

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

Case No. 21-0441EDM

vs.

BREVARD COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A final hearing was held in this case before Diane Cleavinger, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 2, 2021, by Zoom video conference.

APPEARANCES

For Petitioner: Petitioner, pro se
 (Address of Record)

For Respondent: Amy J. Pitsch, Esquire
 Greenspoon Marder LLP
 Suite 500
 201 East Pine Street
 Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether the Student's conduct, on November 30, [REDACTED], that constitutes a violation of the student code of conduct, was a manifestation of his disability.

PRELIMINARY STATEMENT

On December 11, [REDACTED], Respondent conducted a manifestation determination review, at the conclusion of which the team determined that

Petitioner's act of misconduct did not constitute a manifestation of his disability. Petitioner's parent was dissatisfied with the team's decision and on February 9, 2021, filed a request for an expedited due process hearing. The request for hearing was forwarded to DOAH for hearing. By agreement of the parties, the final hearing was scheduled for March 2, 2021.

The final hearing was held, as scheduled. At the hearing, Petitioner's parent testified on behalf of the Student. Petitioner did not introduce any exhibits into evidence. Respondent presented the testimony of two witnesses. Respondent also did not introduce any exhibits into evidence.

At the conclusion of the final hearing, the post-hearing schedule was discussed. Based on those discussions, the parties were to file proposed final orders on or before March 5, 2021, with the final order to follow under Florida Administrative Code Rule 6A-6.03312(7)(c) on or before March 12, 2021. On March 8, 2021, Petitioner requested that the time period to file the proposed final orders be extended. By Order of the same date, the time for filing the proposed final orders was extended to 5:00 p.m., on March 10, 2021, with the final order to follow as previously scheduled.

After the hearing, Petitioner filed a Proposed Final Order on March 11, 2021. Respondent filed a Proposed Final Order on March 5, 2021. Both parties' proposed orders were accepted and considered in preparing this Final Order.

In regard to this Final Order, unless otherwise indicated, all rule and statutory references contained in this Final Order are to the version in effect at the time of the alleged violation. Additionally, for stylistic convenience, the undersigned will use male pronouns in this Final Order when referring to the

Student. The male pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

FINDINGS OF FACT

1. The Student is currently █ years old. He is a student who qualifies for exceptional student education (ESE). His documented exceptionality is Specific Learning Disability (SLD) in math and reading.

2. During the █-█ school year, the Student was in █ grade and attended School A, a public high school in Brevard County, Florida.

3. At all times material, the Student had an Individual Educational Plan (IEP) that was consented to by the Student's parent with the last IEP dated October 2, █. In the development of that IEP, the parent indicated that the Student had matured past needing a Behavior Intervention Plan (BIP) and that the parent was happy where the Student was in his education. Due to the Student's SLD, the IEP contained goals, services, and accommodations for math and reading. There was no BIP contained in the Student's October 2, █, IEP because behavior was not a significant factor in the Student's education. Further, there was no evidence that the Student engaged in drug use.

4. The evidence showed that in the past, the Student's disability was manifested through difficulty in reading and math. The evidence demonstrated that the Student had not been seriously disciplined at school during the █-█ school year, having had only two earlier disciplinary referrals.

5. On November 30, █, a school discipline referral was issued to the Student for possession of drugs, namely a vape pen containing THC, the psychoactive component in marijuana. A properly-noticed manifestation determination meeting was held on December, 11, █.¹ The meeting was

¹ In general, the purpose of a manifestation review hearing is to review the manifestation decision made by the manifestation determination team. The purpose of the hearing is not to challenge the accuracy of the specific act for which a student is being disciplined.

attended by the parent and appropriate personnel who were familiar with the Student and his disability, including a school psychologist. There were no procedural challenges raised to the process followed by the School Board in setting or conducting the meeting.

6. At the meeting, the team determined that the Student's conduct was not caused by, or had a direct and substantial relationship to, the Student's disability, SLD, and that the conduct in question was not the direct result of Respondent's failure to implement the IEP. Thereafter, the IEP team met and determined that the Student should not be expelled, but should be placed in School B, an alternative learning center, for the remainder of his [REDACTED]-grade year with the right of early return should the Student complete a drug education program. There was no evidence that demonstrated that the team's manifestation determination decision was in error. Further, there was no evidence that demonstrated the Student's possession of drugs was related to his disability. Finally, the evidence demonstrated that School B could implement the Student's IEP.

7. The Student has not attended any public school in Brevard County since November 30, [REDACTED], at the election of the parent.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. *See* § 1003.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 6A-6.03311(9)(u) and 6A-6.03312(7).

9. Petitioner bears the burden of proof with respect to each of the claims raised in the Complaint. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Dep't of Educ., Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46724 (Aug. 14, 2006)(explaining that the parent bears the burden of proof in a proceeding challenging a school district's manifestation determination).

10. In enacting the Individuals with Disabilities Education Act (IDEA), Congress sought to “ensure that all children with disabilities have available to them a free appropriate public education that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 694 (11th Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency’s compliance with the IDEA’s procedural and substantive requirements. *Doe v. Alabama State Dep’t of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

11. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child’s records and participate in meetings concerning their child’s education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint “with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(1), (b)(3), & (b)(6).

12. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. Specifically, the IDEA provides that where a school district intends to place a disabled child in an alternative educational setting for a period of more than 10 school days, it must first determine that the child’s

behavior was not a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(C). Pursuant to the IDEA's implementing regulations, "[o]n the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504." 34 C.F.R. § 300.530(h).

13. The necessary inquiry is set forth in 20 U.S.C. § 1415(k)(1)(E), as follows:

Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

14. If the local educational agency, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable, the conduct shall be determined a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the conduct is deemed a

manifestation of the child's disability, the student must be returned to the educational placement from which he or she was removed. 20 U.S.C. § 1415(k)(1)(F)(iii). Additionally, if no BIP was in place at the time of the misconduct, the school district is obligated to "conduct a functional behavioral assessment, and implement a [BIP] for such child." 20 U.S.C. § 1415(k)(1)(F)(i).

15. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school district may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. 34 C.F.R. § 300.530(c). The child, however, must continue to receive education services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Additionally, the child must receive, as appropriate, a functional behavior assessment (FBA), and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(i) and (ii).

16. In this case, Petitioner's complaint raises no procedural issues with the manifestation review process and does not contend that the misconduct in question was a manifestation of the Student's disability. However, the complaint does contend that the Student was simply not guilty of the misconduct.

17. Addressing Petitioner's claim in the complaint that the team failed to properly consider the merits of the underlying conduct in question, the undersigned rejects this contention. The team's function is not to determine guilt or innocence of the underlying conduct in question, but rather to determine, whether said conduct (as determined by the school's investigation) was a manifestation of the Student's disability or of Respondent's failure to implement the IEP. Further, the expedited hearing afforded under IDEA is limited to a review of the manifestation determination by the team. The

hearing does not encompass a review of the merits of the violation of the code of student conduct. *See Danny K. v. Dep't of Educ.*, 2011 U.S. Dist. LEXIS 111066 (D. Haw. 2011)(holding that there is no authority to suggest that a manifestation determination team must review the merits of a school's findings as to how a student violated the code of student conduct as such a requirement would essentially deputize manifestation determination teams, and in turn, [administrative law judges] as appellate deans of students). *See also* Fla. Admin. Code R. 6A-6.03312(7)(c).

18. Petitioner's parent also raised at hearing the parent's belief that the School Board could not place the Student in an alternative education school for more than 45 days based on rule 6A-6.03312(6). However, the parent's interpretation of the rule section is incorrect.

19. Subsection (6) sets forth special circumstances where placement of a disabled student may be changed "without regard to whether the behavior is determined to be a manifestation of the student's disability" when the student has brought to or possessed a weapon on school property or to a school function; sold, possessed, or used illegal drugs on school property or school function; and inflicted serious bodily injury on another at school or a school function. The provision allows a school board to immediately remove a student to an alternative educational setting for up to 45 days without a determination that the student's conduct was a manifestation of the student's disability. The provision does not apply to limit removal to an alternative setting where, as here, the manifestation review team has determined that the Student's possession of drugs on school property (or other special circumstances under the rule) was not a manifestation of the Student's disability. Where, as here, the Student's special circumstance conduct is determined not to be a manifestation of the Student's disability, the Student may be disciplined as any other student and removal to an alternative setting is not limited to 45 days. Fla. Admin. Code R. 6A-6.03312(3)(d).

20. As such, there was no evidence presented at the hearing that demonstrated that Petitioner's misconduct was a manifestation of his disability and Petitioner failed to demonstrate that Respondent's determination concerning the conduct on November 30, [REDACTED], was incorrect. Further, there was no evidence that the Student's IEP was not implemented by the school. Moreover, the team's determination was based on a review of the Student's records and history with input from a school psychologist, the parent, and teachers. Indeed, the uncontroverted evidence demonstrated the Student's behavior was not a manifestation of [REDACTED] disability. Finally, the balance of Petitioner's claims as asserted in the due process Complaint were not supported by the evidence, and, therefore, are dismissed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The manifestation determination decision that Petitioner's conduct on November 30, [REDACTED], was not a manifestation of the Student's disability was correct and is approved.

2. Respondent may apply the relevant disciplinary procedures in the same manner and duration as would be applied to children without disabilities. The Student, however, must continue to receive education services so as to enable the Student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the Student's IEP.

3. All other requests for relief are denied.

DONE AND ORDERED this 12th day of March, 2021, in Tallahassee, Leon
County, Florida.



DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of March, 2021.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).