

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

**,

Petitioner,

vs.

Case No. 23-1160EDM

SARASOTA COUNTY SCHOOL BOARD,

Respondent.

FINAL ORDER

A due process hearing was held by Zoom video conference on April 27 and May 2, 2023, before Administrative Law Judge Brian A. Newman, with the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Amy J. Pitsch, Esquire
 Sniffen & Spellman, P.A.
 123 North Monroe Street
 Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined in this portion of this bifurcated proceeding is whether the student's violation of the student code of conduct was a manifestation of his disability, thus preventing the disciplinary placement of the student in an interim alternative educational setting (IAES).

PRELIMINARY STATEMENT

Petitioner's due process request for a hearing to challenge the student's disciplinary placement in an IAES was filed with Respondent on March 23,

2023. On March 27, 2023, Respondent filed Petitioner's due process request with DOAH, and a Case Management Order expediting this case was issued on March 28, 2023. Thereafter, the parties participated in a resolution session but did not reach an agreement.

A telephonic scheduling conference was held on March 29, 2023, and a Notice of Hearing was issued setting the case for a due process hearing on April 17, 2023. The hearing was held by Zoom video conference as scheduled. At the start of the hearing, before any evidence was received, Petitioner requested more time to retain an attorney. Over the objection of Respondent, the evidentiary portion of the hearing was rescheduled for May 2, 2023, to afford Petitioner time to retain an attorney.

On April 24, 2023, Petitioner filed an amended due process request that raised issues outside the scope of this expedited challenge to the manifestation determination that allowed the student to be placed in an IAES. An order was entered on April 27, 2023, allowing the amended due process request, but bifurcating this proceeding so that issues unrelated to Petitioner's challenge to the manifestation determination could be heard on a later date.

Day two of the hearing was held by Zoom video conference on May 2, 2023. Petitioner did not retain an attorney, but was assisted by a non-attorney advocate. Petitioner asked to waive the confidentiality of this proceeding to allow members of the public to view the hearing. This request was granted, without objection, but no one attempted to join the Zoom video conference to observe the hearing.

At the hearing, Petitioner called four witnesses and did not offer any exhibits. Respondent called four witnesses and offered Exhibits 1 through 5, which were admitted.

The identities of witnesses entered into the record are memorialized in the hearing transcript. Unless otherwise indicated, all rules and statutory references are to the version in effect at the time the events occurred. 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 here is [REDACTED] years old, in [REDACTED] school, and is eligible for exceptional student education (ESE) as a student with a Specific Learning Disability and Language Impairment.

2. According to the student's Individualized Education Plan (IEP), he is to receive adult assistance with transition. This means that an adult aide is assigned to the student during school hours to provide one-on-one supervision and walk with the student between classes and school activities.

3. The school's obligation to provide adult transition assistance starts when the school day begins and ends when the school day is over. An adult aide meets the student at the front gate of the school at the beginning of the school day and walks with the student to and from all classes and activities. At the end of the school day, an adult aide walks the student to the school gate and the student exits school property, unescorted.

4. The school is also required to provide the student specialized transportation to and from school by bus, but the student's mother declined this service. She transports the student to and from school in her personal vehicle. She drops him off at the school gate in the morning before school

starts, and picks him up outside the school gate in the afternoon after the school day has ended. The student is alone and standing outside the school gate when the mother picks him up after school.

5. The student has a Behavior Intervention Plan (BIP) to address behaviors that impede his learning, including the use of inappropriate words (including cursing and racial slurs) and physical aggression (including “hitting/slapping” students and tipping over desks and chairs). According to the student’s BIP, this behavior is impulsive and occurs within 3-5 seconds of provocation.

6. Before March 3, [REDACTED], the student hit or pushed teachers on two separate occasions during school. This occurred while the student was being supervised by an adult aide.

7. On March 3, [REDACTED], the student was found to have violated the student code of conduct. Specifically, the student, along with a group of twelve other students, attacked another student outside the gate of the school, just after the school day ended. The group of students who attacked the victim lined up outside the school gate—seemingly lying in wait—and attacked the victim after he passed by them. The student took a video of the attack, and pushed, kicked and “stomped” the victim, as did others in the group who participated in the attack. This attack occurred across the street from the school, not on school grounds.

8. The altercation was broken up by the assistant principal and the school resource officer. An investigation revealed that the attack was provoked by the belief that the victim was a “snitch,” and was a coordinated and premeditated attack. This is the “charged conduct” here.¹

9. The discipline imposed on the student because of the charged conduct was removal from the [REDACTED] school and placement in an IAES.

¹ Whether the student committed the “charged conduct” is not at issue in this case. *See Danny K. v. Dep’t of Educ.*, 2011 WL 4527387, at *12 (D. Haw. 2011).

10. On March 8, [REDACTED], the school ESE liaison contacted the student's mother by mail and text message to notify her that a manifestation determination meeting to determine whether the charged conduct was a manifestation of the student's disability would be held on March 10, 2023, from 8:45 to 9:45 a.m. The mailed notice identified the members of the manifestation determination team, which is the same membership as the student's IEP team.

11. The mother called the ESE liaison the morning of March 10, [REDACTED], and asked that the manifestation determination meeting take place later that day at 12:00 p.m., so she could attend the meeting in person. This request was granted, and the manifestation determination team met at 12:00 p.m. that day. The mother did not appear for the meeting, however, the assistant principal called her by telephone. The mother was called at 12:06 p.m. and stated that she did not have much time but would like to proceed with the meeting. During the meeting, the mother stated that she did not understand why the altercation was a problem since it happened across the street from the school, off school property. The mother eventually became frustrated and hung up the phone at 12:17 p.m. Soon after, the student's IEP team, sitting as the manifestation determination team, found that the charged conduct was not a behavior caused by, or directly and substantially related to, the student's disability. The IEP team also found that the charged conduct did not result from a failure to implement the student's IEP.

12. Petitioner failed to prove that the charged conduct was a manifestation of the student's disability. Although the student has a history of hitting or shoving other students and teachers, those incidents were impulsive, as described in the student's BIP. The group attack that the student participated in on March 3, [REDACTED], was a premeditated, coordinated attack on a victim that the group believed to be a "snitch." This was unlike any other physical aggression the student had shown at the school, and could not have reasonably been foreseen.

13. Petitioner also contends that the charged conduct occurred because the school failed to implement the student's IEP. Petitioner argues that if the student was supervised by an adult aide at the time the group attack occurred, then the student would not have participated in the group attack. But the evidence here is that the school's obligation to provide adult supervision for the student under his IEP ends when the school day is over. The attack occurred off school grounds, after the school day was over. There is no evidence that the school failed to provide adult transition services on the day the group attack occurred or that providing this service during school hours would have prevented the group attack that occurred after the school day had ended. Thus, Petitioner failed to prove that the student's participation in the group attack was caused by the failure to implement his IEP.

14. Finally, Petitioner contends that the student's mother was not allowed to participate in the manifestation team meeting. The greater weight of the evidence is that the manifestation team meeting was rescheduled at the mother's request, and that the mother left the meeting on her own accord before a decision was made. Petitioner failed to prove that Respondent failed to follow the appropriate procedural safeguards before an educational change in placement occurred.

CONCLUSIONS OF LAW

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

16. Petitioner bears the burden of proof for each of the issues raised here. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

17. 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 Cnty. 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 each agency’s compliance with the IDEA’s procedural and substantive requirements. *Doe v. Ala. State Dep’t of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

18. Parents and children with disabilities enjoy 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 have a right to examine their child's records and participate in meetings concerning their child's education; receive written notice before 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), and (b)(6).

19. School districts have certain limitations on their ability to remove disabled children from their educational placement following a behavioral transgression. 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). Under 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 local education authority (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).

20. The necessary inquiry is set forth in 34 C.F.R. § 300.530(e):

Manifestation determination.

- (1) 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 LEA's failure to implement the IEP.
- (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.
- (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

21. Generally, 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. 34 C.F.R. § 300.530(f)(1). Additionally, if a BIP was not in place at the time of the misconduct, the school district must conduct a functional behavior assessment (FBA) and implement a BIP for such child. *Id.*

22. 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).

23. Here, Petitioner failed to prove that the student's participation in the group attack was a manifestation of his disability or that the school failed to follow the appropriate procedural safeguards for an educational change in placement.

24. Petitioner contends that the IAES cannot provide the student all the services identified in his IEP. That issue is not ripe for this expedited challenge to the manifestation determination, and thus was not decided in this Final Order. Petitioner may raise this issue to be considered in the remainder of this bifurcated proceeding.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to prove that the student's violation of the student code of conduct was a manifestation of his disability, and that portion of Petitioner's due process request challenging the student's placement in an interim alternative educational setting is DISMISSED. All remaining issues raised by Petitioner will be heard in the remainder of this bifurcated proceeding.

DONE AND ORDERED this 16th day of May, 2023, in Tallahassee, Leon County, Florida.



BRIAN A. NEWMAN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2023.

COPIES FURNISHED:

Amanda W. Gay, Esquire
(eServed)

Michael Newsome, M.Ed.,
(eServed)

Petitioner
(eServed)

Dr. Allison Foster, Interim Superintendent
(eServed)

Amy J. Pitsch, Esquire
(eServed)

Andrew King, General Counsel
(eServed)

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).