACTED]'s mother filed a due process hearing request on October 10, 2019. Her due process hearing request indicates concerns regarding Identification, Educational Placement, and provision of a Free and Appropriate Public Education (FAPE). Specifically, Petitioners' raised concerns that Ms. S [REDACTED] "was not in close proximity to [REDACTED] to recognize the antecedent nor did she implement the strategies in is [sic] current behavior intervention plan." An Early Resolution Session and Mediation were held, but were unsuccessful. Accordingly, a hearing was scheduled for November 29, 2018. Petitioners' seek for [REDACTED] to be permitted to return to [REDACTED]

█████ Middle School, for the expulsion to be rescinded, and for █████'s BIP to be reviewed and modified as necessary. *Court Record*.

III. CONCLUSIONS OF LAW

1.

Petitioners bear the burden of proof in this matter. Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) (“The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing.”). The standard of proof on all issues is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

This Court’s review is limited to the issues Petitioners raised in their due process complaint. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ga. Comp. R. & Regs. 160-4-7-.12(j); see also *Co. of San Diego v. Ca. Special Educ. Hearing Office*, 93 F.3d 1458, 1460 (9th Cir. 1996); B.P. v. New York City Dept. of Educ., 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012).

3.

When the placement of a child with disabilities is to be changed because of a violation of a school district’s code of student conduct, the school has ten school days to conduct a manifestation determination. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. 300.530(e)(1); See also 34 C.F.R. § 300.536. The manifestation determination committee must include the LEA, the parent or legal guardian, and relevant members of the child’s IEP team. The committee must review all relevant information to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability, or whether the conduct was a direct result of Respondent’s failure to implement the student’s IEP. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. 300.530(e)(1)(i), (ii).

4.

If after a manifestation determination the misconduct is determined to have been caused by or have a direct and substantial relationship to the student's disability, or is the direct result of the school district's failure to implement the child's IEP, then the school must return the student to the original placement unless the parents and the school district agree otherwise. See 34 C.F.R. §§ 300.530(e) & (f), 300.536. However, if the student's conduct is determined not to be a manifestation of the disability, then "school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. . . ." 34 C.F.R. § 300.530(c).

5.

If a school district applies the relevant disciplinary procedures and removes the child from his current educational placement, the regulations provide that the child's IEP Team determines both the interim alternative educational setting for services and the appropriate educational services "to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 C.F.R. §§ 300.530(d)(1) and (5), 300.531. If the administrative law judge finds that the child's misconduct was a manifestation of his disability, the administrative law judge can return the child to placement from which the child was removed. 34 C.F.R. § 300.532(b)(2)(i).

6.

Petitioners proved that [REDACTED]'s misconduct was, more likely than not, a direct result of the failure to implement his BIP. [REDACTED]'s BIP seeks to diminish targeted behaviors. Prior to the altercation between [REDACTED] and [REDACTED] there were no targeted behaviors for Respondent to address.

Instead, both Ms. S [REDACTED] and Dr. M [REDACTED] initially observed [REDACTED] grab [REDACTED], who responded by defending himself. When neither Ms. S [REDACTED], Dr. M [REDACTED] nor Ms. S [REDACTED] were able to deescalate the situation, Ms. S [REDACTED] sought the assistance and intervention of Coach S [REDACTED]. When Coach S [REDACTED] entered the room, [REDACTED] showed an ability to regulate his behavior by following Coach S [REDACTED]'s directive to put the chair down that [REDACTED] was holding. At that time, [REDACTED] was using profanity and continued to do so after putting the chair down. Accordingly, at this time, [REDACTED]'s BIP should have been implemented because [REDACTED] was demonstrating targeted behaviors that needed to be addressed. However, the BIP was not implemented and [REDACTED] had an opportunity to reengage [REDACTED]. If [REDACTED]'s BIP had been implemented to address his targeted behavior prior to [REDACTED] attempting to reengage him it is more likely than not that [REDACTED] would have responded given that he had positively responded to Coach S [REDACTED]'s directive to put the chair down. This is further emphasized by the fact that the morning of the incident his BIP was implemented regarding another situation and was successful. However, in the Art classroom because the BIP was not implemented to address [REDACTED]'s targeted behavior after Coach S [REDACTED] gained the students attention, [REDACTED] had an opportunity to attempt to reengage [REDACTED] causing Coach S [REDACTED] to turn his attention toward [REDACTED] to address him and turn his back toward [REDACTED] who responded to the threat from [REDACTED] by attempting to swing at [REDACTED] resulting in [REDACTED] inadvertently striking Coach S [REDACTED].

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the court concludes that Petitioners have met their burden and that Respondent's conduct was the direct result of Respondent's failure to implement [REDACTED]'s IEP, which includes his BIP. Accordingly, Petitioners' request for relief is **GRANTED** and the undersigned **ORDERS** [REDACTED] be returned to

██████████ Middle School, the placement from which he was removed. 34 C.F.R.
§ 300.532(b)(2)(i).

SO ORDERED, this 5th day of December, 2018.



Ana P. Kennedy
Administrative Law Judge