

DOCKET NO. 153-SE-0104

Student, BNF Parent ,	§	BEFORE A SPECIAL EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	
EVOLUTION ACADEMY CHARTER	§	
SCHOOL,	§	
Respondent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

PETITIONER

Mr. Christopher Jonas
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RESPONDENT

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Statement of the Case

Petitioner, Student, brought this action against Respondent, Evolution Academy Charter School (hereafter "Evolution Academy"), pursuant to the Individuals with Disabilities Education Act (hereafter "IDEA"), as amended by the IDEA Amendments of 1997, 20 U.S.C. §1400 *et seq.*, seeking a declaration that her suspension from school failed to comply with applicable law; to overturn an adverse manifestation determination by Evolution Academy's ARD Committee; and to contest the ARD Committee's decision to place her in "in-school" suspension for the remainder of the 2003-2004 school year for possessing an illegal drug on school premises. As ancillary matters, Petitioner alleged numerous procedural violations of the IDEA.

A stay-put hearing was held in this matter on January 9, 2004, wherein I confirmed Evolution Academy's right to change Student's educational placement from her general education classes to an interim "in-school" suspension placement during the pendency of this hearing, not to exceed 45 calendar days.¹ A prehearing conference was also held in this matter on January 9, 2004, wherein the parties agreed to set the hearing date for February 11 and 12, 2004 and agreed to extend the decision due date to February 28, 2004. Subsequently, due to scheduling conflicts, Petitioner requested a short continuance of the hearing to February 17, 2004. The hearing was not completed on that date and by agreement of the parties, we reconvened and completed the hearing on February 25, 2004. Petitioner was represented at the hearing by her legal counsel, Mr. Christopher Jonas. Evolution Academy was represented at the hearing by its legal counsel, Mr. Russell Wilson.

Based upon the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

Findings of Fact

1. Student, is a ***-year-old student in the *** grade who enrolled at the Evolution Academy Charter School for the 2003-2004 school year.
2. Student is a student with learning disabilities, other health impairment (attention deficit hyperactivity disorder) and emotional disturbance. Student is of average intelligence and capable of performing grade level work with modifications.

¹ 34 C.F.R. §300.520 (a) (2).

3. Evolution Academy is an open-enrollment charter school having been granted a charter by the State Board of Education under Subchapter D, Chapter 12 of the Texas Education Code. For the 2003-2004 school year, Evolution Academy is responsible for providing Student with a free appropriate public education.
4. When Student enrolled at Evolution Academy, she had a individualized education plan (IEP) developed by Garland Independent School District (hereafter "Garland ISD") that included annual goals and short-term objectives in the areas of math, language arts, behavior and counseling. Her plan also included a behavior intervention plan.
5. On August 29, 2003, Evolution Academy held a temporary transfer ARD Committee meeting to plan Student's interim educational program for 30 days until her official records could be retrieved from Garland ISD. Student's mother provided the ARD Committee with copies of Student's current IEP from Garland ISD, but these unofficial records were not used. Student's mother informed the ARD Committee that Student was not a behavior problem and the ARD Committee agreed to temporarily place Student in four general education classes (Geometry, U.S. History, English IIA, and Biology IA) with access to content mastery and modifications. The ARD Committee also agreed to reconvene within 30 days.
6. Garland ISD's behavior intervention plan and individual goals and objectives designed for Student for her classes and counseling were not attached to Student's August 29, 2003 ARD Committee report and the report did not indicate that the ARD Committee had agreed to implement these IEPs and behavior plan.
7. Despite some testimony to the contrary, Garland ISD's behavior intervention plan and individual goals and objectives designed for Student were not made part of her interim education program by Evolution Academy, since they were not included or attached to the August 29, 2003 ARD Committee records.
8. Student's transfer ARD Committee meeting was held on October 7, 2003. The ARD Committee reviewed Student's progress and determined that Student was capable of following the Student Code of Conduct without modification. The ARD Committee also maintained her placement in its general education program with modifications and access to content mastery for 60 minutes each week.
9. Student's only reported inappropriate behaviors prior to the October 7 2003 ARD Committee meeting were that she talked too much in class, slept in class, was tardy to class and was lazy when it came to doing her work.
10. Although Student's annual goals and short-term objectives for math and English were discussed at the October 7, 2003 ARD Committee meeting, they were not attached to the ARD Committee report and were not provided to Student's mother. Student's mother was not provided with the opportunity to read, review and approve or disapprove of Student's written individualized goals and objectives and there is no evidence that the October 7, 2003 ARD Committee approved such IEP goals and objectives as part of Student's educational program for the 2003-2004 school year.
11. Student's educational plan, as developed at the October 7, 2003 ARD Committee meeting was inappropriate for failing to document and contain individualized annual goals and short-term objectives for Student.

12. There are no IEPs for Student from the October 7, 2003 ARD Committee meeting in the record of this proceeding.
13. Student was suspended from school by Evolution Academy beginning in the afternoon of November 19, 2003, for being in possession of [illegal drug] at school.
14. Student did not have a behavior intervention plan in place on November 19, 2003, when she was suspended from school.
15. When Student was suspended from school, her mother was told that Student could not return to school until an ARD Committee meeting could be held.
16. Student's mother contacted the Evolution Academy on or about December 2, 2003 to inquire about when the ARD Committee meeting would be scheduled.
17. On the evening of Thursday, December 4, 2003, Student's mother received notice scheduling an ARD Committee meeting for Monday, December 8, 2003. She also received a copy of the procedural safeguards.
18. On Friday, December 5, 2003, Student's mother notified Evolution Academy that she could not make the ARD Committee meeting scheduled for Monday, December 8, 2003.
19. The December 4, 2003 notice did not provide Student's parents with 5 school days notice of the scheduled December 8, 2003 ARD Committee meeting.
20. December 8, 2003 was the 10th consecutive school day of Student's suspension.
21. Student returned to Evolution Academy on December 15, 2003 and was temporarily placed by school officials in "in-school" suspension.
22. Student's "in-school" suspension placement isolated her from other students. Because of the 1-on-1 instruction Student received while in "in-school" suspension, she performed better academically while in this placement.
23. Student was suspended from school by Evolution Academy for 14 consecutive school days.
24. Evolution Academy's failure to provide Student's parents with five school days notice of the December 8, 2003 ARD Committee meeting resulted in Student being suspended from school for 14 consecutive school days.
25. Student was not provided with any educational services from Evolution Academy from November 20, 2003 until December 15, 2003.
26. An ARD Committee meeting was held on December 17, 2003. This meeting was attended by Student's mother. The ARD Committee recommended that Student should be placed in "in-school" suspension for the remainder of the school year with 60 minutes of special education content mastery services per week. Student's mother disagreed with this proposal and the parties agreed to reconvene the ARD Committee on January 9, 2004.

27. The ARD Committee actually reconvened on January 7, 2004, at which time the ARD Committee completed its manifestation determination, finding that Student's possession of illegal drugs on campus was not a manifestation of her disabilities. The ARD Committee decided to retain Student in "in-school" suspension for the remainder of the school year as her alternative educational placement, as a disciplinary consequence for having possessed an illegal drug at school. Student's mother disagreed with the ARD Committee decisions and filed for a due process hearing.
28. The January 7, 2004 ARD Committee also authorized counseling for Student for 45 minutes per week.
29. Evolution Academy contemplated taking action to change Student's educational placement from the general education environment to an alternative educational placement as of December 17, 2003, when it recommended that Student be placed in "in-school" suspension for the remainder of the school year.
30. The manifestation determination conducted by the January 7, 2004 ARD Committee was completed within 10 school days after the decision to take action to place Student in an alternative educational placement was made by Evolution Academy.
31. Evolution Academy provided Student's parents with notice of its contemplated action and with a copy of the procedural safeguards on or before December 17, 2003, the date on which Evolution Academy made the recommendation to place Student in an alternative education program.
32. Evolution Academy had not conducted a functional behavioral assessment or implemented a behavior intervention plan for Student prior to her suspension on November 19, 2003.
33. As of December 9, 2003, Student's removal from school for more than 10 consecutive school days constituted a change in her educational placement.
34. The January 7, 2004 ARD Committee in making its manifestation determination, improperly determined that Student's then current IEP was appropriate, since there was no recognized and approved IEP in effect for Student.
35. The January 7, 2004 ARD Committee, in making its manifestation determination improperly determined that Student's then current special education support services and supplemental aids were appropriate, since there was no recognized and approved IEP in effect for Student.
36. The January 7, 2004 ARD Committee, in making its manifestation determination improperly determined that Student's then current behavior intervention strategies which were compliance with the student code of conduct and were consistent with her IEP and placement, since there was no recognized and approved IEP in effect for Student.
37. The January 7, 2004 ARD Committee, in making its manifestation determination, erred in concluding that the manifestation determination standards had been met; that Student's behavior was not a manifestation of her disabilities; and that Student's then current IEP was appropriate, since there was no recognized and approved IEP in effect for Student.

38. Each of Student's school days involved 220 minutes of academic instruction.
39. Despite the procedural deficiencies in the development of Student's IEPs, she was otherwise provided beneficial educational services by Evolution Academy and made educational progress from the beginning of the 2003-2004 school year through January 7, 2004 (including her disciplinary stay-put placement of "in-school" suspension).
40. The appropriate relief for the denial of a free appropriate public education to Student in this case should be limited to four school days (13 hours) of compensatory educational services.

Discussion

A primary issue raised by Petitioner in this matter involved whether Student was suspended from school for more than 10 consecutive school days in violation of the IDEA and if so, whether such suspension resulted in Student being denied educational services and a free appropriate public education. Petitioner claims that Student was suspended for 14 consecutive school days. Respondent claims that Student's suspension lasted for 10 consecutive school days and that she was absent for another 4 school days. I find, based on the evidence presented, that Student was suspended by Evolution Academy for 14 consecutive school days due to its failure to provide appropriate prior notice to Student's parents as to when Student was to return to school. The evidence established that Evolution Academy would not allow Student to return to school until an ARD Committee meeting could be held. Evolution Academy attempted to contact Student's parents by telephone beginning December 2, 2003, to schedule an ARD Committee meeting for December 8, 2003, which was the 10th consecutive school day after Student's suspension. However, Evolution Academy did not provide Student's parents with written notice of the December 8, 2003, ARD Committee meeting until December 4, 2003. The IDEA's implementing federal regulations require that public agencies notify parents of ARD Committee meetings early enough to ensure that they will have any opportunity to attend. 34 C.F.R. §300.345(a)(1). State rules require that this notice be in writing and comply with the notice requirements of 34 C.F.R. §§300.345, 300.503 and 300.505. *See*, 19 Tex. Admin. Code §89.1045(a). 34 C.F.R. §300.503 requires that written notice must be given to parents of children with disabilities a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE (free appropriate public education) to the child. State rules define this reasonable notice as at least five school days, unless the parents agree otherwise. *See*, 19 Tex. Admin. Code §89.1015. Accordingly, unless Student's parents agreed otherwise, they were entitled to five school days notice of the December 8, 2003 ARD Committee meeting. Student's mother did not receive timely written notice of this ARD Committee meeting and notified Evolution Academy that she could not attend the meeting. The meeting was subsequently rescheduled and held on December 17, 2003 but prior thereto, Evolution Academy agreed to allow Student to return to school and be placed in "in-school" suspension beginning December 15, 2003. There is no evidence that Evolution Academy ever notified Student's mother that Student could return to school on December 9, 2003, after having served 10 consecutive school days of suspension. In fact, the evidence established the contrary. Accordingly, I find that Student was improperly suspended from school by Evolution Academy in excess of 10 consecutive school days without any educational services being provided in violation of 34 C.F.R. §300.520(a)(1)(ii). I also find that Student was denied educational services and a free appropriate public education from Evolution Academy for 4 school days, from December 9, 2003 through December 12, 2003.

Petitioner also questioned whether Student's suspension violated State Law which limits suspension of students to no more than three days. I find that Section 37.005 of the Texas Education Code which limits suspensions to no more than 3 days for violations of the Student Code of Conduct is not applicable to open-enrollment charter schools, including Evolution Academy. Tex. Educ. Code §12.104(b); 12.131

Petitioner further alleged that Evolution Academy failed to develop an individualized education program for Student for the 2003-2004 school year. Evolution Academy claims that it developed appropriate IEPs for Student at the October 7, 2003 ARD Committee meeting. Based upon a preponderance of the evidence presented, I find in favor of Petitioner on this issue. Although some evidence infers that the October 7, 2003 transfer ARD Committee discussed and drafted IEPs for Student, including annual goals and short-term objectives, these IEPs were not attached to the October 7, 2003 ARD Committee documents, were not provided to Student's mother and there is no evidence that they were ever agreed to by the ARD Committee.² Quite simply, there are no agreed upon IEPs for Student in evidence in this proceeding. The IEPs attached to the January 7, 2004 ARD Committee report were prepared on January 7, 2004 and are redrafted copies of IEPs purportedly developed at the October 7, 2003 ARD Committee meeting. There was even conflicting testimony as to whether these redrafted copies constituted all of the IEPs developed at the October 7, 2003 ARD Committee meeting. Regardless, the record of this proceeding is void of any IEPs that were developed and agreed to by an ARD Committee for Student from October 7, 2003 through January 7, 2004, the date the hearing in this matter was requested. Accordingly, I find that Student was denied a free appropriate public education by Evolution Academy from October 7, 2003 through January 7, 2004, excluding the period from November 19, 2003 (her suspension date) until December 9, 2003 (first day after end of 10 consecutive school days of suspension) due to its failure to prepare, attach and document approval of Student's IEPs in the record of the October 7, 2003 ARD Committee and due to its failure to provide copies of Student's IEPs to her mother.³

Petitioner further claimed that the manifestation determination made by the January 7, 2004 ARD Committee failed to comply with applicable law. I concur. The failure of Evolution Academy to attach and include appropriate IEPs for Student in its October 7, 2003 ARD Committee records and its failure to provide copies of the IEPs to Student's parents and obtain ARD Committee approval for these IEPs, renders the manifestation determination based on these alleged IEPs inappropriate. *See*, 34 C.F.R. §300.523(c)(d) and (f). Accordingly, Student's behavior must be considered a manifestation of her disability. *See* 34 C.F.R. §300.523(d). Additionally, since there are no recognized IEPs in place for Student, Evolution Academy is obligated to take immediate steps to remedy this deficiency. 34 C.F.R. §300.523(f).

Petitioner also complained that placing Student into an "in-school" suspension that results in Student's isolation from other students, is not an appropriate alternative educational setting. I

² Federal regulations require that the IEP for each child with disabilities include, among other matters, a statement of measurable annual goals, including benchmarks or short-term objectives related to (i) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and (ii) meeting each of the child's other educational needs that result from the child's disabilities. 34 C.F.R. §300.347(a)(2). Moreover, federal regulations require that a copy of the child's IEP be given to the parent at no cost to the parent. 34 C.F.R. §300.345(f). This was not done.

³ I find that despite the failure to have in place a documented IEP for Student, Evolution Academy had the right under the IDEA to suspend Student for 10 consecutive school days from November 19, 2003 until December 9, 2003. During the 10 consecutive school days of suspension, Student was not entitled to and therefore was not denied a free appropriate public education under applicable law.

disagree. The Amendments to the IDEA recognized the need for school officials to have some leeway in disciplining students with disabilities. The IDEA does not prohibit the use of "in-school" suspension as an alternative educational setting. Instead, the decision as to the disciplinary interim alternative educational setting, must be made by an ARD Committee. It is the ARD Committee's duty to ensure that the setting selected will enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications provided for in the child's IEP and to implement the services and modifications needed to address and prevent the child's misbehavior. *See*, 34 C.F.R. §300.522. Additionally, state law provides that a disciplinary alternative education program is one that, among other matters: (1) is provided in a setting other than a student's regular classroom; (2) is located on or off of a regular school campus; (3) provides for students to be separated from students not assigned to the program; (4) focuses on the student's academics; and (5) provides for student's educational and behavioral needs. Tex. Educ. Code §37.008. Accordingly, I find that Evolution Academy, under appropriate circumstances, has the right to use "in-school" suspension as its alternative educational setting. However, because Student's behavior was a manifestation of her disabilities, Evolution Academy is prevented from placing Student into this alternative education setting for the remainder of the school year. Instead, Evolution Academy is required to convene an ARD Committee meeting to address the deficiencies that existed in Student's IEP, including developing appropriate annual goals and short-term objectives for Student in her areas of educational need. This may include the provision of counseling services and development and implementation of an appropriate behavior intervention plan for Student.

Petitioner also alleged that Student's parents were not provided with the procedural safeguards when Student was suspended from school. I disagree. Parents must be given copies of procedural safeguards, (i) upon initial referral for evaluation; (ii) upon each notification of an ARD Committee meeting; (iii) upon reevaluation of the child; and (iv) upon receipt of a request for a due process hearing. 34 C.F.R. §300.504(a). The evidence established that Petitioner received a copy of the procedural safeguards from Evolution Academy on December 4, 2003, prior to the December 17, 2003 ARD Committee meeting. There is no requirement that Evolution Academy provide Student's parents with a copy of the procedural safeguards when it suspended Student from school on November 19, 2003.

Petitioner further alleged that proper notice of ARD Committee meetings was not provided to Student's parents. The evidence indicates that Student's mother participated in the August 29, 2003, and October 7, 2003 ARD Committee meetings and that Student's mother was provided with proper notice of the December 17, 2003 and January 7, 2004 ARD Committee meetings. The fact that Student's mother participated in the August 29, 2003 and October 7, 2003 ARD Committee meetings indicates that any complaint regarding lack of proper notice was waived with regard to these meetings. Accordingly, I find in favor of Evolution Academy on this issue.

Petitioner further alleged that ARD Committee meetings were not duly constituted and failed to maintain confidentiality of the process by allowing outsiders to come into the meeting room during the ARD Committee meetings. I find that Petitioner failed to establish by a preponderance of the evidence that the ARD Committees were not duly constituted or that the confidentiality of the meetings were compromised. There is no conclusive evidence in the record to support Petitioner's contention that persons not relevant to the discussions being held during the ARD Committee meetings were present or allowed into the meeting by Evolution Academy. Accordingly, I find in favor of Evolution Academy on this issue.

Petitioner also alleged that the January 7, 2004 ARD Committee minutes were inaccurate or misleading. I find that I lack jurisdiction under the IDEA to address this issue. Student's parents may request that Evolution Academy amend Student's educational records that they believe are inaccurate or misleading. 34 C.F.R. §300.567. If Evolution Academy refuses, then Student's parents have the right to request a hearing to challenge the accuracy of the records. This hearing however is held pursuant to the Family Educational Rights and Privacy Act of 1974 (FERPA), 34 C.F.R. §99.22. *See*, 34 C.F.R. §300.570.

In conclusion, I find that Evolution Academy failed to fully comply with the requirements of the IDEA relating to development of IEPs and disciplinary placements. I find that Student was denied any educational services for four school days in December, 2003. I also find that despite the procedural deficiencies in the development of her IEPs, she was otherwise provided beneficial educational services by Evolution Academy and made educational progress from the beginning of the 2003-2004 school year through January 7, 2004 (including the disciplinary stay-put placement of "in-school" suspension). Consequently, I have determined that the appropriate relief for the denial of a free appropriate public education to Student in this case should be limited to four school days (13 hours) of compensatory educational services.

Conclusions of Law

After due consideration to matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student qualifies for special education services from Evolution Academy as a student with learning disabilities. 34 C.F.R. §300.7.
2. Evolution Academy is an open-enrollment charter school and part of the public school system of the State of Texas. Tex. Educ. Code §12.105.
3. Evolution Academy is subject to the special education programs provisions under Subchapter A, Chapter 29 of the Texas Education Code. Tex. Educ. Code §12.104(b)(F) or (G).
4. Evolution Academy, being Student's public school, has the responsibility of providing her with a free appropriate public education in the least restrictive environment. 20 U.S.C. §1401; 34 C.F.R. §300.300.
5. Evolution Academy had the authority to suspend Student for up to 10 consecutive school days and place Student in an alternative educational setting for up to 45 days for possessing an illegal drug at school. 34 C.F.R. §300.520(a)(1) and (2).
6. Evolution Academy did not have the authority under the IDEA to suspend Student, a student with disabilities, for more than 10 consecutive school days. 34 C.F.R. §300.520(a)(1).
7. Chapter 37 of the Texas Education Code, except for Section 37.0021 regarding discipline management practices or behavior management techniques, is not applicable to open-enrollment charter schools. Tex. Educ. Code §12.104(b); 12.131.

8. Section 37.005 of the Texas Education Code which limits suspensions to no more than 3 days for violations of the Student Code of Conduct is not applicable to open-enrollment charter schools, including Evolution Academy. Tex. Educ. Code §12.104(b); 12.131
9. Evolution Academy failed to provide Student's parents with the required five school days notice of its proposed December 8, 2003 ARD Committee meeting. 19 Tex. Admin. Code §89.1015.
10. Student was denied a free appropriate public education by Evolution Academy for four school days, from December 9, 2003 through December 12, 2003, the period of time that she was suspended from school in excess of 10 consecutive school days. 34 C.F.R. §300.520.
11. Student was denied a free appropriate public education by Evolution Academy from October 7, 2003 through January 7, 2004, excluding the period from November 19, 2003 (her suspension date) until December 9, 2003 (first day after end of 10 consecutive school days of suspension) due to its failure to prepare, attach and document ARD Committee approval of Student's IEPs in the records of the October 7, 2003 ARD Committee and due to its failure to provide copies of Student's IEPs to her mother.
12. "In-school" suspension may be used as an alternative educational program for students with disabilities. *See*, Tex. Educ. Code §37.008.

ORDER

After due consideration of the record and the foregoing findings of fact and conclusions of law, I ORDER that:

1. Evolution Academy's decision to change 's education placement for the remainder of the 2003-2004 school year to its alternative educational setting of "in-school" suspension as a disciplinary consequence for Student's misconduct that occurred on November 19, 2003 is OVERRULED.
2. Evolution Academy shall retain Student in her general education curriculum for the remainder of the 2003-2004 school year, except as otherwise agreed to by the parties or as required for disciplinary reasons.
3. For the remainder of the 2003-2004 school year, Evolution Academy has the right to use "in-school" suspension as an alternative educational setting for Student for any future misconduct that warrants her placement in an alternative educational setting under applicable law.
4. Evolution Academy shall provide Student with the opportunity to receive 13 hours of compensatory educational services in the nature of tutorial services. Such tutorial services shall be offered by Evolution Academy or a qualified designee to Student on school premises before or after school (at the option of Petitioner) during the remainder of the 2003-2004 school year and in the frequency and amount determined appropriate by the ARD Committee. Such tutorial services shall be in areas of Student's academic needs as determined by the ARD Committee. Any tutorial services offered but not utilized by Petitioner within the time period prescribed shall be forfeited. Any transportation costs incurred by Petitioner associated with the

provision of such compensatory services, in excess of that which would not otherwise be incurred by Petitioner but for the provision of the such compensatory services, shall be the responsibility of Evolution Academy and Evolution Academy shall reimburse Petitioner for such transportation costs at the mileage rate set by the State of Texas of 35 cents per mile.

5. Evolution Academy shall undertake to modify Student's attendance records and grades to eliminate any adverse consequences, if any, resulting from Student not having attended school from December 9, 2003 through December 12, 2003.
6. The parties shall convene an ARD Committee meeting within 20 school days of this ORDER for purposes of implementing this ORDER and for purposes of reviewing and/or developing appropriate annual goals and short-term objectives for Student in areas of her educational need.

Finding that the public welfare requires the immediate effect of this Final Decision and ORDER, I hereby make it effective immediately.

The charter school shall timely implement this decision within 10 school days in accordance with 19 Tex. Admin. Code §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of the decision: 1. documentation demonstrating that the decision has been implemented; or 2. if the timeline set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the charter school's plan for implementing the decision within the prescribed timeline, and a signed assurance from the director that the decision will be implemented.

SIGNED this 28th day of February 2004.

/s/ James W. Holtz
James W. Holtz
Special Education Hearing Officer

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SCHOOL,		§	
Respondent		§	FOR THE STATE OF TEXAS

SYNOPSIS

Issue: Whether Charter School suspended a student with disabilities for more than 10 consecutive school days for possessing illegal drugs at school.

Held: For the Parent. The IDEA limits the authority of school personnel to suspend students with disabilities. Their authority is limited to suspensions lasting no more than 10 consecutive school days. In this case the student's suspension lasted 14 consecutive school days due, in part, to the failure of the Charter School to provide parent with timely and proper notice of ARD Committee meeting.

Cite: 34 C.F.R. §300.520 (a)(1).

Issue: Whether student's excessive suspension resulted in denial of a free appropriate public education.

Held: For the Parent. Evidence established that student was improperly removed from school and denied any educational services by the Charter School for four of the fourteen days of suspension. The failure of the Charter School to provide any educational services to the student for four days does not comport with the requirements of the IDEA and constitutes a denial of a free appropriate public education.

Cite: 34 C.F.R. §300.13; 34 C.F.R. §300.520 (a)(1).

Issue: Whether student's suspension for more than three days violated state law?

Held: For the Charter School: Section 37.005 of the Texas Education Code which limits suspensions to no more than 3 days for violations of the Student Code of Conduct is not applicable to open-enrollment charter schools.

Cite: Tex. Educ. Code §12.104 (b); 12.131

Issue: Whether Charter School could utilize an "in-school" suspension setting, including isolation of the student from other students, as its alternative educational setting?

Held: For the Charter School: The IDEA does not prohibits the use of "in-school" suspension as an alternative educational setting. The determination of what the disciplinary interim alternative educational setting will be for a particular child must be made by an ARD

Committee. *See*, 34 C.F.R. §300.522. Additionally, state law defines a disciplinary alternative education program as one that: (1) is provided in a setting other than a student's regular classroom; (2) is located on or off of a regular school campus; (3) provides for students to be separated from students not assigned to the program; (4) focuses on the student's academics; and (5) provides for student's educational and behavioral needs.

Cite: *See*, 34 C.F.R. §300.522; Tex. Educ. Code §37.008.

Issue: Whether manifestation determination by ARD Committee that student's misconduct was not a manifestation of her disabilities was appropriate and in compliance with the IDEA?

Held: For the Parent: The Charter School failed to establish that student's IEP had been developed, agreed to by parent and ARD Committee and provided to parent prior to student's misconduct. Manifestation determinations require review of student's current IEP. The IEP purportedly developed at prior ARD Committee meeting was not part of ARD Committee documents or placed into the record of this proceeding. A copy had not been provided to the parent and the ARD Committee documents gave no indication that an IEP had been developed and approved by the ARD Committee. As a consequence, there was no current IEP from which to make a manifestation review. By law, if a determination cannot be made that the child's IEP and placement were appropriate as it relates to the behavior subject to the disciplinary action, then the behavior must be considered a manifestation of the child's disability.

Cite: 34 C.F.R. §300.523(c) and (d).

Issue: Whether parent was properly provided with the procedural safeguards when student was suspended from school?

Held: For Charter School: At a minimum, parents must be given copies of procedural safeguards, (i) upon initial referral for evaluation; (ii) upon each notification of an ARD Committee meeting; (iii) upon reevaluation of the child; and (iv) upon receipt of a request for a due process hearing. 34 C.F.R. §300.504(a). There is no requirement that Charter School provide parent with a copy of the procedural safeguards when it temporarily suspends student from school.

Cite: 34 C.F.R. §300.504 (a).

Issue: Whether ARD Committee developed IEPs for student with disabilities?

Held: For Parent: The Charter School failed to establish that student's IEP had been developed, agreed to by parent and ARD Committee and provided to parent. The IEP purportedly developed at the October 7, 2003 ARD Committee meeting was not part of ARD Committee documents or placed into the record of this proceeding. A copy had not been provided to the parent and the ARD Committee documents gave no indication that an IEP had been developed and approved by the ARD Committee.

Cite: 34 C.F.R. §300.347(a)(2); 34 C.F.R. §300.345(f).

Issue: Whether ARD Committed minutes were inaccurate or misleading?

Held: No jurisdiction: This is an issue for adjudication under FERPA.

Cite: 34 C.F.R. §300.567; 34 C.F.R. §99.22; *See*, 34 C.F.R. §300.570.

Issue: Whether proper notice of ARD Committee meetings had been provided to Parent?

Held: For Charter School: Although there was a lack of proper written notice given parent of ARD Committee meetings in August and October, 2003, parent attended and participated in meetings. Proper written notice was provided parent of ARD Committee meetings held in December 2003 and January 2004.

Cite: 34 C.F.R. §300.345; 19 Tex. Admin. Code §89.1045 and 89.1015.

Issue: Whether ARD Committees were duly constituted and maintained confidentiality of proceeding?

Held: For Charter School: There was a lack of evidence to support claim that ARD Committees were not duly constituted or that persons without relevant knowledge or information were present or allowed into ARD Committee meetings by the Charter School.

Cite: 34 C.F.R. §300.344