

CONSOLIDATED  
TEA DOCKET NOS. 066-SE-1207 AND 114-SE-0108

STUDENT BNF PARENT, Petitioner	§ § §	BEFORE A DUE PROCESS
VS.	§ §	HEARING OFFICER FOR
FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT, Respondent	§ § §	THE STATE OF TEXAS

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**DECISION OF THE HEARING OFFICER**

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**Statement of the Case**

Petitioner (also “parent”), as next friend and on behalf of her son (hereafter “student”), brought this due process complaint against Respondent, Flour Independent School District (hereafter “Flour Bluff ISD”) pursuant to the Individuals with Disabilities Education Improvement Act (hereafter “IDEA”), 20 U.S.C. §1400 *et seq.* The parent complains that Flour Bluff ISD failed to properly implement the student’s behavior intervention plan resulting in the student threatening a peace officer and receiving a long-term disciplinary placement. The parent also contests the manifestation determination made by the November 11, 2007 ARD Committee and the student’s disciplinary placement.

**Procedural History**

The parent filed a due process complaint with the Texas Education Agency (hereafter “TEA”) on December 5, 2007. The problems described in the complaint involved an incident on November 8, 2007, wherein the student made a terrorist threat against a police officer and was arrested and taken into custody. The parent complained that the student’s behavior intervention plan had not been properly implemented and that the student’s behavior had been aggravated by the actions of school personnel. The parent also complained that the school district’s failure to implement the student’s behavior intervention plan resulted in the student being placed in a more restrictive placement and that the school district failed to conduct a functional behavioral assessment. As relief, the parent sought appropriate behavior interventions, additional services necessary for the student to be successful at school and one year of compensatory educational services. Based on the wording of the complaint, it was initially identified as a non-disciplinary complaint filed pursuant to 20 U.S.C. §1415 (b)(6) and (7) and was set for hearing on January 22, 2008.

On December 14, 2007, Flour Bluff ISD filed its Response to Petitioner’s Complaint and Motion to Dismiss. In its Motion to Dismiss, Flour Bluff ISD alleged that the issues raised in this complaint had been previously litigated in TEA Docket No. 193-SE-0307.

On January 3, 2008, the parent filed a Motion to Enforce Stay-Put claiming that the student had been assigned to an alternative educational disciplinary placement, but that the “stay-put” provision of the IDEA required him to be returned to his pre-disciplinary placement at the behavior intervention unit at the \*\* school. Flour Bluff ISD contended that the stay-put provision regarding disciplinary appeals was applicable and that the student should remain in the disciplinary placement.<sup>1</sup>

A telephone prehearing conference was held on January 8, 2008 to address these pending motions. During the prehearing conference, Flour Bluff ISD raised a jurisdictional issue claiming that the student was no longer a resident of the school district. An affidavit from the parent regarding residency was submitted after completion of the prehearing conference. The parent indicated that over the Christmas recess she and student had temporarily moved from Flour Bluff ISD, but intended to relocate and reestablish residency within Flour Bluff ISD as soon as possible. Based on this information, the parent’s motion for stay-put was denied. By January 16, 2008, the parent and student had reestablished residency within Flour Bluff ISD and the student had reenrolled at school.

On January 10, 2008, Flour Bluff ISD filed an unopposed motion for continuance. On January 15, 2008, the parent filed an Amended Motion to Enforce Stay-Put.

Another telephone prehearing conference was held on January 16, 2008 to address Flour Bluff ISD’s Motion to Dismiss and the parent’s Amended Motion to Enforce Stay-Put. I denied Flour Bluff ISD’s Motion to Dismiss finding the issues raised in this due process complaint had not been adjudicated in TEA Docket No. 193-SE-0307. In addressing the parent’s Motion to Enforce Stay-Put, the parent clarified that her issue involving “least restrictive environment” was intended to be an appeal of the disciplinary placement pursuant to 20 U.S.C. §1415(k). This “clarification” of the “least restrictive environment” issue constituted an amendment of the due process complaint to include a request for an expedited hearing on the issue of the appropriateness of the disciplinary placement.<sup>2</sup>

The expedited hearing on the discipline appeal was set for February 1, 2008, and the hearing on non-disciplinary issues, originally set for January 22, 2008, was consolidated with the disciplinary hearing and rescheduled for that date.

On January 28, 2008, the parent filed another due process complaint pursuant to 20 U.S.C. § 1415(k) to contest an unfavorable manifestation determination of Flour Bluff ISD’s

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<sup>1</sup> A review of the IDEA and its implementing regulations indicates that the disciplinary placement becomes the stay-put placement *only* if a party has appealed a disciplinary issue under 20 U.S.C. §1415(k). If a disciplinary change in placement is proposed against a student that is not appealed, but at the same time there is pending a due process complaint not involving a disciplinary matter, then the general maintenance of placement provision would appear applicable requiring the student to remain in his or her then current non-disciplinary placement during the pendency of the non-disciplinary hearing. *See and compare* 20 U.S.C. §1415(j) and (k)(3) and (4).

<sup>2</sup> An amendment of an expedited due process complaint brought pursuant to 20 U.S.C. §1415 (k) is not governed by the amendment provision of the IDEA. See 34 C.F.R. §§300.533, 300.532(a), 300.508(a) and (b). Accordingly, it did not require consent of the hearing officer or the school district and did not require a recommencement of the timelines for due process complaints.

November 16, 2007 ARD Committee. This complaint was assigned TEA Docket No. 114-SE-0108.

On January 30, 2008, in the appeal to federal district court of TEA Docket No. 193-SE-0307(a prior decision involving these parties), the federal judge issued a temporary restraining order enjoining further proceedings in these due process hearings until such time as the judge determined if the administrative proceedings interfered with the Court's jurisdiction or operated in derogation of the appeal. In accordance with the temporary restraining order, the due process hearings were stayed and the applicable timelines for conducting the hearings and rendering the decisions were tolled.

On February 21, 2008, the federal judge dissolved the temporary restraining order finding that the school district had failed to demonstrate any extraordinary circumstances justifying its extension.

On February 22, 2008, the expedited hearing in TEA Docket No. 066-SE-1207 was rescheduled for March 7, 2008 and the expedited hearing in TEA Docket No. 114-SE-0108 was set for March 14, 2008. Subsequently, at the request of Flour Bluff ISD and in the interest of administrative/judicial economy, these pending due process complaints were consolidated and set for hearing on March 7, 2008. This was the 20<sup>th</sup> school day (inclusive of the tolling period) from the date of filing of the expedited hearing complaint in TEA Docket No. 066-SE-1207.

These matters proceeded to hearing on March 7, 2008. The decision due date for expedited hearings is normally 10 school days after the date of the hearing. 20 U.S.C. §1415 (k)(4)(B). However, in this case, a stricter state regulation requires the decision to be rendered within 45 calendar days from when the expedited hearing request was filed. 19 Tex. Admin. Code §89.1191. Taking into consideration the tolling of the timelines during the period of the temporary restraining order, the decision due date in this matter is March 24, 2008.

#### Issues

1. Whether the student's misbehavior on November 8, 2007 was a manifestation of the student's disability?
2. Whether Flour Bluff ISD failed to implement an appropriate behavior intervention plan on November 8, 2007, when an incident between the student and a police officer occurred?
3. Whether on November 8, 2007, Flour Bluff ISD aggravated and encouraged the student's misbehaviors and caused the student to be denied a free appropriate public education?
4. Whether the discipline placement enabled the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's individualized education plan (IEP)?

5. Whether a functional behavioral assessment of the student should have been conducted by Flour Bluff ISD on or about November 8, 2007, as part of its behavioral analysis for disciplinary purposes?

#### Relief Sought

As relief, the parent sought implementation of appropriate behavior interventions; additional educational services the student needed to be successful in school; an order finding that student's misbehavior on November 8, 2007 was a manifestation of his disability; and one year of compensatory educational services.

Based on 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. The student is \*\* years-old, in the \*\* grade and attends school within Flour Bluff ISD.
2. The student qualifies for special education and related services meeting the IDEA's eligibility criteria for emotional disturbance and learning disability in the area of written expression. [Petitioner Exhibit No. 7, hereafter P. Exh. \_\_\_\_].
3. During the 2007-2008 school year the student was educationally placed in a behavior unit at the \*\* school. The student's IEP included a behavior intervention plan designed with the goals of treating others with respect, cooperating with his teachers and attending to instruction. The plan included counseling to teach social skills, use of point sheets, an adult mentor, and positive behavioral strategies, including earning privileges for being respectful and cooperative. The plan, as developed and implemented, was appropriate and generally successful in addressing the student's problematic behaviors to the extent that he could receive an educational benefit. [P. Exh. #7, 12].
4. From November 8, 2007, through December 21, 2007, the last school day before the Christmas recess, the student resided with his parent within the jurisdictional boundaries of Flour Bluff ISD. [Hearing Transcript, pages 77-81, hereafter T. \_\_\_\_].
5. On November 9, 2007, the student was suspended, charged with a criminal offense of making a terroristic threat against a police officer and withdrawn from Flour Bluff ISD. On or about November 12, 2007, he was admitted to the Padre Behavioral Hospital located within Corpus Christi ISD, where he completed his fall semester of school. [P. Exhs. #4, 7, 14].
6. During the Christmas holiday season, the parent lost electricity at the trailer in which she and the student maintained their residence and moved temporarily to live with her sister in Beeville, Texas. [T. 77-81, R. Exh. #1].
7. By January 16, 2008, the parent had leased an apartment within the jurisdictional boundaries of Flour Bluff ISD and the student reenrolled in Flour Bluff ISD. From

approximately January 16, 2008 through January 28, 2008, the date of the expedited hearing request in TEA Docket No. 114-SE-0108, the parent and student were residents of Flour Bluff ISD. [T. 77-81, P. Exh.#4, 14].

8. From November 8, 2007, through November 9, 2007, and from January 16, 2008 through January 28, 2008, Flour Bluff ISD was responsible for providing the student with special education and related services necessary to provide the student with a free appropriate public education.

9. Although Flour Bluff ISD argues it made a definitive determination sometime during the fall of 2007 that the student and parent were not residents of the school district and verbally notified the parent of its determination, there was no documented formal action revoking the student's enrollment status or terminating his educational services. [T. 271-272].

10. On November 8, 2007, the student refused to comply with his teacher's directive to move from the computer table back to his desk. At that time, a police officer with the Corpus Christi Police Department and a school district security officer entered the student's classroom conducting their weekly walk-through. As the police officer walked by the student, he also directed the student to go back to his desk. This caused the student to become angry and upset. The police officer and the security officer then left the classroom. Shortly thereafter, the student returned to his desk and wrote on a napkin that "I smell baken (sic)," and "Cops are big fat pigs." He told his teacher to give it to the officer. He then asked if he could call his mother to have her come and pick him up. His teacher allowed the call. The student asked his mother to come and pick him up because the police officer was there that day. His mother refused to pick him up, explaining that there were just two of hours left during the school day and that she could not pick him up every time the police officer was on campus. After the phone call, the student said, "I'm going to kick his ass" referring to the police officer. His teacher tried to redirect him. He then asked her to call the police officer back to the room so he could hit him. He then stated the officer couldn't put his hands on him, unless he had him in handcuffs. The student then went and turned on the computer to type a letter to the police officer. His teacher told him that would not be a good idea. The student then said he was going to go get a gun and come up to the school and shoot the police officer. His teacher told him she could not ignore that comment and contacted administration. The time period between when the police officer redirected the student and the student's threat was approximately 35 minutes. [T. 197]. The student was suspended from school and criminal charges were filed against the student for making a terroristic threat. [T. 83-84, 186-189, 195-202, P. Exh. #9].

11. The student's version of what transpired on November 8, 2007, differed slightly from that of his teacher. He contended that the police officer had threatened to forcibly remove him if he didn't return to his desk. He also testified that the police officer had squeezed his arm hurting him and that it made him "very mad and very furious and upset." [T. 70-71]. The student admitted that after the police officer left the classroom and after he had called his mother, he told his teacher he would get a gun and bring it to school and shoot the officer. He added he did not mean it and remained in his chair when he said it. [T. 68-72].

12. On November 8, 2007, Flour Bluff ISD did not aggravate or in any manner encourage the student's misbehavior.
13. The teacher appropriately attempted to defuse the student's anger through counseling and redirection of his behavior. However, the student's emotional state did not wane and he fixated on and remained angry about what had occurred. This incident culminated in the student making the terroristic threat against the police officer. [T. 186-189, 195-202].
14. On November 16, 2007, an expulsion hearing was held by Flour Bluff ISD regarding the student's terroristic threat toward a police officer. The student was found to have violated the Student Code of Conduct and the school administrator recommended, in lieu of expulsion, that the student be placed in the Student Development and Guidance Center (SDGC), a disciplinary alternative educational placement, for 90 successful days. [P. Exh. #6].
15. On November 16, 2007, Flour Bluff ISD convened an ARD Committee to determine whether the student's misconduct on November 8, 2007 was a manifestation of his disability. [P. Exh. #7].
16. As of November 16, 2007, the student's identified disabilities were emotional disturbance and learning disabled in the area of written expression. For his emotional disturbance classification, the student met the eligibility criteria as having "demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" and for having "a general pervasive mood of unhappiness or depression." [R. Exh. #1, page 1322, P. Exh. #7].
17. As of November 16, 2007, an ARD Committee had not determined that the student met the IDEA's eligibility criteria for mental retardation. At the ARD Committee meeting, the parent did not raise or request that the student be considered mentally retarded for purposes of making the manifestation determination. [P. Exh. #7; T. 191].
18. The parent provided the November 16, 2007 ARD Committee with a letter from the student's physician dated November 13, 2007, indicating that the student was being treated for a schizo-affective disorder and Asperger's disorder.
19. The parent also provided the ARD Committee with a psychological evaluation completed by Dr. \*\* on October 31, 2007, just eight days before the student made the terroristic threat against the police officer. This psychological evaluation had been requested by the Nueces County Juvenile Probation Department to determine if the student was fit to stand trial for a pending burglary of a habitation offense. [P. Exh. #11].
20. The relevant assessment information regarding the student available to the November 16, 2007 ARD Committee included the May 12, 2006 psycho-educational evaluation of Dr. \*\*; the July 17, 2007 psychological assessment of Dr. \*\*; the October 31, 2007 psychological evaluation of Dr. \*\*; and the letter from the student's psychiatrist dated November 13, 2007. Additionally, the ARD Committee had available for review the student's current IEP, behavior intervention plan, and a functional behavioral assessment dated April 17, 2007.

21. Although the November 16, 2007 ARD Committee reviewed the information provided by the parent and all relevant information in the student's folder, it only used and considered Dr. \*\* May 2006 evaluation when making its manifestation determination. [T. 104-105, P. Exh. #7].
22. The November 16, 2007 ARD Committee determined that the student's terroristic threat toward a police officer was not caused by his disabilities of emotional disturbance or learning disability in written expression. The ARD Committee also determined that there was no direct or substantial relationship between the conduct in question and the student's disabilities. Moreover, the ARD Committee determined that the student had received all services in accordance with his IEP. The parent disagreed with the manifestation determination by the ARD Committee. [P. Exh #7].
23. On December 5, 2007, the parent filed a request for a due process hearing with the Texas Education Agency.
24. The student's conduct in question on November 8, 2007, was not shown by the parent to be a manifestation of the student's learning disability in written expression.
25. The November 16, 2007 ARD Committee Report fails to document the underlying rationale for the manifestation determination. Although the ARD Supplement form contains a box for explanations, none was provided. Instead, the ARD Committee simply restated its conclusion. [R. Exh. #2].
26. The ARD Committee's justification for its manifestation determination was not adequately explained. The only information in the record explaining the reasons for the manifestation determination is the limited testimony of a few members of the ARD Committee.
27. The Educational Diagnostician testified that it was her belief that the student's misconduct was predetermined and therefore was not directly or substantially related to his disabilities. [T. 105-106].
28. The student's special education teacher, also a member of the November 16, 2007 ARD Committee, testified that it was her opinion that the student's misconduct was not caused by nor directly or substantially related to his disability because the student had begun taking some accountability for his actions and was learning to self-monitor his behavior. [T. 192]. She described the events leading up to the misconduct, indicating that she had counseled the student about making good decisions, about how angry he was, and how he was probably saying things he shouldn't say. She stated that the student agreed with her, but then sat there a few minutes before telling her he wanted to type a letter to the police officer, which she dissuaded. It was a few minutes afterwards that the student stated he was going to go get a gun and bring it back and shoot the police officer. [T. 200-201].
29. The manifestation opinions of the Educational Diagnostician and special education teacher are provided little weight as they lack sufficient explanation and detail in the context of the surrounding circumstances, and with regard to the relevant information purportedly reviewed by the ARD Committee.

30. Dr. \*\*’s May 12, 2006 psycho-educational evaluation described the student has having significant behavioral problems at home and school. He was impulsive, disrespectful, non-compliant and used profanity. He engaged in criminal activity such as stealing money and jewelry, and he was physically aggressive to both adults and peers, including threatening others. He acted without thinking about the consequences of his behavior. [R. Exh. #1, pages 1325-1327]. He was found to have extreme levels of depressive symptoms including sadness, isolation and feelings of ineffectiveness. [R. Exh. #1, page 1337]. His problem behaviors at school involved poor attention and concentration, difficulty working with peers, difficulty staying on task, and excessive activity levels. [R. Exh. #1, page 1326]. His adaptive behavior scores indicated he was functioning well below typical ranges as compared to others his age, particularly in his ability to relate positively, communicate, and function in the educational setting. [R. Exh. #1, pages 1333-1334]. Many of his problem behaviors at school were described as being a direct result of his mood swings, depressed mood, attentional problems and lack of motivation. [R. Exh. #1, page 1339]. Dr. \*\*’s diagnoses included Bipolar Disorder, Attention Deficit Hyperactivity Disorder (by history), Oppositional Defiant Disorder and Disorder of Written Expression. She did not find the student to have a pervasive developmental disorder, specifically Asperger’s Disorder. [R. Exh. #1, page 1341].

31. Dr. \*\*’s evaluation is provided only limited weight because it is prior in time to Dr. \*\*’s and Dr. \*\*’s evaluations which reflect a significant deterioration in the student’s mental health and functioning since Dr. \*\*’s evaluation.

32. At the hearing, Dr. \*\* rendered an expert opinion in support of the ARD Committee’s decision. It was her opinion, taking into consideration the circumstances surrounding the incident and looking at the common features and characteristics of his emotional disturbance disability, that making threatening statements to authority figures was not directly or substantially related to his specific emotional disturbance. However, when asked to identify the IDEA eligibility criteria under which the student had been classified as emotionally disturbed, Dr. \*\* could not recall all the criteria, only the criteria regarding “having a general pervasive mood of unhappiness and depression” finding that it related to his DSM-IV diagnosis of bipolar disorder. When clarifying her opinion regarding the student’s functional behavioral assessment and its targeted problem area related to verbal and physical aggression, Dr. \*\* opined that she would need to look at the specific situation and know the circumstances surrounding them, but that in general terms individuals with oppositional defiant disorder tend to resist authority figures; be defiant; rebellious; engage in behaviors that intentionally annoy people; and that this contributes to negative behaviors such as displayed by the student. She equated it to a power struggle between the student and the teacher. [T. 240-241]. When viewing the conduct of the student using the IDEA disability criteria instead of a clinical DSM-IV diagnosis, she opined that his past verbal and physical aggression may have been part of the “unhappiness and depression” characteristic of his emotional disturbance. [T. 241]. When asked about Dr. \*\*’s evaluation on October 31, 2007, indicating that the student was bipolar with psychotic features and was too mentally ill to stand trial for a pending criminal offense, she indicated that a person with this diagnosis has severe highs and lows in terms of their behavior and will during manic periods exhibit psychotic features, some being hallucinations, delusions, grandiose thoughts, and breaks with reality. [T. 239]. She acknowledged that in her evaluation in May, 2006, she had not

observed or diagnosed the student with psychotic features and had not thereafter evaluated the student. [T. 239].

33. Although Dr. \*\* has the professional qualifications to render an expert opinion regarding the manifestation determination, the fact that she has not evaluated the student since May, 2006, diminishes the weight furnished her opinions. Instead, the greater evidentiary weight, that amounting to a preponderance of the evidence, is assigned to the opinions expressed by Drs. \*\* and \*\* in their testimony and to the information and results of their more recent psychological evaluations of the student.

34. Dr. \*\*, a licensed clinical and school psychologist, completed an independent psychological evaluation of the student on July 17, 2007. He diagnosed the student with psychosis, not otherwise specified and mental retardation, mild. Dr. \*\* recognized a pattern of diminishing overall IQ and math abilities involving the student. He opined that what is occurring is a chronic, insidious, deterioration in the student's cognitive, verbal, behavioral, social and academic functioning and opined this was consistent with childhood schizophrenia. Dr. \*\*'s testing of the student's personality attributes and emotional functioning was positive for anxiety, depression, ineffective coping strategies, and poor social skills. Dr. \*\* made the following observations and findings:

“He is not very introspective and does not realize the impact his behavior has on other people. He has limited capacity to critically examine himself and modify his behavior accordingly. [The student] tends to misperceive events and misjudge people. His misinterpretations frequently result in behaviors which are inappropriate for the situation. [The student's] failure to perceive people and events realistically represents a substantial impairment of reality testing and may be prompted by feelings of anger and resentment.

He is prone to episodes of affective disturbance that also interfere with his ability to function effectively on a day-to-day basis. In stressful situations he is likely to demonstrate limited frustration tolerance and poor impulse control, marked by oppositionality and negativity toward authority. [The student] shows little interest in engaging in collaborative relationships with others. His seemingly indifferent attitude causes him to be disliked and excluded from normal peer activities. He generally finds himself on the periphery of social interactions, which further contributes to his feelings of despair.” [P. Exh. #13].

Dr. \*\*'s evaluation, being more recent in time from that of Dr. \*\*'s, and with results and diagnoses commensurate with the psychological evaluation of Dr. \*\*, is provided greater evidentiary weight than that furnished Dr. \*\*'s evaluation.

35. Dr. \*\* also rendered an expert opinion at the hearing. He concluded that the student's misconduct was related to his disability of emotional disturbance. Dr. \*\* acknowledged that the student is not mentally incompetent 24 hours a day, seven days a week, and that in making a determination of whether the student's behavior was caused by or directly or substantially related to the student's disability, it needed to be based on the circumstances surrounding the incident.

He opined that if the preceding events leading up to the threat had the precipitating stressors, then it would be related. He elaborated that for people with psychotic conditions stress increases their detachment from reality and increases their delusional grandiosity. [T. 59] After reviewing the conduct in question, Dr. \*\* opined that the incident with the police officer was the precipitating cause of the behavior and that it was directly related to the student's serious emotional disturbance. [T. 63].

36. Dr. \*\*' October 31, 2007 psychological evaluation confirmed that the student's mental condition was such that he was not fit to proceed to trial for a pending offense of burglary of a habitation. Dr. \*\* found that the student was mentally ill, and had borderline intelligence with a full scale IQ of only \*\*. Dr. \*\* diagnosed the student with Bipolar I Disorder, Most Recent Episode Mixed, Moderately Severe, with Psychotic Features; Oppositional Defiant Disorder; Attention Deficit/Hyperactivity Disorder – Residual Type; and Borderline Intellectual Functioning. He opined that the student's bipolar disorder with psychotic features was chronic and not expected to remit. [P. Exh. #11]. Dr. \*\* also opined as follows:

“Manifestations of this patient's bipolar disorder include behavior and moods which are usually labile, impulsive and rapidly changeable. Like others who struggle with a mood swing disorder, this patient's symptoms include restlessness, over-activity, ease of boredom and disinterest in routine or details with episodes of despondency, irritability and withdrawal.

Because of his bipolar disorder and borderline intellect, this patient shows diminished insight regarding the self defeating nature of his impulsive and non-compliant behaviors which have resulted in his current and prior difficulty with the law. The patient resents external controls and he ordinarily gratifies important affective needs mostly by way of active, extratensive means. The nature of 'cooperation' of individuals with an oppositional disorder undermines the utility of their compliance.

The results of my examination of this patient indicate that his reality testing is highly ideographic and inconsistently accurate. The patient's thought processes are peculiar and he may have an underlying organic deficit.” [P. Exh. 11].

Dr. \*\*' evaluation, being more recent in time from that of Dr. \*\*'s and with results and diagnoses commensurate with Dr. \*\*'s psychological evaluation, is provided greater evidentiary weight than that furnished Dr. \*\*'s evaluation.

37. Although Dr. \*\* testified at the due process hearing in this matter, he was not asked and did not render an expert opinion as to whether the student's terroristic threat against a police officer was a manifestation of his emotional disturbance disability.

38. A functional behavioral assessment of the student was completed on April 17, 2007. This functional behavioral assessment had been obtained as part of a prior disciplinary action taken against the student for having brought a “look-alike” handgun to school. The assessment indicted that the student had received numerous office discipline referrals for disrespect,

defiance, making threats and harassment and that as the school year progressed, he had been disciplined for more serious offenses of aggression and assault. The functional behavioral assessment identified the student's problem behaviors as disrupting instruction, disrespect toward teachers, verbal and/or physical aggression, harassing peers, non-compliant, stealing, and carrying a "look-alike" hand gun. One of its targeted behaviors was the student's verbal and physical aggression toward adults and peers. The analysis of this behavior indicated that the student resorted to aggression to avoid embarrassment or failure academically and socially.

39. The November 16, 2007 ARD Committee properly determined that the student's functional behavior assessment was current and did not need to be updated. [T. 103].

40. The student's individual education plan and behavior intervention plan were appropriate and being properly implemented when the student made a terroristic threat against a police officer. [T. 106, 170, 178-179, 190, 192, 200-201].

41. Relevant information, including the student's assessment data, indicate that behaviors caused by or directly or substantially related to the student's emotional disturbance include impulsivity, disrupting instruction, disrespect toward teachers, verbal and/or physical aggression, restlessness, over-activity, ease of boredom and disinterest in routine or details with episodes of despondency, irritability, withdrawal, limited capacity to critically examine self and modify behavior, misperception of events, and misjudging people.

42. The circumstances surrounding the conduct in question confirm that incident provoked an angry reaction from the student, possibly due either to embarrassment or his oppositional defiance towards authority figures. They also confirm that the threat was not predetermined or premeditated to the extent it was an independent act, unrelated to the student's emotional disturbance disability. Instead, the threat was the culmination of a series of derogatory statements made by the student that began almost immediately after the police officer left the room. The student's first reaction was to write on a napkin a derogatory remark about the police officer being a "pig." Next, the student called his mother to come pick him up because the police officer was on the campus. When that didn't work, the student said, "I'm going to kick his ass." His teacher tried to redirect him. He then asked her to call the officer back into the room so he could hit him. He then stated the officer couldn't put his hands on him, unless he had him in handcuffs. The student then went and turned on the computer to type a letter to the police officer. His teacher told him that would not be a good idea. Finally, the student said he was going to go get a gun and come up to the school and shoot the police officer. This threat, although serious, was part of an escalating situation. The student angrily fixated on the incident and for approximately 35 minutes could not be effectively redirected by his teacher. Although the culminating threat may not have been an impulsive act, it was not a predetermined or premeditated act unrelated to his disability as found by the ARD Committee. Instead, it was typical of the behaviors previously described in the student's assessment data and of the type expected of a student with the type and severity of his emotional disturbance. Because of his emotional disturbance disability, the student was unable to critically examine his conduct and modify his behavior accordingly. He misperceived events and misjudged the situation. His ultimate threat was in the nature of an act of verbal aggression; a behavior which was directly related to the student's emotional disturbance.

43. On or about January 16, 2008, the student was sent to Flour Bluff ISD's disciplinary alternative educational placement.

44. On January 28, 2008, the parent appealed the manifestation determination made by the November 16, 2007 ARD Committee by filing a due process complaint.

## Discussion

### **Jurisdiction/Residency**

Flour Bluff ISD contends that prior to January 16, 2008, the student and parent were not residents of the school district and that it should not be held responsible for educating the student. In the prior due process hearing between the parties (TEA Docket No. 193-SE-0307), a hearing was held on the issue of the residency to determine jurisdiction to proceed with the IDEA due process hearing.<sup>3</sup> It was determined that the student and parent were residents of Flour Bluff ISD. This issue is pending appellate review.

In this proceeding Flour Bluff ISD again argues that the student and parent were not residents of the school district as of November 8, 2007, when the incident in question arose. It is recognized however, that the student has been receiving educational services from Flour Bluff ISD throughout most of the 2007-2008 school year. Even assuming, *arguendo*, they were not residents of Flour Bluff ISD on November 8, 2007 when the incident made the basis of this action occurred, the student was still enrolled within Flour Bluff ISD and receiving special education and related services. Although Flour Bluff ISD argues it made a definitive determination sometime during the fall of 2007 that the student and parent were not residents of the school district and verbally notified the parent of its determination, there was no documented follow-up action revoking the enrollment status of the student. As long as the student was enrolled within Flour Bluff ISD, it would have received state and federal funding for the student and it had a continuing legal obligation, to provide a free appropriate public education to the student. 34 C.F.R. §§300.200 – 300.202.

On November 9, 2007, the student was withdrawn from Flour Bluff ISD and admitted to a hospital located within another school district. The student did not reenroll in Flour Bluff ISD until approximately January 16, 2008. At that time Flour Bluff ISD determined the student and parent were residents of the School District. This withdrawal and reenrollment did not affect this pending due process hearing, except that Flour Bluff ISD would be absolved of any obligations

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<sup>3</sup> Normally, school boards or their designees are charged with the obligation to make residency determinations. However, when residency issues under State law intertwine with the free appropriate public education (FAPE) obligations placed upon local educational agencies by the IDEA, IDEA hearing officers have concurrent and overlapping jurisdiction to determine residency for purposes of identifying the local educational agency responsible for the provision of FAPE to the student. See, *Central Dauphin School District*, 31 IDELR 49 (PA SEA 1999); *Dallas Plantation* 40 IDELR 252 (ME SEA 2004); *Franklin Township Community School Corp.*, 44 IDELR 110 (IN SEA 2005); *Cambridge Public Schools*, 22 IDELR 838 (MA SEA 1995); *Lapp, et al v. Reeder Public Sch. Dist. No. # 3, et al*, 491 N.W.2d 65 (1992); *Burbank Unified School Dist.*, 506 IDELR 371 (CA SEA 1984); *Lewis Cass Intermediate Sch. Dist. v. M.K. ex rel. J.K.*, 40 IDELR 8 (W.D. Mich. 2003).

to provide the student with a free appropriate public education during that time period in which the student was not enrolled.

### Issue: 1

#### **Manifestation Determination: Was Conduct in Question Caused by or Directly or Substantially Related to Student's Disability?**

The IDEA and its implementing federal regulations allow school officials to remove students with disabilities who violate a code of student conduct from his or her current educational placement to an appropriate interim alternative educational setting for more than ten consecutive school days, 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 and if the disciplinary procedures are applied in the same manner and for the same duration as applied to children without disabilities. See 34 C.F.R. §300.530(b) and (c).

Manifestation determinations must be made within 10 school days of any decision to change the placement of a child with a disability who has violated a code of student conduct. 34 C.F.R. §300.530(e)(1). It is the local educational agency, the parent and relevant members of the child's IEP team, as determined by the parent and the local educational agency that make the manifestation determination. These parties 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: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 34 C.F.R. §300.530(e)(1)(i) and (ii). If either of these conditions exists, then the conduct must be determined to be a manifestation of the child's disability. 34 C.F.R. §300.530(e)(2).

In Texas, ARD Committees are responsible for making manifestation determinations. See, 19 Tex. Admin. Code §89.1050(a)(4) and (g); 34 C.F.R. §300.530(e)(1).

The parent, as the moving party, bears the burden of proof in this manifestation challenge. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531, 163 L. Ed. 2d 387 (2005).

The issue appealed is whether the November 16, 2007 ARD Committee correctly determined that the student's misconduct in threatening to get a gun and come to school and shoot a police officer was not a manifestation of his emotional disturbance disability.

The parent met her burden of proof in this appeal. A preponderance of the evidence confirms that the ARD Committee erred in determining that the conduct in question was not directly or substantial related to the student's disability of emotional disturbance.

A preliminary part of a manifestation determination is the identification and review of the disabilities that serve the basis for the student's eligibility. The ARD Committee properly

identified the student's disabilities as emotional disturbance<sup>4</sup> and a learning disability in the area of written expression.

The parent contends, as part of this manifestation appeal, that the student meets the IDEA's eligibility criteria as mentally retarded. Much was made of this claim at the hearing, as it is a matter being appealed in TEA Docket No. 193-SE-0307.<sup>5</sup> However, the parent furnished the ARD Committee with a recent psychological evaluation of the student by Dr. \*\* dated October 31, 2007, in which Dr. \*\* opined that the student was not mentally deficient despite testing indicating a full scale IQ score of \*\*. Instead, Dr. \*\* diagnosed the student with "Borderline Intellectual Functioning." Moreover, the evidence confirmed the parent never requested that the ARD Committee consider the student mentally retarded for purposes of its manifestation review. [T. 191]. Accordingly, the ARD Committee acted appropriately, based on the information available at that time, in not identifying the student with mental retardation for purposes of making its manifestation determination.

In making manifestation determinations, the ARD Committee was required to review all relevant information in the student's file, including the student's IEP, teacher observations, and any relevant information provided by the parents. The relevant assessment information available to the ARD Committee included the May 12, 2006 psycho-educational evaluation by Dr. \*\*; the July 17, 2007 psychological assessment by Dr. \*\*; the October 31, 2007 psychological assessment by Dr. \*\*; and a letter from the student's psychiatrist dated November 13, 2007. Additionally, the ARD Committee had available for review the student's current IEP, behavior intervention plan, and functional behavioral assessment.

The required review of all relevant information is to ensure that the Committee members are well informed as to the manifestation characteristics of the child's disability so that they can make reasonable and appropriate manifestation determinations.

This is an interesting case in that there is conflicting evidence as to the mental and emotional status and capabilities of the student. In fact, it is hard to imagine information being more diametrically opposed than in this case. The school district witnesses describe a student who is of average to below average intelligence, capable of doing grade level work, who is in touch with reality, understands what he is doing, understands right from wrong, and who made a conscious predetermined decision to threaten to shoot a police officer. The school district witnesses based their finding and observations primarily on their daily interactions with the student.

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<sup>4</sup> The student met the IDEA's eligibility criteria for emotional disturbance as having "demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" and for having "a general pervasive mood of unhappiness or depression." 34 C.F.R. §300.8(b)(4).

<sup>5</sup> Flour Bluff ISD sought to elicit from teachers and school staff lay opinions as to whether the student appeared mentally retarded. Such information would be material as part of a full and individual evaluation of the student when conducted by a qualified evaluator, but only in that context. Presenting such information during a due process hearing in an attempt to raise some inference that the student is not mentally retarded is meaningless, since it is not part of a formal assessment. Whether a student meets the IDEA eligibility criteria for mental retardation must be based on valid assessment data collected by a multi-disciplinary team with the final decision regarding eligibility made by an ARD Committee. 34 C.F.R. §300.8; 19 Tex. Admin. Code §89.1040 (b).

The parent's expert witnesses and evidence depict a student who is severely mentally ill; who suffers from bipolar disorder with psychotic features or possibly childhood schizophrenia; who was determined by state appointed psychologist to be so mentally ill that eight days prior to the conduct in question, he was found unfit to stand trial in criminal court; who over the past couple of years has significantly deteriorated cognitively so that he now is either of borderline intellect or mentally retarded<sup>6</sup>; and who is incapable of doing grade level work. These expert witnesses based their findings and opinions primarily on the assessment information gathered and the results of their psychological evaluations of the student.

There exist such diametrically opposed facts as to the mental and emotional state of the student that a comprehensive review of the record is necessary to determine which evidence should be assigned greater weight. Based on that review, the greater weight of evidence is furnished to the parent's witnesses and evidence. This evidence constitutes a preponderance of the evidence and confirms the parent's position that the conduct in question was a manifestation of the student's emotional disturbance disability.

The evidentiary problems begin with the ARD Committee documentation of the manifestation review. Although the November 16, 2007 ARD Committee Report sets forth the manifestation determination, there is no indication or description of how the student's emotional disturbance disability manifested itself. Also lacking is any rationale or justification from the ARD Committee for its decision. The form used by the ARD Committee contains an explanation box, but its contents simply restate the ARD Committee's conclusion that the conduct in question was not related to the student's disability. Consequently, there is no explanation in the November 16, 2007 ARD Committee Report as to why the ARD Committee determined that the student's conduct was not related to his disability. In fact, in the entire record of this proceeding there are only a few instances where any type of explanation is attempted.

Three members of the ARD Committee testified as to their personal observations and opinions related to the manifestation determination. The educational diagnostician testified she believed the conduct in question was not related to his disability because the student understood what he was doing and that it was a predetermined plan - that it was not impulsive. [T. 106]. The student's teacher testified that she believed the student's misconduct was not directly related to his disability because he had recently been taking some accountability for his actions and was learning to self-monitor his behavior. [T. 191-192]. The Counselor testified only as to her decision and that it was based on the information available at the meeting. [T. 318]. The rationale for her decision was not given. Later, she opined that if the student had been determined to be mentally retarded she still would not have believed his misconduct was related to that disability because he had the ability to make good decisions. [T. 320]. These

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<sup>6</sup> In 2003, the student's full scale IQ was measured at \*\*, indicating normal intelligence. By May, 2006, it had dropped to \*\* per Dr. \*\*'s evaluation. By May/June, 2007 it had decreased to \*\*, a score in the mentally deficient range, per Dr. \*\*'s evaluation. In October, 2007, Dr. \*\* obtained a score of \*\*, again in the mentally deficient range. Between 2003 and the present, there has been a significant reduction in IQ which Dr. \*\* opined was most likely due to the emergent of a serious mental illness. Dr. \*\*' evaluation confirms that the student was so mentally impaired that he was not fit to stand trial for a criminal offense. [R. Exh. #1].

manifestation opinions are provided little weight as they are not sufficiently explained in the context of the surrounding circumstances, nor with regard to the relevant information that was to have been reviewed by the ARD Committee.

Flour Bluff ISD, in its Closing Statement and Memorandum argued that the ARD Committee, in accordance with the IDEA, considered all the relevant information. However, this is not supported by the ARD Committee Report. Although the ARD Committee Report states that the information provided by the parent “can be” considered by the ARD Committee, it also states that “for purposes of the [manifestation determination] the district must go by Dr. \*\*’s evaluation.” This is an inaccurate statement and improper application of the law. The ARD Committee was not required to “go by” Dr. \*\*’s evaluation and in so doing apparently ignored the more recent psychological evaluations from Dr. \*\* and Dr. \*\* and the updated information contained therein. These evaluations reflect a significant deterioration in the student’s mental and emotional state since Dr. \*\*’s evaluation. The greater evidentiary weight is given to the Dr. \*\* and Dr. \*\*’ evaluations as they are more recent than Dr. \*\*’s and their results and findings are quite similar.

Dr. \*\*’ diagnosis of the student with Bipolar Disorder with Psychotic Features closely corresponds with Dr. \*\*’s diagnosis in July 2007, of a progressive psychosis, not otherwise specified, which he later determined to be childhood schizophrenia. In her May, 2006 evaluation, Dr. \*\* had not diagnosed the student with any psychotic features. Accordingly, this important information regarding the student’s then current mental condition was apparently not considered by the ARD Committee when making its manifestation determination. In fact, his teacher and counselor, who were members of the November 16, 2007 ARD Committee testified that they did not believe the student had psychotic features or that his judgment was impaired. [T. 205, 324]. This is completely contrary to the information contained in the most recent assessment instruments of the student.

At the hearing, Dr. \*\*, the school district’s psychologist, rendered an expert opinion in support of the ARD Committee’s manifestation decision. She was not a member of the ARD Committee, did not participate in its deliberations, and did not identify the rationale used by the ARD Committee when making its manifestation determination. However, it was her opinion, taking into consideration the circumstances surrounding the incident and looking at the common features and characteristics of his emotional disturbance disability, that making threatening statements to authority figures was not directly or substantially related to his specific emotional disturbance. She opined that even if the student had psychotic features, there was nothing in the circumstances surrounding the incident indicating that he was in a psychotic state at the time and that information obtained from school personnel did not indicate that he had demonstrated any psychotic symptoms in the school environment. [T. 225]. However, when questioned concerning the IDEA eligibility criteria under which the student had been classified as emotionally disturbed, Dr. \*\* could not recall all the criteria, only the criteria regarding “having a general pervasive mood of unhappiness and depression” finding that it related to his DSM-IV diagnosis of bipolar disorder. When asked to clarify her opinion taking into account the student’s functional behavioral assessment and its targeted problem area related to verbal and physical aggression, Dr. \*\* hesitated to make any global statement without looking at the facts, but then opined that in general terms individuals with oppositional defiant disorder tend to resist

authority figures; be defiant; rebellious; engage in behaviors that intentionally annoy people; and that this contributes to negative behaviors such as those displayed by the student. [T. 240-241]. When asked to view the conduct of the student using the IDEA disability criteria instead of a clinical DSM-IV diagnosis, she admitted that his past verbal and physical aggression could be a part of the “unhappiness and depression” characteristic of his emotional disturbance. [T. 241]. When asked about Dr. \*\*’ evaluation on October 31, 2007, indicating that the student was bipolar with psychotic features and was too mentally ill to stand trial for a pending criminal offense, she indicated that a person with this diagnosis has severe highs and lows in terms of their behavior and will, during manic periods, exhibit psychotic features, some being hallucinations, delusions, grandiose thoughts, and breaks with reality. [T. 239]. However, she indicated that she did not perform “Fitness to Proceed” assessments and had no opinion concerning its findings. She acknowledged that in her evaluation in May, 2006, she had not observed or diagnosed the student with psychotic features and had not thereafter evaluated the student. [T. 229, 239].

Although Dr. \*\* has the professional qualifications to render an expert opinion regarding the manifestation determination, the fact that she has not evaluated the student since May, 2006, diminishes the weight furnished her opinions. Instead, the greater evidentiary weight, that amounting to a preponderance of the evidence, is assigned to the opinions expressed by Drs. \*\* and \*\* in their testimony and to the information and results of their more recent psychological evaluations of the student.

At the hearing, Dr. \*\*, the parent’s expert who had completed an independent psychological evaluation of the student in July 2007, also rendered an expert opinion regarding the manifestation determination. He concluded that the student’s misconduct was related to his disability of emotional disturbance. Dr. \*\* acknowledged that the student is not mentally incompetent 24 hours a day, seven days a week, and that in making a determination of whether the student’s behavior was caused by or directly or substantially related to the student’s disability, it needed to be based on the circumstances surrounding the incident. He opined that if the preceding events leading up to the statement had the precipitating stressors, then it would be related. He elaborated that in people with psychotic conditions stress increases their detachment from reality and increases their delusional grandiosity. [T. 59] After reviewing the underlying facts of the conduct in question, Dr. \*\* opined that the incident was the precipitating cause of the behavior and that it was directly related to the student’s emotional disturbance. [T. 63].

As indicated, great evidentiary weight is also given to the findings and results contained in Dr. \*\*’s evaluation. He found the student was not introspective and did not realize the impact his behavior had on other people; that he tends to misperceive events and misjudge people; and that his misinterpretations frequently result in behaviors which are inappropriate, including feelings of anger and resentment. Additionally, he found that in stressful situations, the student is likely to demonstrate limited frustration tolerance and poor impulse control, marked by oppositionality and negativity toward authority.

Additional support for Dr. \*\*’s opinion and evaluation is found in Dr. \*\*’ October 31, 2007 psychological evaluation of the student. Dr. \*\*’ evaluation confirmed that eight days prior to the conduct in question, the student’s mental condition was so impaired that he was not fit to

stand trial for a pending offense of burglary of a habitation. Dr. \*\* found the student was mentally ill; had bipolar disorder with psychotic features; and that this condition was chronic and not expected to remit. Dr. \*\*' evaluation also identified manifestations of the student's bipolar disorder. These included behavior and moods which are usually labile, impulsive and rapidly changeable; restlessness; overactivity; irritability; and withdrawal. Dr. \*\* also opined that because of his bipolar disorder and borderline intellect, the student had diminished insight regarding the self-defeating nature of his impulsive and non-compliant behaviors which have resulted in his current and prior difficulty with the law.

The student's functional behavioral assessment also identifies behaviors exhibited by the student related to his emotional disturbance. It is noted that the student's functional behavioral assessment was deemed current by the ARD Committee when it made its manifestation determination. It indicated that the student had received numerous office discipline referrals for disrespect, defiance, making threats, and harassment and that as the school year progressed, he had been disciplined for more serious offenses of aggression and assault. The functional behavioral assessment identified the student's problem behaviors as disrupting instruction; disrespect toward teachers; verbal and/or physical aggression; harassment; non-compliance; stealing; and carrying a "look-alike" hand gun. One of its targeted behaviors was the student's verbal and physical aggression toward adults and peers. The analysis of this behavior indicated that the student resorted to aggression to avoid embarrassment, or failure academically and socially.

The findings and results of Dr. \*\*' evaluation, coupled with the findings of Dr. \*\* as to the student's mental and emotional state, virtually predicted how the student would react to the incident in question.

The incident began with a minor classroom confrontation with the police officer, wherein the student was ordered by the police officer - in front of his teacher and other students - to return to his seat. This provoked an oppositional, negative and angry reaction from the student, possibly due to embarrassment, oppositionality and/or poor impulse control. For the next 30 minutes or so, the student did not regain control of his mental or emotional state.

To say that the student's threat was predetermined or that he could easily control his conduct ignores the totality of the circumstances leading up to the threat and the severity of the student's emotional disturbance. The threat against the police officer was the culmination of a series of derogatory statements made by the student that began almost immediately after the police officer left the room. The student's first reaction was to write on a napkin a derogatory remark about the police officer being a "Pig." Next, the student called his mother to come pick him up because the police officer was on the campus. When that didn't work, the student said, "I'm going to kick his ass." His teacher tried to redirect him. He then asked her to call the officer back into the room so he could hit him. He then stated the officer couldn't put his hands on him, unless he had him in handcuffs. The student then went and turned on the computer to type a letter to the police officer. His teacher told him that would not be a good idea. Finally, the student said he was going to go get a gun and come up to the school and shoot the police officer. This threat, although serious, was part of a pattern of misbehavior directly related to his emotional disturbance. The student angrily fixated on the incident and for approximately 35

minutes could not be effectively redirected by his teacher. Although the culminating threat may not have been an impulsive act, it was not a premediated act unrelated to his disability as purportedly determined by the ARD Committee. Instead, it was typical of the behaviors previously described in the student's assessment data and of the type expected of a student with the severity and type of his emotional disturbance. Because of his emotional disturbance disability, the student was unable to critically examine his conduct and modify his behavior accordingly. He misperceived events and misjudged the situation and his threat amounted to an act of verbal aggression - a behavior directly related to the student's emotional disturbance.

Accordingly, the foregoing expert opinions and evaluations establish that the conduct in question was a manifestation of the student's emotional disturbance disability.

When a determination is made that the child's behavior was a manifestation of the child's disability, a hearing officer may return the child to the placement from which the child was removed. 34 C.F.R. §300.532(b)(2). Although Flour Bluff ISD argues that the student is a danger and should remain in the discipline placement, there is no express authority for this action in the regulations, unless and until Flour Bluff ISD files a request for an expedited due process hearing and establishes that maintaining the student in his current non-disciplinary placement is substantially likely to result in injury to the child or others. See 34 C.F.R. §300.532. Subsection (b)(2)(ii) of this regulation is not read as empowering hearing officers to order a change in placement of a student to an appropriate interim alternative educational setting in manifestation appeals brought by parents. Instead, it is presumed that this subsection applies only to appeals initiated by the local educational agency seeking to alter the placement of a potentially dangerous student.

Therefore, the student shall be ordered returned to the educational placement from which he was removed.

Maintaining a student in a disciplinary placement for conduct directly or substantially related to the student's disability constitutes a denial of a free appropriate public education during the time period that the student is removed from his current program. In this action, the student was removed to the discipline placement on or about January 16, 2008. However, the parent failed to present any evidence that the student suffered any deprivation of educational services as a result of this removal. On the contrary, the record reflects that the student received appropriate educational services in his disciplinary placement designed to enable him to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. 34 C.F.R. §300.530(d).

The parent failed to present any evidence as to the appropriate form of relief for the improper disciplinary placement. Although in her complaint, the parent requests additional services the student needs to be successful, those are not identified anywhere in the record of this proceeding. Without such evidence, the appropriate form of relief cannot be formulated. Accordingly, the sole relief ordered in this proceeding is the return of the student to the educational placement from which he was removed.

## Issue 2

### **Manifestation Determination: Was Conduct in Question a Direct Result of Failure to Implement Student's Behavior Intervention Plan?**

The parent alleges that Flour Bluff ISD failed to implement an appropriate behavior intervention plan for the student on November 8, 2007, and that this alleged failure caused the misconduct of the student. This issue is also a part of the manifestation determination. If the student's conduct in question was the direct result of Flour Bluff ISD's failure to implement the IEP, then the conduct must be determined to be a manifestation of the child's disability. 34 C.F.R. §300.530(e)(1)(ii) and (2). The student's behavior intervention plan was part of his IEP.

This issue was raised and identified in the due process complaint, but the parent failed to present any evidence that Flour Bluff ISD did not appropriately implement the student's IEP, including the behavior intervention plan. The parent did not call any witnesses in support of this allegation, or present any documentary evidence establishing or inferring that the student's behavior intervention plan was not being properly implemented. The parent wholly failed to meet her burden of proof on this issue.

## Issue 3

### **Whether on November 8, 2007, Flour Bluff ISD aggravated and encouraged the student's misbehaviors and caused the student to be denied a free appropriate public education?**

The parent failed to present any evidence that on November 8, 2007, Flour Bluff ISD aggravated or in any manner encourage the student's misbehavior. The evidence established that the student became upset when a police officer entered the classroom and instructed the student, who was being non-compliant with his teacher, to return to his chair. Although the student testified that the police officer squeezed his arm and hurt him, even if true, such an action would not rise to the level of denying the student a free appropriate public education. There is nothing in the record to show that the police officer acted outside the course and scope of his official duties in dealing with a non-compliant student. Although the parent argues in her post-hearing brief that nowhere in the student's behavior intervention plan does it allow for it to be implemented by a police officer, the record is clear that the officer was not acting as an educator and was not bound by or otherwise responsible for implementing the provisions of the student's behavior intervention plan.

The record establishes that the teacher appropriately utilized behavior intervention strategies in attempting to redirect the student after the incident. Accordingly, this issue is without merit.

#### **Issue 4**

**Whether the discipline placement enabled the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP?**

By law, children with disabilities who are removed from their current placements for disciplinary purposes must continue to receive educational services designed to provide them with a free appropriate public education, so as to enable the child to continue to participate in the general 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).

Although this issue regarding the student's change in educational placement to a disciplinary alternative educational program was raised in the due process complaint, the parent failed to present any evidence that the educational services the student received in the disciplinary placement did not comply with applicable law. Accordingly, the parent wholly failed to meet her burden of proof on this issue.

#### **Issue: 5**

**Whether a functional behavioral assessment of the student should have been conducted by Flour Bluff ISD on or about November 8, 2007?**

The IDEA provides that if the ARD Committee determined that the conduct in question was a manifestation of the child's disability, then the ARD Committee must either conduct a functional behavioral assessment, unless the school district had conducted one before the behavior that resulted in a change in placement occurred, and had implemented a behavioral intervention plan for the child; or if a behavior intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. 34 C.F.R. §300.530(f).

The evidence confirmed that a current functional behavioral assessment of the student and a behavior intervention plan existed on November 8, 2007 when the conduct in question occurred. These documents were reviewed by the November 16, 2007 manifestation review ARD Committee and found to be appropriate. Since the ARD Committee did not find that the student's misconduct was a manifestation of his disability, it did not conduct another functional behavioral assessment or review and modify, as necessary the child's behavior intervention plan. Since this decision has determined that the ARD Committee erred in its manifestation determination, the issue becomes whether another functional behavioral assessment should have been conducted. On this issue, the parent presented no evidence that the current functional behavioral assessment or the behavior intervention plan of the student are inadequate or otherwise need to be updated. The parent had the burden of proof on this issue and failed to meet this burden.

### **Ancillary Issue**

In this proceeding, Flour Bluff ISD sought to raise the issue of whether maintaining the current placement of the student in the behavior unit at the high school is substantially likely to result in injury to the child or others. Flour Bluff ISD desires to maintain the student's placement in the disciplinary alternative educational placement on the belief that the student, if returned to the behavioral unit at the high school, is substantially likely to cause injury to himself or others. The parent objected to adjudicating this issue within the confines of its due process complaints.

The IDEA and its implementing federal regulations give local educational agencies the right to request a due process hearing whenever they believe that maintaining a child in his or her current placement is substantially likely to result in injury to the child or to others. 20 U.S.C. §1415(k)(3)(A); 34 C.F.R. §300.532(a). According to the regulation, the hearing must be requested by filing a complaint pursuant to 34 C.F.R. §§300.507 and 300.508(a) and (b). See 34 C.F.R. §300.532(a). Flour Bluff ISD did not request a hearing on this issue by filing a due process complaint. However, in its Closing Statement and Memorandum, Flour Bluff ISD argues that it should have the right to raise this issue in response to the parent's appeal of the manifestation determination, claiming that nothing in the IDEA precludes raising this issue as a defensive posture. A review of applicable law indicates otherwise. The IDEA and its regulation clearly require that for a hearing officer to consider such a claim by a local educational agency, it must first request a hearing by filing a due process complaint.<sup>7</sup> Since Flour Bluff ISD failed to request a hearing on this issue, it would be inappropriate and contrary to the IDEA to adjudicate this issue in this proceeding. Nothing however, precludes Flour Bluff ISD from hereafter filing such a due process complaint.

Flour Bluff ISD also argues that hearing officers pursuant to *Honig v. Doe*, 484 U.S. 305 (1988) should consider such arguments raised as a defensive posture when a parent has already filed for a hearing. However, as the School District indicated in its Memorandum, that opinion allows districts to file suit for appropriate injunctive relief when maintaining the current placement is substantially likely to result in injury to the student or to others. It is noted that the opinion was issued in 1988 and that the IDEA has since been amended to set forth the specific authority of hearing officers in this area. Injunctive relief issued outside the confines of the IDEA is not a remedy that can be ordered by hearing officers.

### **Conclusions of Law**

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<sup>7</sup> When the statutory "language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917); internal quotation marks omitted).

1. While the student was enrolled within Flour Bluff ISD, it had a continuing legal obligation to provide him with a free appropriate public education. 34 C.F.R. §§300.149, 300.200-201
2. Normally, school boards or their designees are charged with the obligation to make residency determinations. Tex. Educ. Code §25.001. However, when residency issues under State law intertwine with the free appropriate public education (FAPE) obligations placed upon local educational agencies by the IDEA, IDEA hearing officers have concurrent and overlapping jurisdiction to determine residency for purposes of identifying the local educational agency responsible for providing FAPE to the student. See, *Central Dauphin School District*, 31 IDELR 49 (PA SEA 1999); *Dallas Plantation* 40 IDELR 252 (ME SEA 2004); *Franklin Township Community School Corp.*, 44 IDELR 110 (IN SEA 2005); *Cambridge Public Schools*, 22 IDELR 838 (MA SEA 1995); *Lapp, et al v. Reeder Public Sch. Dist. No. # 3, et al*, 491 N.W.2d 65 (1992); *Burbank Unified School Dist.*, 506 IDELR 371 (CA SEA 1984); *Lewis Cass Intermediate Sch. Dist. v. M.K. ex rel. J.K.*, 40 IDELR 8 (W.D. Mich. 2003); 34 C.F.R. §§300.101, 300.201.
3. Manifestation determinations must be made within 10 school days of any decision to change the placement of a child with a disability who has violated a code of student conduct. 34 C.F.R. §300.530(e)(1). It is the local educational agency, the parent and relevant members of the child's IEP team, as determined by the parent and the local educational agency that make the manifestation determination. These parties 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: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. 34 C.F.R. §300.530(e)(1)(i) and (ii). If either of these conditions exist then the conduct must be determined to be a manifestation of the child's disability. 34 C.F.R. §300.530(e)(2).
4. In Texas, ARD Committees are responsible for making manifestation determinations. 19 Tex. Admin. Code §89.1050(a)(4) and (g).
5. The parent, as the moving party, bears the burden of proof in manifestation challenges. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531, 163 L. Ed. 2d 387 (2005).
6. The student met the IDEA's eligibility criteria for emotional disturbance as having "demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" and for having "a general pervasive mood of unhappiness or depression." 34 C.F.R. §300.8(b)(4).
7. An analysis of all relevant information in the record of this proceeding, including the expert opinions and all evaluations, including those provided by the parent, establish by a preponderance of the evidence that the conduct in question was a manifestation of the student's emotional disturbance disability. 34 C.F.R. §300.530(e)(1)(i).

8. The parent failed to meet her evidentiary burden of establishing by a preponderance of the evidence that student's conduct in question was the direct result of Flour Bluff ISD's failure to implement the IEP. 34 C.F.R. §300.530(e)(1)(ii) and (2).
9. Flour Bluff ISD was not obligated to conduct a functional behavioral assessment of the student on November 8, 2007, when the conduct in question occurred, since it already had in effect a current and valid functional behavioral assessment of the student and an appropriate behavior intervention plan. 34 C.F.R. §300.530(f).
10. When a parent prevails in a manifestation determination appeal, the hearing officer may return the child with a disability to the placement from which the child was removed. The appropriate remedy in this proceeding is an order returning the student to his behavior intervention unit at the high school. 34 C.F.R. §300.532(b)(2)(i).
11. As part of a parent's manifestation appeal, a hearing officer lacks jurisdiction to address a school district request not to return the child to his or her current placement because the child is substantially likely to cause injury to himself or others. 34 C.F.R. §300.532(a).
12. To address Flour Bluff ISD's claim that maintaining the current placement of the child is substantially likely to result in injury to the child or others, Flour Bluff must request a hearing by filing a complaint. 34 C.F.R. §300.532(a).
13. The parent failed to meet her evidentiary burden of establishing by a preponderance of the evidence that the services the child received in the disciplinary alternative educational placement were not of the type which enabled him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. 34 C.F.R. §300.530(d)(i).
14. Maintaining a student in a disciplinary placement for conduct directly or substantially related to the student's disability constitutes a denial of a free appropriate public education during the time period that the student is removed from his current program. In this action the student was removed to the discipline placement on or about January 16, 2008 and was denied a free appropriate public education. 34 C.F.R. §300.101.
15. As a result of a flawed manifestation determination, the student was improperly placed in a discipline alternative educational program beginning January 16, 2008. 20 U.S.C. §1415(f)(3)(E)(i).
16. The parent failed to meet her evidentiary burden of establishing by a preponderance of the evidence any deprivation of educational services or denial of a free appropriate public education requiring compensatory educational services or other form of relief. Accordingly, no compensatory relief is ordered. *Reid v. District of Columbia*, 401 F.3d. 516, 43 IDELR 32 (D.C. Cir. 2005); 34 C.F.R. §300.101.

## ORDER

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

That Flour Bluff ISD return the student to the placement from which he was removed within 10 days of the date of this decision.

This decision is final and is appealable to state or federal district court.

The District 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 parent within 15 school days from the date of this 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 District's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 24<sup>th</sup> day of March 2008.

/s/ James W. Holtz

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James W. Holtz  
Special Education Hearing Officer

CONSOLIDATED  
DOCKET NOS. 066-SE-1207 AND 114-SE-0108

STUDENT BNF PARENT, Petitioner	§ § §	BEFORE A DUE PROCESS
VS.	§ §	HEARING OFFICER FOR
FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT, Respondent	§ § §	THE STATE OF TEXAS

**SYNOPSIS**

**Issue: Whether ARD Committee made an appropriate manifestation determination relating to whether the student’s conduct in question was caused by or had a direct or substantial relationship to his emotional disturbance disability.**

Held: For parent: Parent established that the conduct in question, being a threat by the student that he was going to go get a gun and shoot a police officer, had a direct and substantial relationship to student’s emotional disturbance disability. Recent psychological evaluations and expert opinions confirmed a direct nexus between the conduct and the student’s disability.

Cite: 34 C.F.R. §§300.530(e), 300.532(a) and (b)(i).

**Issue: Whether ARD Committee made an appropriate manifestation determination relating to whether the conduct in question was the direct result of the School District’s failure to implement the student’s behavior intervention plan?**

Held: For School District: Parent failed to present any evidence that the student’s behavior intervention plan had not been implemented on the day the conduct in question occurred. The School District presented evidence that it had implemented the behavior intervention plan on the day in question.

Cause of student’s disciplinary placement was the student’s conduct and a flawed manifestation determination related to conduct by the ARD Committee, not any failure to implement the student’s behavior intervention plan.

Cite: 34 C.F.R. §§300.530(e), 300.532(a) and (b)(i).

**Issue: Whether on November 8, 2007, the School District aggravated and encouraged the student’s misbehaviors and caused the student to be denied a free appropriate public education?**

Held: For School District: Parent failed to present any evidence that School District personnel aggravated and encouraged the student's misbehaviors causing a denial of a free appropriate public education. On the day in question, a police officer making his routine rounds assisted the teacher by instructing the student to return to his chair. The actions of the police officer were within his official duties and did not aggravate or encourage the student's misbehavior. Moreover, there was no evidence that any Flour Bluff ISD personnel aggravated or otherwise encouraged the student's misbehavior. Instead, the evidence showed that his teacher acted professionally, competently and appropriately in attempting to redirect the student's misbehavior when the conduct in question occurred.

Cite: 34 C.F.R. §§300.101; 300.530(e).

**Issue: Whether the discipline placement enabled the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP?**

Held: For School District. Although this issue regarding the student's change in educational placement to a disciplinary alternative educational program was raised in the due process complaint, the parent failed to present any evidence that the educational services the student received in the disciplinary placement did not comply with applicable law. Accordingly, the parent wholly failed to meet her burden of proof on this issue.

Cite: 34 C.F.R. §300.530(e)(1)(ii) and (2).

**Issue: Whether a functional behavioral assessment of the student should have been conducted by Flour Bluff ISD on or about November 8, 2007?**

Held: For School District: The School District was not obligated to conduct a functional behavioral assessment of the student on November 8, 2007, when the conduct in question occurred, since it already had a current and valid functional behavioral assessment of the student and an appropriate behavior intervention plan.

Cite: 34 C.F.R. §300.530(f).

**Issue: Whether School District could raise the issue of whether maintaining the current placement of the student in the behavior unit at the high school is substantially likely to result in injury to the child or others as a defense to the manifestation appeal by the parent?**

Held: For Parent: Hearing officers lack jurisdiction to address School District contention that maintaining the current placement of the student in the behavior unit at the high school is substantially likely to result in injury to the child or others as a defense to the manifestation appeal by the parent. Such an issue must be raised by the School District by filing its own request for hearing.

Cite: 34 C.F.R. §§300.507,300.508(a) and (b), 300.532(a).

**Issue: Whether special education due process hearing officers have jurisdiction in Texas to make residency determinations for purposes of identifying the school district responsible for the provision of a free appropriate public education to the student?**

Held: For Parent: Normally, school boards or their designees are charged with the obligation to make residency determinations. However, when residency issues under State law intertwine with the free appropriate public education (FAPE) obligations placed upon local educational agencies by the IDEA, IDEA hearing officers have concurrent and overlapping jurisdiction to determine residency for purposes of identifying the local educational agency responsible for providing FAPE to the student.

Cite: Tex. Educ. Code §25.00; 34 C.F.R. §§300.101, 300.201; *Central Dauphin School District*, 31 IDELR 49 (PA SEA 1999); *Dallas Plantation* 40 IDELR 252 (ME SEA 2004); *Franklin Township Community School Corp.*, 44 IDELR 110 (IN SEA 2005); *Cambridge Public Schools*, 22 IDELR 838 (MA SEA 1995); *Lapp, et al v. Reeder Public Sch. Dist. No. # 3, et al*, 491 N.W.2d 65 (1992); *Burbank Unified School Dist.*, 506 IDELR 371 (CA SEA 1984); *Lewis Cass Intermediate Sch. Dist. v. M.K. ex rel. J.K.*, 40 IDELR 8 (W.D. Mich. 2003).