

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

IN THE MATTER OF:

Docket No.: 18-019951

**L.R. o/b/o Z.C.,
Petitioner**

Case No.: 18-00077

v

Agency: Education

**Van Buren Public Schools,
Respondent**

Case Type: Ed Sp Ed Expedited

Filing Type: Appeal

**Issued and entered
this 20th day of November 2018
by: Eric J. Feldman
Administrative Law Judge**

DECISION AND ORDER

PROCEDURAL HISTORY

On October 18, 2018, Petitioner L.R. filed an expedited Due Process Hearing Request under the Individuals with Disabilities Education Act (IDEA), 25 United States Code (USC) 1400 *et seq.* with the Michigan Department of Education (MDE) on behalf of her child, Z.C. (Student)¹. Petitioner challenges Van Buren Public Schools (District and/or Respondent) manifestation determination process and/or placement/suspension of Student. This Due Process Complaint was forwarded to the Michigan Administrative Hearing System (MAHS) for hearing and was assigned to undersigned Administrative Law Judge (ALJ) Eric Feldman.

A Scheduling Order was issued on October 19, 2018, scheduling a Prehearing Conference for October 26, 2018, and an Expedited Due Process Hearing for November 9, 2018. The Scheduling Order also informed both parties that the exchange for witness and exhibit lists were due October 26, 2018.

On October 26, 2018, Attorney Robert A. Dietzel, on behalf of Respondent, filed a Stipulation to Extend Deadline, which stated that both parties stipulate that the exchange deadline for witness and exhibit lists be extended to November 2, 2018.

On October 26, 2018, a Prehearing Conference was convened via teleconference. As part of the Prehearing Conference, all provisions of the October 19, 2018, Scheduling

¹ Student will be used in place of child's name to protect the minor child's identity.

Order were continued, except that the exchange of witness and exhibit lists were due by November 2, 2018. On October 29, 2018, the undersigned issued an Order Following Prehearing Conference.

On November 2, 2018, Attorney Jason Wine, on behalf of Petitioner, submitted Petitioner's Witness and Exhibit List. On November 2, 2018, Mr. Dietzel also submitted Respondent's Witness and Exhibit List.

On November 8, 2018, Mr. Wine informally requested via electronic methods to allow the doctors listed on Petitioner's witness list to testify by telephone. Mr. Wine indicated that Respondent's counsel would not stipulate to telephone testimony. On November 8, 2018, the undersigned initially denied Petitioner's request to have the doctors testify by telephone.

On November 9, 2018, Mr. Wine formally requested a Motion to Permit Telephonic Testimony of Dr. Kaufman or Dr. Hurvitz (motion included attachments). The undersigned did not have sufficient time to address Petitioner's motion prior to the hearing. However, at the commencement of the hearing, the undersigned addressed Petitioner's motion. Respondent objected to the motion. In light of the expedited nature of this hearing, Petitioner had established good cause for the request to permit telephone testimony. As such, the undersigned granted Petitioner's Motion to Permit Telephonic Testimony of Dr. Kaufman or Dr. Hurvitz.

On November 9, 2018, the hearing was convened as scheduled. The undersigned presided. Mr. Wine appeared on behalf of Petitioner. Petitioner L.R. and her spouse, D.C., were also present for the hearing. Mr. Dietzel appeared on behalf of Respondent. Karen Johnston, Student Services Director, was also present on behalf of Respondent.

The following exhibit was offered by Petitioner and admitted into evidence unless otherwise indicated:

1. Petitioner Exhibit 1 is a Neuropsychological Assessment by Jacqueline Kaufman, Ph.D., dated July 12, 2018.
2. Exhibits 2, 3, 4, and 5 were not offered.

The following exhibits were offered by Respondent and admitted into evidence unless otherwise indicated:

1. Respondent Exhibit A is Student's Incident Report Statement 1, dated October 8, 2018.²

² Exhibit A was admitted over Petitioner's relevance objection.

2. Respondent Exhibit B is Student's Incident Report Statement 2, dated October 8, 2018.
3. Exhibits C and D were not offered.
4. Respondent Exhibit E is a Notice of a Change in Placement as a Result of a Disciplinary Removal, dated October 8, 2018.
5. Respondent Exhibit F is an Expulsion Recommendation, dated October 9, 2018.
6. Respondent Exhibit G is a Building Investigation Summary Letter, dated October 9, 2018.
7. Respondent Exhibit H is Bus Video 1.
8. Exhibit I was not offered.
9. Respondent Exhibit J is a Referral/Review of Existing Evaluation Data/Notice & Consent Form, dated April 17, 2014.
10. Respondent Exhibit K is an Individualized Education Program (IEP) Team Report, dated March 11, 2016.
11. Respondent Exhibit L is a Referral/Review of Existing Evaluation Data/Notice & Consent Form, dated March 8, 2017.
12. Respondent Exhibit M is an IEP Team Report, dated March 8, 2017.
13. Respondent Exhibit N is an IEP Team Report, dated March 6, 2018.
14. Respondent Exhibit O is a Manifestation Determination Review (MDR), dated October 15, 2018.
15. Exhibit P was not offered.
16. Respondent Exhibit Q is a Proposed Amendment to the IEP, dated October 25, 2018.
17. Respondent Exhibit R are e-mails between Ms. Johnston and Bill McCully concerning Academic Services, dated October 25, 2018.

18. Respondent Exhibit S are e-mails concerning Transportation Services, dated October 25 and 26, 2018.

19. Respondent Exhibit T is Student's Discipline Record from January 30, 2009 to October 8, 2018.

20. Respondent Exhibit U is Student's Official Transcript.

21. Exhibits V and W were not offered.

The following individuals testified in this matter:

1. L.R., Petitioner
2. Jacqueline Kaufman, Ph.D., Associate Professor at the University of Michigan³
3. Scott Wilsey, New Tech Director
4. Jake Sweets, School Counselor for New Tech at Belleville High School
5. Felicia Lasenby, Special Education Teacher at Belleville High School
6. Kim Bargardi, School Social Worker
7. Connie Testorelli, Special Education Coordinator
8. Alison Brooks, Teacher at Belleville High School
9. Stacey Buhro, Principal of Belleville High School
10. Myra Cain-Dingle, School Psychologist at Belleville High School
11. Karen Johnston, Student Services Director of Van Buren Public Schools

At the conclusion of the hearing, a post-hearing brief schedule was ordered. It was noted that the expedited timelines require that a decision in this matter be issued within 10 school days of the hearing. As such, there is not sufficient time to permit the parties to obtain the transcript and submit a traditional brief. However, it was agreed that the parties would be permitted to submit a post-hearing brief. The parties were given until 8:00 a.m. on November 15, 2018, to submit any final written documentation. Petitioner and Respondent both filed their closing briefs on November 15, 2018.

³ Testified by telephone.

ISSUE

Is Student's alleged conduct a manifestation of her disability?

APPLICABLE LAW

The petitioner-parent, as the party challenging Respondent's determination or implementation of special education and related services, has the burden of proof by a preponderance of the evidence for all claims raised in this matter. *Schaffer v Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); *Doe v Defendant I*, 898 F2d 1186 (CA 6, 1990).

As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the fact finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985). A "preponderance of evidence" is best described as that evidence having the greatest weight.

The protections afforded to students with disabilities under IDEA include a prohibition against removing them from their normal IEP placement for conduct that results from their disabilities. Further, in relation to discipline for students with disabilities under the IDEA, the Code of Federal Regulations, 34 CFR 300.530 states in pertinent part:

§ 300.530

Authority of school personnel.

(a) *Case-by-case determination.* School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) *General.*

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school

days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) *Additional authority.* For disciplinary changes in placement that would exceed 10 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 pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.*

(d) *Services.*

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days

or less in that school year, if it provides services to a child without disabilities who is similarly removed.

- (4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.(5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.
- (5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) Manifestation determination.

- (1) *Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—*
 - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or*
 - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.*
- (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.
- (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii)

of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

* * *

(h) *Notification.* On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

* * *

In relation to due process requests made pertaining to discipline and the authority of the undersigned in accordance therewith, 34 CFR 300.532 states:

§ 300.532

Appeal.

(a) *General.* The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the *manifestation determination* under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

(b) *Authority of hearing officer.*

- (1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.
- (2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—
 - (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or
 - (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
- (3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) *Expedited due process hearing.*

- (1) *Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.507 and 300.508(a) through (c) and §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.*
- (2) *The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.*
- (3) *Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in § 300.506—*
 - (i) *A resolution meeting must occur within seven days of receiving notice of the due process complaint; and*
 - (ii) *The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.*
- (4) *A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§ 300.510 through 300.514 are met.*
- (5) *The decisions on expedited due process hearings are appealable consistent with § 300.514.*

34 CFR 300.532 [Emphasis added.]

Under 20 USC 1415(f)(3)(E), it may be found that free appropriate public education (FAPE) has been denied to a disabled student based on either substantive or procedural violations of the Individuals with Disabilities Education Act (IDEA or Act). To find a denial of FAPE based on procedural violations of the Act, it must also be found

that the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits

In *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.*, at 206-07.

In assessing whether a student's IEP was reasonably calculated to enable the student to receive educational benefits under *Rowley's* second basis above, our Sixth Circuit Court of Appeals noted that nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit, and held that the IDEA requires an IEP to confer a "meaningful educational benefit gauged in relation to the potential of the child at issue." *Deal v Hamilton County Bd of Ed*, 392 F3d 840, 862 (CA 6, 2004).

Nevertheless, the IDEA requirement that school districts provide disabled children with a free appropriate public education does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Doe v Tullahoma City Schools*, 9 F3d 455 (CA 6, 1993); *Fort Zumwalt Sch Dist v Clynes*, 119 F3d 607, 612 (CA 8, 1997), *cert den*, 523 US 1137 (1998). In *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017), the US Supreme Court expanded its explanation of FAPE in *Rowley* and stated that in order to provide a FAPE, the IDEA requires an educational program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibit, the following findings of fact are established:

1. Student is currently 17-years-old. During the 2018-2019 school year, Student attends the New Tech program at Belleville High School within Van Buren Public Schools. She is in the 12th grade and on track to graduate in May of 2019. [Resp. Exh. N, pp. 1 and 8.]
2. Petitioner L.R. is the mother of Student. [Pet. Exh. 1, p. 2.]
3. Student is eligible for special education services as a student with a physical impairment, R. 340.1709. [Resp. Exh. N, p. 1.]

4. Student has a lifelong medical diagnosis of spastic diplegic cerebral palsy. [Resp. Exh. N, p. 2.]
5. Petitioner's most recent Multidisciplinary Evaluation Team (MET) was completed on May 17, 2011. [Resp. Exh. N, p. 1.]
6. On April 17, 2014, a Referral/Review of Existing Evaluation Data/Notice & Consent Form (REED) was completed for Student. The REED stated Student is eligible for special education services as a student with a physical impairment. The REED further stated that Student did not need additional evaluation for areas such as cognitive ability and social/emotional/behavior. Petitioner signed the REED indicating she agreed that no additional evaluation data of her child (Student) is needed at the time. [Resp. Exh. J, pp. 1-3.]
7. On March 11, 2016, an annual IEP Team Report was completed for Student. The IEP team determined that Student was eligible for special education as a Student with physical impairment, R. 340.1709. The IEP noted that Student is friendly, polite, and the teachers report that she is conscientious and will ask questions. Under the socio-emotional/behavioral section, the IEP noted that teachers report that there are times Student gets distracted with peer relationship issues and that she needs school social work services to assist in problem solving peer relationship issues and using the resources available to her. Under the perception/motor/mobility section, the IEP noted that Student's functional fine and gross motor skills impact her ability to participate independently within her educational curriculum and she is most successful in group settings. The IEP indicated that supplementary aids and services for Student include extended time for assignments, quizzes, and tests; small group setting for quizzes and tests; use of the resource room; use of text to speech; and use of speech to text. She would further receive resource program support 1 to 3 hours per week and school social works services (direct/consultation) 15 to 30 minutes, 1 to 2 times per month. [Resp. Exh. K, pp. 1-15.]
8. On March 8, 2017, a REED was completed for Student. The REED stated Student is eligible for special education services as a student with a physical impairment. The REED further stated that Student did not need additional evaluation for areas such as cognitive ability and social/emotional/behavior. Petitioner signed the REED indicating she agreed that no additional evaluation data of her child (Student) is needed at the time. [Resp. Exh. L, pp. 1-4.]
9. On March 8, 2017, an annual and reevaluation IEP Team Report was completed for Student. The IEP team determined that Student was eligible for special education as a Student with physical impairment, R. 340.1709. The IEP noted

that Student is an outgoing student and she does well in school when she applies herself. The IEP stated her grades often fluctuate throughout the marking periods, but she is able to demonstrate the ability to self-monitor her grades and performance. Under the socio-emotional/behavioral section, the IEP noted that there are times Student gets distracted with peer relationship issues and that she needs school social work services to assist in problem solving peer relationship issues and using the resources available to her. Under the perception/motor/mobility section, the IEP noted that Student's functional fine and gross motor skills impact her ability to participate independently within her educational curriculum and she is most successful in group settings. The IEP indicated that supplementary aids and services for Student include extended time for assignments, quizzes, and tests; small group setting for test and quizzes with more than 10 questions; use of the resource room; and use of speech to text. She would further receive resource program support 1 to 3 hours per week and school social works services (direct/consultation) 15 to 30 minutes, 1 to 2 times per month. [Resp. Exh. M, pp. 1-13.]

10. On March 6, 2018, Student had her most recent annual and reevaluation IEP Team Report completed. The IEP team determined that Student was eligible for special education as a Student with physical impairment, R. 340.1709. The IEP noted that Student is an outgoing student and she does well in school when she applies herself. The IEP stated her grades often fluctuate throughout the marking periods, but she can demonstrate the ability to self-monitor her grades and performance. Under the socio-emotional/behavioral section, the IEP noted that Student is bright, friendly student who gets good grades in school. It stated that Student gets involved with peer relationship issues and that she needs school social work services to assist in problem solving peer relationship issues. Under the perception/motor/mobility section, the IEP noted that Student's functional fine and gross motor skills impact her ability to participate independently within her educational curriculum and she is most successful in group settings. The IEP indicated that supplementary aids and services for Student include extended time for assignments, quizzes, and tests; small group setting for test and quizzes with more than 10 questions; use of the resource room; and use of speech to text. She would further receive resource program support 1 to 3 hours per week and school social works services (consultation) 15 to 30 minutes, 1 to 2 times per month. [Resp. Exh. N, pp. 1-15.]
11. On July 12, 2018, Jacqueline Kaufman, Ph.D., completed a Neuropsychological Assessment of Student. Dr. Kaufman stated Student has a history of prematurity with mild cerebral palsy (CP) (gross motor function classification system (GMFCS 1)) and cognitive concerns. Under academic history, Dr. Kaufman noted Student has an IEP under the physical impairment though "supports are organized around her developmental and learning needs as opposed to her

physical needs per se which do not appear to specifically interfere with her participation in her schooling.” [Pet. Exh. 1, pp. 1-2.]

12. Dr. Kaufman assessed Student and wrote the following conclusions and recommendations in pertinent part:

The current evaluation finds that [Student] is functioning in the low average range of intellectual ability, with consistent academic performance overall. Attention is relatively intact overall, and memory generally in the average range, with some difficulties noted for visual constructional recall, possibly secondary to broader organizational and visual-constructional difficulties. Higher order executive functioning is noted for more intact skills when rote demands are in place, or when regular feedback and structure is provided. In contrast, when she is expected to organize her work (e.g. essay writing, visual-constructional planning) absent any externally provided structure or if she is given instructions but not regular feedback she tends to deviate from stated rules and/or struggle to initiate and execute a successful plan. Behavioural concerns are not specifically reported as a primary concern, though concerns about executive behaviours, adaptive functioning and safety awareness are highlighted in the context of observed reduced maturity and lower insight regarding future planning needs during the clinical visit. Diagnostically we do see some areas of executive dysfunction (R41.844) and this is felt to be also described as other specified mental disorders due to known physiological condition (F06.8).

With regard to etiology, her history of significant prematurity with grade II IVH and resulting diagnosis of CP is consistent with an elevated risk for learning, cognitive and general developmental delay. We did see delays and cognitive sequelae with her prior evaluations and think many of the things we are seeing now are subtle but functionally quite relevant as they are related to executive functioning and newly demanded of her as an emerging young adult. For young adults functioning in the low average range it is common for school and learning to be more effortful and for performance to be below peers functioning in the average range though this is not per se a frank impairment; she is falling right on the boundary at this time. Functionally, her

adaptive behaviour is falling in the borderline to mild range of impairment overall which reflects the more applied representation of her skills. Some of the observations of delayed maturity, difficulties with safety awareness and delays in her self-management and insight into academic and vocational demands are associated with this profile and will benefit from targeted support.

Specific Recommendations are as follows:

1. Continue with academic plan to maintain an Individualized Education Program (IEP). I would strongly encourage consideration of changing the IEP to the Other Health Impaired designation related to her cerebral palsy to better reflect the reality of the academic needs which are not physical per se and more cognitive and developmental. Transition needs in particular are very important here, and I think this is getting lost to some degree with the mental planning of her program because the stated focus of the needs is on the physical label.
2. It is recommended that [Student] continue to receive support in the resource/academic support setting. The combination of the low average ability range paired with her executive functioning and adaptive functioning delays together coalesce to create a higher need of support academically. Note is made of particular weaknesses for reading accuracy and given the reading demands in high school this will be important to target along with her writing challenges.

* * *

[Pet. Exh. 1, pp. 5-6.]

13. Prior to the incident at issue, Student's discipline record shows the last documented behavioral issue at school occurred on May 21, 2013. Student's discipline record shows no other documented incidents afterward's, except for the incident at issue. [Resp. Exh. T, pp. 1-5.]

14. On October 8, 2018, Student participated in oral sex on the bus with a male student (Student A)⁴ when they were on their way to school. Student was

⁴ Student A will be used in place to protect the identity of the male student. Student A attended another school.

brought to Belleville High School main office by a friend in order to report the inappropriate conduct that had occurred. Student initially informed Respondent administrators/staff that she was physically forced by Student A to perform oral sex. An investigation immediately began as a result of the sexual assault allegation. [Resp. Exh. G, p. 1.]

15. On October 8, 2018, Student wrote a statement on an Incident Report claiming Student A forced her to perform oral sex on him on the bus. Student also provided a more detailed statement, with the assistance and transcribed by Kim Bargardi (School Social Worker), again claiming that Student A forced her to perform oral sex on him on the bus. [Resp. Exh. A, p. 1; Resp. Exh. B, p. 1.]
16. After the incident, Student's parents were immediately contacted about the situation, Respondent administrators/staff requested the bus video of the incident, and the school resource officer was contacted. [Resp. Exh. G, p. 1.]
17. Later that day, the bus video was obtained and reviewed by Respondent administrators/school resource officer. The bus video indicated that Student and Student A sat next to each other on the bus.⁵ After viewing the video, Respondent administrators/school resource officer concluded that there was no physical coercion by Student A and that it appeared to be a consensual act. It was determined that Student made false allegations about the sexual assault and that she violated the student code of conduct, resulting in her suspension from the District immediately. Student went home with parents that day. [Resp. Exh. E, p. 1; Resp. Exh. G, p. 1.]
18. On October 8, 2018, Connie Testorelli, Special Education Coordinator, sent the Student's parents via mail a Notice of Change in Placement as a Result of a Disciplinary Removal. The notice informed the parents that on October 8, 2018, a decision was made to remove Student for 10-days as a result of a violation to the student code of conduct. The notice further stated that the removal constitutes a change in placement and requires an MDR to be conducted. [Resp. Exh. E, p. 1.]
19. On October 9, 2018, Scott Wilsey, New Tech Director, wrote a Building Investigation Summary Letter (investigation summary) that summarized the events that occurred on October 8, 2018. The investigation summary concluded that there was no physical coercion by Student A and that it appeared to be a consensual act, resulting in false allegations by Student. The investigation

⁵ Exhibit H, Bus Video 1, was observed during the hearing which showed Student and Student A sitting next to each other on the bus. Scott Wilsey, New Tech Director, was able to identify Student and Student A on the video. Proposed Exhibit I, Bus Video 2, which depicts the behavior at issue was *not* observed during the hearing nor offered into the evidence record.

summary further stated that Student was is in violation of Belleville High School Code of Conduct, specifically, rules #29 – indecency, #25 – inappropriate conduct, and #15 – false allegations, resulting in the recommendation that Student be expelled. [Resp. Exh. G, p. 1.]

20. On October 9, 2018, Stacey Buhro, Principal of Belleville High School, wrote an expulsion recommendation memorandum to Superintendent Peter Kudlak. [Resp. Exh. F, p. 1.]
21. Late September 2018 or early October 2018, Petitioner received the completed Neuropsychological Assessment by Dr. Kaufman. On October 10, 2018, Petitioner subsequently sent the report to Ms. Testorelli, Ms. Bargardi, and Felicia Lasenby. All three read the report prior to the MDR.
22. On October 15, 2018, an MDR was completed. The MDR team determined that Student's conduct on October 8, 2018, was not a manifestation of her disability. This was based primarily on the fact that her disability is a physical impairment and affects her functional mobility within her educational curriculum. The MDR further indicated the following: (i) she struggles with peer relationships and often affects her grades; (ii) she receives school social worker services to assist in problem solving peer relationship issues, voice to text, peer buddy, graphic organizers, and books on audio, small group settings; (iii) her grades often fluctuate, but she is able to demonstrate the ability to self-monitor her grades and performance, and complete courses with passing grades; (iv) teachers report Student is polite, bright, friendly student who gets good grades in school and there are times when she becomes distracted by the relationships of others and loses focus on her academics; and (v) the MDR indicated that it received the report from Dr. Kaufman provided by the parent. And finally, when describing why there is no relationship between the disability and the behavior, it was written that it was based on criteria in the most recent MET from May of 2011. [Resp. Exh. O, pp. 1-2.]
23. Once the MDR team determined that Student's behavior was not a manifestation of her disability, a discipline hearing was held on October 18, 2018. Student was expelled.
24. On October 18, 2018, Petitioner filed the expedited Due Process Hearing Request.
25. On October 25, 2018, a Proposed IEP Amendment was created for Student. The Proposed IEP Amendment serves to amend Student's programs and services, with a home-based location. The Proposed IEP Amendment indicated that supplementary aids and services for Student include extended time for

assignments, quizzes, and tests; small group setting for test and quizzes with more than 10 questions; use of the resource room; and use of speech to text. She would further receive teacher consultant (T.C.) emotionally impaired consultation 5 to 10 minutes, 1 to 2 times per week; resource program support 1 to 3 hours per week; and school social works services (consultation) 10 to 15 minutes, 1 to 2 times per month. The Proposed IEP Amendment further commented that Student has been expelled and Respondent will be offering her services for 6 to 8 weeks so that she can continue to work on IEP goals and to earn credits. [Resp. Exh. Q, pp. 1-15.]

26. On November 6, 2018, Respondent reduced Student's discipline to a 30-day suspension and she will be allowed to return to school.

CONCLUSIONS OF LAW

In the instant matter, like in most due process hearings, many witnesses testified and there were numerous exhibits offered and admitted into evidence. The undersigned has reviewed the exhibits, transcripts of the hearing, and post-hearing briefs in deciding this matter. It is clear from the record that Petitioner is a loving parent who wants the best for her child. It is also clear from the record that Respondent staff who have worked with Student also want the best for Student.

Was the manifestation determination incorrect because the misconduct was caused by or had a direct and substantial relationship to Student's disabilities or that the conduct in question was a direct result of Respondent's failure to implement the IEP?

The manifestation determination involves analysis of the misconduct's relationship to Student's disability or examination of whether the misconduct was caused by Respondent's failure to properly implement Student's IEP. On October 15, 2018, the MDR team determined that Student's conduct on October 8, 2018, was not a manifestation of her disability, which Petitioner disputes. Specifically, Petitioner argues two main points: (i) Student's manifestation determination was procedurally deficient because the MDR team did not adequately consider Dr. Kaufman's report; and (ii) Dr. Kaufman's report, including her testimony, shows that Student's conduct was a manifestation of her disability. [Pet's Post Hr'g Br. pp. 2-3.] The undersigned disagrees with both arguments.

First, Petitioner argues that Respondent's failure to review Dr. Kaufman's report was a procedural violation that became a substantive violation. [Pet's Post Hr'g Br. p. 2, Attach. A, *Corrective Action Process for Noncompliance with the IDEA and MARSE*, Michigan Department of Education Office of Special Education, dated July 25, 2018.] Petitioner further cites a case that addresses procedural violations in terms of an MDR

meeting. In *Fitzgerald v. Fairfax County School Board*, 556 F.Supp.2d 543, 559 (E.D.Va. 2008), the Court stated:

Rather, the statute requires that the MDR committee "shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents" to make its manifestation determination. § 1415(k)(1)(E)(i). This language does not require each member to read before the meeting every piece of information in the student's file. All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision, including the child's IEP, his teachers' comments, and any information provided by the parents. And this review clearly may occur before or during the course of an MDR hearing.

Petitioner argues that the testimony of Respondent's administrators/staff did not review the information before or during the course of the hearing. [Pet's Post Hr'g Br. p. 3.] Petitioner testified that she sent Dr. Kaufman's report to Ms. Testorelli, Ms. Bargardi, and Ms. Lasenby for it to be discussed at the MDR meeting, but that it was not. Petitioner then argues that few members of the MDR team did not review Dr. Kaufman's report before or during the course of the MDR hearing.

Jake Sweets, School Counselor for the New Tech program, testified that Student's conduct was not a manifestation of her disability. There was no indication that he read Dr. Kaufman's report.

Mr. Wilsey testified that Student's conduct was not a manifestation of her disability. He testified that he did not read Dr. Kaufman's report prior to the meeting. He testified he was aware of the report at the time of the meeting and that the report was discussed at the meeting. He testified that he read the report after the meeting.

Ms. Lasenby testified that Student's conduct was not a manifestation of her disability. She testified that Petitioner provided her with Dr. Kaufman's report prior the hearing. She testified that the report was not taken into consideration when conducting the MDR, but that it would be addressed instead at a subsequent IEP meeting.

Based on the above information, Petitioner argues that Dr. Kaufman's report was not considered prior to or during the MDR meeting, resulting in a procedural violation in denying Student's FAPE. [Pet's Post Hr'g Br. p. 4.]

Respondent argues that the MDR satisfied IDEA's procedural requirements. [Resp't Post Hr'g Br. p. 15.] Respondent's cites 34 CFR 300.530(e)(1), which states that IDEA requires only that a district "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" as part of the MDR. Respondent claims that the statute does not require each team member review every document that a parent provides nor does the statute require that every document be reviewed at the MDR meeting. [Resp't Post Hr'g Br. p. 15.] In fact, Respondent argues that Petitioner discussed the report and read from it at the meeting. Ms. Lasenby, Ms. Testorelli, and Ms. Bargardi were all familiar with the report and read it before the meeting. And finally, the report was documented on the MDR as "[r]elevant information provided by the parent[.]" [Resp. Exh. O, p. 1.] In sum, Respondent argues that the District did what IDEA requires, they received Dr. Kaufman's report, listened to Petitioner discuss the report, and ultimately concluded that it was not persuasive. [Resp't Post Hr'g Br. p. 16.] As a result, Respondent claims that the MDR team "reviewed" relevant information provided by the parents and therefore, there was no procedural violation. [Resp't Post Hr'g Br. p. 16.]

However, Respondent argues that if the Tribunal finds a procedural violation, the Tribunal should conclude that it was only harmless error and cited the *Fitzgerald* case. [Resp't Post Hr'g Br. p. 15.] In *Fitzgerald*, the Court stated the following:

Finally, it is clear that a procedural violation of the IDEA is not alone sufficient to show a school failed to provide a child with a FAPE. Thus, a "presumably correct finding" concerning a child with a disability will not be overturned simply because the IDEA's procedural requirements were not strictly followed; rather, the violation must "actually interfere with the provision of a FAPE to that child." *DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir.2002) (emphasis in original). Put differently, the inquiry does not end when a court finds a procedural violation of the IDEA; instead, a court must then determine "whether [the procedural violation] resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA." *M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir.2002); see also 20 U.S.C. § 1415(f)(3)(E)(ii); *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37, 43-44 (D.Me.2001) ("When the crux of an appeal is a procedural blunder in applying the IDEA, a harmless error standard applies."). *Id.* at 551.

Respondent argues that because certain members did not review Dr. Kaufman's report, does not provide that Student's conduct was a manifestation of her disability. [Resp't Post Hr'g Br. p. 17.] Respondent further points out that those who reviewed the report afterwards, i.e., Mr. Wilsey, his opinion did not change. In conclusion, Respondent argues that there is no evidence to suggest that a more thorough review of Dr. Kaufman's report would have resulted in a determination that Student's conduct was a manifestation of her disability and was nothing more than harmless error. [Resp't Post Hr'g Br. p. 18.]

Based on the totality of the hearing record, Petitioner has not established, by a preponderance of the evidence, that Student's manifestation determination was procedurally deficient. The undersigned does not find Petitioner's argument persuasive that Dr. Kaufman's report was not considered prior to or during the MDR meeting. Instead, the undersigned finds that Dr. Kaufman's report was discussed during the MDR meeting. Petitioner, herself, testified that she mentioned Dr. Kaufman's report at the MDR meeting. She testified she talked about some of the findings of Dr. Kaufman's report at the MDR meeting. Further, the report was documented on the MDR as "[r]elevant information provided by the parent[.]" [Resp. Exh. O, p. 1.] Moreover, Ms. Lasenby, Ms. Testorelli, and Ms. Bargardi were all familiar with the report and read it before the meeting. And Mr. Wilsey was familiar with the report before the meeting. As a result, the undersigned finds that Respondent met the requirements of IDEA, specifically 34 CFR 300.530(e)(1). The MDR team received the report, listened to Petitioner mention the report, including the findings of the report, and ultimately concluded that the report was not persuasive evidence that Respondent's conduct was a manifestation of her disability. Therefore, the undersigned finds that the MDR team *reviewed* all the relevant information provided by the parent as IDEA requires, pursuant to 34 CFR 300.530(e)(1). Accordingly, the undersigned finds no procedural violation.

Second, Petitioner argues that Dr. Kaufman's report, including her testimony, shows that Student's conduct was a manifestation of her disability. [Pet's Post Hr'g Br. p. 4.] Dr. Kaufman saw Student in her clinic for a neuropsychological evaluation for her history of prematurity and cerebral palsy with cognitive concerns. Dr. Kaufman has practiced neuropsychology for 14 years. She is a credentialed faculty member at the University of Michigan and director of the division of rehab psychology and neuropsychology.

During direct-examination, Dr. Kaufman testified that she had some very limited information that was sent to her by the parents about the incident at issue. She testified that Student is diagnosed with cerebral palsy, which is secondary to her premature birth, and of intraventricular hemorrhage from her development. Dr. Kaufman testified Student is presently diagnosed with cognitively with some executive functioning deficits from a neuropsychology perspective. In regards to the incident, Dr. Kaufman testified she would have to conduct a clinical evaluation to conclusively state that Student's

behavior was a manifestation of her disability. [Pet's Post Hr'g Br. p. 4.] She testified that Student does not function at a maturity level typical of her same aged peers. She testified that cerebral palsy can have an effect on cognitive, developmental, and behavioral factors for people. She testified that she believes this is applicable for Student's case. She testified that if the individual had cognitive impairments associated with their cerebral palsy, it would be very relevant and appropriate for their IEP to address that. She testified that it is certainly possible that Student's lower maturity and low safety awareness would put her at risk for making a poor decision such as this case. She testified that Student's cognitive profile would be consistent with one who should know the difference between the truth and a lie.

During cross-examination, Dr. Kaufman testified Student's intellectual functioning is in the range of low average to borderline range. She testified that she would require a review of the specific facts when making a determination as to whether Student's behavior was a manifestation of her disability.

In response, Respondent argued that no witness testified that Student's misconduct was caused by or directly and substantially related to her disability. [Resp't Post Hr'g Br. p. 9.] Respondent argued Dr. Kaufman even declined to draw such a conclusion nor does Petitioner's sole exhibit establish that point. [Resp't Post Hr'g Br. pp. 9-10.] Respondent claims that at best, Petitioner suggested there might be an attenuated link between the misconduct and behavior, but no proof of a causal connection. [Resp't Post Hr'g Br. p. 10.] Respondent further argued that Petitioner presented no evidence that her act was a result of her executive functioning deficits nor was evidence presented that Student is unable to control her behavior. [Resp't Post Hr'g Br. pp. 10-12.] And finally, Respondent argued that Petitioner did not present any evidence that the behavior was impulsive or coerced in which Student was pressured into performing the sexual act, or that Student has engaged in similar misconduct in the past. [Resp't Post Hr'g Br. p. 12.]

Based on the totality of the hearing record, Petitioner has not established, by a preponderance of the evidence, that Student's conduct in question was caused by or had a direct and substantial relationship to Student's disabilities, or that conduct in question was a direct result of Respondent's failure to implement the IEP. At the time of the incident, Student's disability was identified as physical impairment, which affects her mobility. Understanding the nature of Student's disability is imperative to assessing whether her misconduct was a result of that disability. The misconduct of Student in this case was her participation in oral sex with Student A on the bus. Student then initially reported that she was forced to provide oral sex; however, after an investigation, it was found that she was not physically forced to participate in this act. [Resp. Exh. O, p. 1.] The evidence is clear that Student made false allegations about the sexual assault. Dr. Kaufman testified that Student's cognitive profile would be consistent with one who should know the difference between the truth and a lie indicating that Student's

false allegation was not a manifestation of any executive functioning deficits. Petitioner has not shown a preponderance of evidence that Student's conduct was a manifestation of her disability. The conduct in this matter was just poor judgment by Student.

A review of Dr. Kaufman's report, including her testimony, does not find any evidence suggesting that Student's conduct was a manifestation of her disability. [Pet. Exh. 1, pp. 1-8.] In fact, Dr. Kaufman testified that she would require a review of the specific facts when making such a determination. The report itself finds that Student is functioning in the low average range of intellectual ability, with consistent academic performance overall. [Pet. Exh. 1, p. 5.] The report further states that diagnostically, there is some areas of executive dysfunction, but nothing suggesting that Student's disability or characteristics of her disability like immaturity would cause her to engage in such misconduct. [Pet. Exh. 1, p. 5.] Overall, Dr. Kaufman's report, including her testimony, fails to establish that Student's conduct in question was caused by or had a direct and substantial relationship to Student's disability.

Moreover, Petitioner failed to establish any evidence demonstrating a causal link between Student's cerebral palsy and her inappropriate/deceptive behavior. There was no evidence presented that Student is unable to control her behavior nor was any evidence presented that the behavior in this incident was impulsive or coerced. Petitioner further did not present any evidence demonstrating that Student has engaged in similar misconduct in the past.

Instead, the evidence shows quite the contrary. A review of the evidence shows that student does not have any history of similar types of misconduct, and the last documented behavioral incident occurred more than five-years-ago. [Resp. Exh. T, pp. 1-5.] A review of Student's most recent and past IEP's shows peer relationship issues and being distracted at school, but nothing suggesting inappropriate sexual behavior as in this case. [Resp. Exh. N, p. 3.] Testimony by members of Student's IEP team, including administrator/staff, indicated that Student has done well at New Tech and she is well liked by staff and students. For example, Ms. Testorelli, the Special Education Coordinator who has worked for Respondent for approximately 30-years, testified that Student is doing well, she will stand-up for herself, and she will seek out an adult to say if there is a problem. She further testified that Student can resolve any conflicts and in fact, Student is involved with student council that involves the exchange of ideas. Overall, Respondent presented testimony from qualified and experienced administrators/staff members supporting its position that the MDR team made the appropriate determination that Student's conduct was not a manifestation of her disability.

In conclusion, Petitioner has not established any procedural error regarding the MDR team meeting or that the IEP was not properly implemented. Unfortunately, the

evidence shows that Student knowingly engaged in a sexual act and then lied regarding the act, which was unrelated to her disability.

CONCLUSION

- A. Petitioner did not establish, by a preponderance of the evidence, that Student's conduct in question was caused by or had a direct and substantial relationship to Student's disabilities, or that conduct in question was a direct result of Respondent's failure to implement the IEP.

ORDER

IT IS ORDERED that Petitioner's due process complaint is dismissed.

IT IS FURTHER ORDERED that any claims or defenses not specifically addressed herein are dismissed with prejudice.

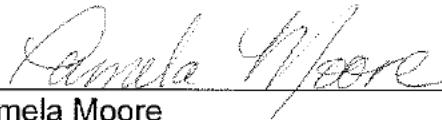
A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.



Eric J. Feldman
Administrative Law Judge

PROOF OF SERVICE

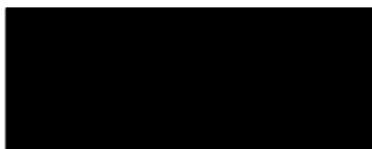
I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 20th day of November, 2018.



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