BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [redacted], [redacted], Petitioners,	)	
VS.	)	NO. 06-05
BLOUNT COUNTY SCHOOL SYSTEM, Respondent.	)	

FINAL ORDER

This case came to be heard on February 17, 2006, before John W. Cleveland, Administrative Law Judge, on the Petitioners' due process hearing request for an expedited hearing, the testimony of witnesses, the exhibits filed by the parties and the record as a whole, from all of which the Administrative Law Judge makes the findings of fact and reaches the conclusions of law set forth in his Memorandum Opinion, which is filed herewith and incorporated herein by reference as fully and completely as if set forth verbatim.

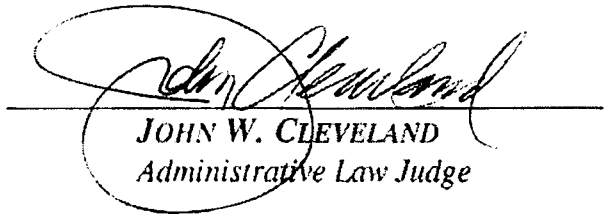
IT IS THEREFORE ORDERED as follows:

1. [redacted] shall be returned to the placement from which he was removed.

2. [redacted] IEP Team shall perform a Functional Behavior Assessment of [redacted] which includes, at least, identification of behaviors that may be anticipated as manifestations of [redacted] Emotionally Disturbed disability ("anticipated behaviors") and behaviors, circumstances and environments that precede and may lead to anticipated behaviors (collectively "antecedent behaviors").

3. [redacted] IEP Team shall implement an appropriate Behavior Intervention Plan for Charles Lee, consistent with the Functional Behavior Assessment ordered hereinabove, which, at least, *(a)* identifies antecedent behaviors, *(b)* adopts strategies to avoid and/or contain antecedent behaviors, *(c)* identifies anticipated behaviors and *(d)* directs specific appropriate responses to particular anticipated behaviors by teachers, staff and other students.

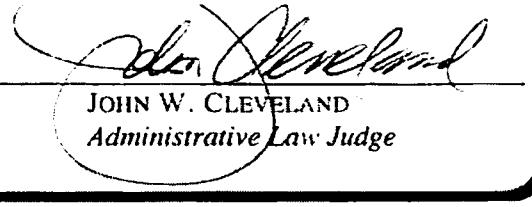
ENTER this 24th day of February, 2006.



JOHN W. CLEVELAND
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Opinion, Final Order and Notice filed in this case were served upon all parties in this case or their counsel of record by placing a true copy of same in the United States Mail, addressed to said parties or their counsel at their offices, with sufficient postage thereon to carry the same to its destination, *to-wit*: Melinda Baird, Attorney at Law, 2527 Jacksboro Pike, Jacksboro, Tennessee 38757, and [redacted], Louisville, Tennessee 38302, on February 24, 2006.



JOHN W. CLEVELAND
Administrative Law Judge

EXECUTIVE SUMMARY OF A DUE PROCESS HEARING

CASE NOS: 06-05

LEA: BLOUNT COUNTY SCHOOL SYSTEM

ALJ: JOHN W. CLEVELAND

DATE: FEBRUARY 24, 2006

A special education student, certified ED, was upset by an argument between his parents. The next morning, he threw his backpack on the floor, knocked over two desks, refused to participate in class activities and slept at his desk. When a teacher's assistant pressured the student to tell him what was wrong, the student threatened to bring a knife to school and kill all the teachers. The student's behaviors that led to his certification as ED included threats to harm himself and others. The student had a similar episode less than one year before, which had been determined a manifestation of his disability. The student's functional behavioral assessment identified attitudes, did not identify any behaviors, and failed to identify any antecedent behaviors. No separate written behavior intervention plan was implemented. The IEP Team determined, over the objection of the student's mother and his special education teacher, that the student's threat to harm others at school was not a manifestation of his disability. Following an expedited due process hearing, the student's behavior was determined to be a manifestation of his disability.

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [redacted]	)	
[redacted]	)	
	)	
	)	
Petitioners,	)	
VS.	)	NO. 06-05
	)	
BLOUNT COUNTY SCHOOL SYSTEM.	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

JOHN W. CLEVELAND
Administrative Law Judge
TENNESSEE DEPARTMENT OF EDUCATION
120 W. Morris Street
Sweetwater. Tennessee 37874
Phone: 423/ 337-2111
Fax: 423/ 337-2121
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MEMORANDUM OPINION
No. 06-05

This cause came to be heard on February 17, 2006, before the Honorable John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, upon the Due Process Hearing Request filed by the Parents, the testimony of witnesses and the exhibits filed by the parties. The Petitioners and Respondent were present. The School was represented by counsel, but the Parents were not represented by counsel.

Identifying information appears on the cover page of this Opinion and on the Expedited Order, which incorporates this Opinion and is filed with this Opinion. To preserve the parties' privacy in compliance with the Federal Educational Right to Privacy Act ("FERPA")[1], the parties, the schools, the witnesses and other identifying information are referred to by general descriptions, *e.g.*, the or this "Student," the "School System," the "Supervisor of Special Education." Publication of the cover page of this Memorandum Opinion and Final Order, the Final Order or other identifying information violates federal law.

References to the record of the due process hearing in this matter appear in endnotes, *i.e.*, Exhibit 3, Transcript 69, which do not contain identifying information, and may be published with this Memorandum Opinion, in the user's discretion.

PROCEDURAL HISTORY

This case arises out of a threat made by the Student, who is a special education student certified as emotionally disturbed on August 14, 2003.[2] The threat resulted in the Student being suspended for three days until the Student's IEP Team could convene to make a manifestation determination. On February 3, 2006, the Student's IEP Team determined that the Student's threat was not a manifestation of his disability.[3]

On February 10, 2006, the Parents filed a due process request, No. 06-05, which was assigned to ALJ John Cleveland for an expedited hearing.[4] The expedited due process hearing was conducted on February 17, 2006.[5]

FINDINGS OF FACT

The Student is fifteen years old.[6] He was retained in his earliest grades. He was socially promoted from the fourth to sixth grade.[7] He has a history of in-patient treatment at a regional psychiatric hospital for depression, post-traumatic stress and psychosis.[8]

On April 15 and 16, 2003, a psychological evaluation of the Student was performed by a school psychologist with an M.A. degree and NCSP credentials.[9] That evaluation reported that the Student had only one office referral while at his then-current middle school, but the report noted the referral was for insubordination.[10] Several teachers, the father and stepmother completed BASC rating scales for the evaluation. The results of the profiles were found to be a true reflection of the Student's behavior. Items designated "critical" included the following:

Says, "I hate myself"	Almost always
Threatens to hurt others	Often
Says, "I want to die" or "I wish I were dead"	Often[11]

The evaluation found the Student suffers from a mood disorder, poor self-concept and psychosis according to records from an outside agency, and that a clinical assessment needed to be completed to further address these issues as they apply to the educational setting.[12]

On May 2, May 30 and June 20, 2003, a clinical evaluation was conducted by a Ph.D. psychologist to determine whether the Student meets criteria for Seriously Emotionally Disturbed (SED), sometimes referred to as Emotionally Disturbed (ED) certification.[13] The Student's classroom teachers and administrators expressed concern for his emotional health. He was becoming increasingly withdrawn and increasingly defiant since the beginning of the 2002-03 school year. He was difficult to motivate and generally withdrawn from activities in the classroom. He had made statements to his teachers that he wanted to kill himself. The Student had a few aggressive confrontations with peers over the years. Many of the Student's teachers reported their reluctance to make too many demands on the Student because he appears very angry and ready to explode. Student's teachers believed the Student's emotional problems were manifested in an oppositional attitude. Overall, the Student's teachers reported little academic progress during the 2002-03 school year and believed his emotional condition was a significant factor in his social and educational difficulties.[14] The Student hated school because the work was too hard and he was embarrassed due to his lack of skills and understanding of most tasks.[15]

The psychologist found that the Student has a chronic sense of powerlessness and inadequacy. He also found that the Student has impaired empathic responding and is likely to have difficulty respecting the rights and feelings of others due to his own emotional neediness. Oppositional tendencies were noted.[16] The evaluation concluded that social maladjustment is not the major issue involved with the Student. The Student's moderate oppositional defiant behaviors are secondary to his emotional issues. His lack of productivity in the classroom and his passive resistance/oppositionality are a manifestation of his emotional condition and skill deficits.[17]

On August 14, 2003, the assessment team met in a conference attended by the parents and certified the Student as Emotionally Disturbed.[18]

On November 23, 2003, the Student's Functional Behavior Assessment described the Student's behavior to "include depressed mood, feelings of insecurity, auditory hallucinations, self-injurious thoughts/suicidal ideation and numerous somatic complaints."[19]

On February 28, 2005, the Student was called down in his regular education social studies class for talking to another student. He was embarrassed, but he gave no indication of his distress to the teacher. When he returned to his special education classroom, the Student refused to participate in classwork and began stabbing his finger with a pencil. The teacher's assistant tried to talk to the Student to get him to explain what happened to upset him. The Student refused to discuss anything with the teacher's assistant. The teacher removed the Student from the room and tried to talk to him. The Student continued to claim nothing was wrong and insisted he was not going to cooperate with school rules. The Student sat in the hall for 10 to 15 minutes to "regroup" and talk, but then he looked up at his teacher and said, "I'm just going to bring one of my uncle's guns to school and blow you all (meaning teachers) away."[20]

On March 4, 2005, the Student's IEP Team convened for a manifestation meeting. The IEP Team found that "when under duress, [the Student] does not have the capability of exhibiting normal reactions and/or behaviors in response to difficult situations. The IEP Team determined that the Student's behavior was a manifestation of his disability.[21] The IEP Team modified the Student's behavior plan to add three specific interventions in the event that the Student became a danger to himself or other, "including making threats to harm himself or others."[22]

During the evening of January 30, 2006, the Student's Parents engaged in an argument, which, while not involving physical contact, was unusually vicious by the family's historical standards. The Parent's argument was overheard by the Student. The Student was very upset by his Parent's argument, but he did not discuss his fears or concerns with either of his Parents that evening or the next morning.[23] When the Student arrived at school on January 31, 2006, he threw his backpack in the floor and knocked over two desks in his self-contained class for special education students with behavioral problems, several of whom are certified emotionally disturbed. The Student did not want to participate in any classroom activities, and consistent with the general classroom policy - or "plan" to address such behavior - the Student was allowed to withdraw and sleep at his desk for one-and-a-half to two hours.[24]

When it was time for the class to go to lunch, the Student was awakened. He told his self-contained classroom teacher that he did not want to accompany his class to the lunchroom. The self-contained classroom teacher told the teacher's assistant to allow the Student to remain in the classroom. The teacher's assistant encouraged the Student to go eat lunch and tried to get the Student to talk about what was bothering him, but the Student did not want to eat or talk. The

Student told the teacher's assistant that he just wanted to go home. The teacher's assistant tried to telephone the Student's Parent but was unable to contact a Parent. When the teacher's assistant again tried to get the Student to talk about what was bothering him, the Student threatened. "Leave me the h _ _ _ alone. I am gonna' bring a knife to school and kill all you b_ _ _ _ _s! And I am not joking!"[25]

The teacher's assistant talked with the Student about the seriousness of the threat, the consequences for making the threat for thirty to forty-five minutes. The Student would not recant and repeated the threat to the teacher's assistant several times. The teacher's assistant tried to find a School Resource Officer[26], but neither of the two assigned to the school could be found. The teacher's assistant talked the Student into riding to the lunchroom in a golfcart, but he took the Student to the Assistant Principal's office.[27]

The Student did not make threats to anyone other than the Teacher's Assistant.[28] Upon hearing the Assistant Teacher's report of the Student's threats without a response or explanation from the Student, the Assistant Principal suspended the Student for three days until the Student's IEP Team could convene to make a manifestation determination.[29] The teachers, staff and administrators are not afraid the Student will carry out his threat.[30]

On February 3, 2006, the Student's IEP Team determined - over the objection of the Student's Mother and the Special Education Teacher - that the Student's threat was not a manifestation of his disability.[31]

CONCLUSIONS OF LAW

A. Introduction.

The Individuals with Disabilities Education Act ("IDEA")[32] requires that Tennessee, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education."[33] IDEA mandates that participating states provide such education for all children "regardless of the severity of their handicap."[34] In pertinent part, the Act defines a free appropriate public education as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, ... and (D) are provided in conformity with the individualized education program ....[35]

Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP).[36] The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive.[37] An IEP is "more than a mere exercise in public relations;"[38] indeed, it is the "centerpiece of the statute's education delivery system for disabled children."[39]

B. Discipline Procedures.

The application of discipline procedures to students with disabilities requires particular attention under IDEA if the disciplinary measure removes the student from the placement required by the student's IEP because the discipline amounts to a change in placement. The history of the relationship between discipline and IDEA was described in *Honig v. Doe*, 484 U.S. 305. 108 S.Ct. 592, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 USLW 4091, 43 Ed. Law Rep. 857, 1 A.D.D. 333 (1988).

> Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (1972), and *PARC*, 343 F.Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F.Supp., at 869-870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, *id.*, at 868-869, 875, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline." *Id.*, at 880.
>
> Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate *all* disabled children, regardless of the severity of their disabilities. 20 U.S.C. §1412(2)(C), and included within the definition of "handicapped" those children with serious emotional disturbances. §1401(1). It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend §1415(e)(3) to operate inflexibly, see 121 Cong.Rec. 37412 (1975) (remarks of Sen. Stafford), and they therefore allowed for interim placements where parents and school officials are able to agree on one.
>
> * * *

> Our conclusion that §1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR §300.513 (1987). Such procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. [Footnote omitted.] This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement.

Honig 484 U.S. at 324-326. Since *Honig*, IDEA has been amended to particular attention to discipline of students with disabilities. The procedural safeguards afforded by IDEA when discipline procedures are applied to a student with a disability begin with 20 U.S.C. §1415(k)(1). Placement in alternative educational setting.

> §1415(k)(1) 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 to order a change in placement for a child with a disability who violates a code of student conduct.

In this case, the Student, who is a child with a disability, violated a code of student conduct.[40] School System personnel made a determination to order a change in the Student's placement on a case-by-case basis, *i.e.*, a determination based on the unique circumstances of the Student's case rather than an application of general policy.

> §1415(k)(1) Authority of school personnel.
>
> * * *
>
> (B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

School personnel suspended the Student for just three days until a meeting could be convened to determine whether the Student's violation was a manifestation of his disability.[41]

§1415(k)(1) Authority of school personnel.

* * *

(C) Additional authority. If school personnel seek to order a change in placement that would exceed 10 school days and 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 subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title, although it may be provided in an interim alternative educational setting.

School personnel sought to order a change in the Student's placement that would exceed 10 days. The Student's behavior that gave rise to the violation of the school code was determined by the IEP team not to be a manifestation of the child's disability. The Student's placement was changed to his home as an interim alternative educational setting with homebound instruction. This discipline was applied in the same manner - through the School System's Disciplinary Hearing Authority - and for the same duration in which the procedures would have been applied to children without disabilities. The School System disciplinary procedure complied with the exception required by 20 U.S.C. §1412(a)(1) by changing the Student's placement to his home, rather than suspending him altogether, so that he could continue to be provided FAPE through homebound instruction.

§1415(k)(1) Authority of school personnel.

* * *

(D) Services. A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall -

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, 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, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

In this case, the Student was removed from his current placement under subparagraph (C), *i.e.*, the IEP team determined the Student's behavior that gave rise to the violation was not a manifestation of his disability. He continued to receive educational services through homebound instruction so as to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in his IEP. Because this due process hearing is expedited, inadequate time has elapsed to conduct a functional behavioral assessment, behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.

> §1415(k)(1) Authority of school personnel.
>
> * * *
>
> (E) Manifestation determination.
>
> (i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child' s IEP, any teacher observations, and any relevant information provided by the parents to determine -
>
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.
>
> (ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

The Student's IEP Team determined that the Student's threat was not a manifestation of his disability.[42]

§1415(k)(1) Authority of school personnel.

* * *

(H) Notification. Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

The School System notified the Student's parents of its decision to take disciplinary action against the Student on the date the decision was made, January 31, 2006. The Student's interim alternative educational setting was determined by the IEP Team in accordance with an agreement between the Student's parents and the School System and in compliance with 20 U.S.C. §1415(a)(2).[43]

C. Appeal for Expedited Due Process Hearing.

The preceding part of this Opinion started with the acknowledgment that "The procedural safeguards afforded disabled students by IDEA when discipline procedures are applied to a disabled student begin with 20 U.S.C. §1415(k)(1), Placement in alternative educational setting." However, the procedural safeguards afforded disabled students by IDEA when discipline procedures are applied to a disabled student do not end with 20 U.S.C. §1415(k)(1) but continue with 20 U.S.C. §1415(k)(3).

§1415(k)(3) Appeal.

(A) In general. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

The Student's parents disagreed with the School System's decision regarding the manifestation determination made by the IEP Team. The Student's parents also disagreed with the School System's decision regarding the Student's interim educational placement. Because of their disagreement, the Student's parents filed the Due Process Hearing Request that lead to the due process hearing in this case. This due process hearing was expedited and convened within 20 school days of the date the hearing was requested pursuant to 20 U.S.C. §1415(k)(4)(B), which also requires that the due process hearing result in a determination within 10 school days after the hearing.

D. Manifestation Determination.

20 U.S.C. §1415(k)(3)(B)(i) Appeal provides as follows:

> (B) Authority of hearing officer.
>
> (i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

Pursuant to §1415(k)(3)(B)(i), the first determination to be made in this appeal is whether the Student's conduct was a manifestation of the Student's disability. If the IEP Team's manifestation determination is affirmed, there will be no further issues to consider in this case because the Student's parents agreed to the interim educational placement. If, and only if, the due process hearing results in a finding that the Student's conduct was a manifestation of the Student's disability would it be necessary to resolve the placement issue under 20 U.S.C. §1415(k)(3)(B)(ii)(II).

This Administrative Law Judge finds from the foregoing analysis under the heading DISCIPLINE PROCEDURES that the School System properly followed all of the procedural requirements of 20 U.S.C. §1415(k)(1) and (2). The issue remains whether IEP Team's manifestation determination is substantively correct.

20 U.S.C. §1415(k)(1)(E)(I) provides that when the School System makes a decision to change the placement of a child with a disability because of a violation of a code of student conduct, the child's IEP Team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

The Student is emotionally disturbed. His emotional disturbance was caused by a long history of abuse and neglect by his biological parents before his adoption by the Student's Parents. Psychologists diagnosed the Student's disturbances as mood disorder, poor self-concept and psychosis.[44] The reports of psychologists, Parents and teachers upon which the School System relied to certify the Student as Emotionally Disturbed based on evidence of his disability manifested by three sets of attitudes and behaviors.

The reports of psychologists, Parents and teachers that were the basis for the School System to certify the Student as Emotionally Disturbed included particular attitudes and behaviors. The Student suffers a chronic sense of powerlessness and inadequacy. The Student is embarrassed due to his lack of skills and understanding of most tasks.[45] The Student hates school because he feels the work is too hard. The Student hates school, is difficult to motivate and withdraws from classroom activities. As he feels pressured to participate and study, he becomes defiant, insubordinate and oppositional. The Student is unable to feel empathy for others; therefore, he does not understand or respect the rights and feelings of others. The Student becomes aggressive and confronts his peers.[46] The Student is not socially maladjusted, or colloquially, he is not "just plain mean." His lack of productivity in the classroom and his passive resistance/oppositionality are a manifestation of his emotional condition and skill deficits. His oppositional/defiant behaviors are secondary to his emotional issues.[47]

On January 31, 2006, the Student was upset because his Parents had a fight. The Student was incapable of managing his emotions arising from this turmoil in an appropriate way. Upon entering the classroom, he threw his backpack on the floor and knocked over two desks. He was unmotivated to study and became withdrawn. When he felt pressured to participate by going to lunch, he became defiant. When asked to talk about why he did not want to participate, he became oppositional and just wanted to go home. When pressed further, the Student threatened violence. These are the same attitudes and behaviors that manifested the Student's emotional disturbance and lead the School System to certify the Student as Emotionally Disturbed.[48] Based on the assessment reports of psychologists, teacher observations, relevant information provided by the Parents, certification by the School System that the Student is Emotionally Disturbed, all relevant information in the student's file and the record of these proceedings as a whole, the Administrative Law Judge finds that the Student's conduct in question had such a direct and substantial relationship to the Student's disability that it was caused by the Student's disability within the meaning of 20 U.S.C. §1415(k)(1)(E)(i)(I).

E. Placement Determination.

20 U.S.C. §1415(k)(3)(B)(ii) Appeal provides as follows:

> (B) Authority of hearing officer.
>
> * * *
>
> (ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may -
>
> (I) return a child with a disability to the placement from which the child was removed; ... or

(II) order a change in placement of a 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 such child is substantially likely to result in injury to the child or to others.

The Student has had a few aggressive confrontations with peers over the years. The Student has appeared to teachers to be so angry that he was ready to explode.[49] The Student has made threats to other students on several occasions throughout the present school year. The Student had made a lot of progress this school year, and his threats to other students have decreased. Significantly, the Student has never injured another student.[50] Based primarily on the testimony of the Student's teachers assistant and the school psychologist, but also on the entire student record, the Administrative Law Judge finds that maintaining the current placement of the Student IS NOT substantially likely to result in injury to the Student or to others within the meaning of 20 U.S.C. §1415(k)(3)(B)(ii)(II). In accordance with 20 U.S.C. §1415(k)(3)(B) (ii)(I), the Student should be returned to the placement from which he was removed.

F. Functional Behavioral Assessment and Behavioral Intervention Plan.

20 U.S.C. §1415(k)(1) "Authority of school personnel" provides, in pertinent part, that

* * *

(F) Determination that behavior was a manifestation. If the local educational agency, 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 shall -

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

The Student's conduct now having been determined to have been a manifestation of his disability, the IEP Team is required to conduct a functional behavioral assessment, and implement a behavioral intervention plan for the Student, provided that the local educational agency had not conducted such assessment prior to such determination; or in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior. Conduct of the Student, distinct from that under review in this case but virtually identical to the conduct in this case, gave rise to a manifestation determination on March 4, 2005.[51] The Student's IEP Team determined that the Student's conduct was not a manifestation of his disability, but a functional behavioral assessment was conducted pursuant to 20 U.S.C. §1415(k)(1)(D), which requires a functional behavioral assessment for a child with a disability who is removed from the child's current placement irrespective of whether the behavior is determined to be a manifestation of the child's disability.

The functional behavioral assessment did not identify any behaviors. Further, a set of questions in bold print appears in the functional behavioral assessment document, which are designed as a tool to assist in actually assessing the subject's behavior(s) including identification of such essential information as antecedent behavior and environments. The questions were not answered, and the information they were designed to elicit was not addressed.[52]

The IEP Team was also required to implement a behavioral intervention plan for the Student. One purpose of the behavioral intervention plan is to address the Student's behavior to deter such behavior in the future.[53] There is no document identified as a behavioral intervention plan. Some notes appear on conference summaries that "call SRO" and "deny music class." Whether a general classroom procedure applied to all students in a class is a "plan" or appropriate as an individual plan is not at issue in this case. Whether calling a law enforcement officer or denying the Student the educational benefit of a music class[54] is appropriate or effective, there is no clear connection between the "plan" and the functional behavioral assessment.[55]

Immediately following entry of the Final Order in this due process hearing, the Student's IEP Team must conduct a true functional behavioral assessment - one that, at least, identifies behaviors that may be anticipated as manifestations of the Student's Emotionally Disturbed disability ("anticipated behaviors") and behaviors, circumstances and environments that precede and lead to anticipated behaviors (collectively "antecedent behaviors").

As soon as possible after completion of the Student's functional behavioral assessment, the IEP must implement an appropriate behavioral intervention plan for the Student, consistent with the Student's functional behavioral assessment, which, at least, *(a)* identifies antecedent behaviors, *(b)* adopts strategies to avoid and/or contain antecedent behaviors, *(c)* identifies anticipated behaviors and *(d)* directs specific appropriate responses to particular anticipated behaviors by teachers, staff and other students. The functional behavioral assessment and behavioral intervention plans must each consist of a single distinct written document. The School System and IEP Team must understand that the shortcomings of the existing functional behavioral assessment and behavioral intervention plans are so substantial that neither document separately or both together give rise to a situation under 20 U.S.C. §1415(k)(1)(F)(ii) where a behavioral intervention plan has been developed that can be reviewed and modified.

JOHN W. CLEVELAND
Administrative Law Judge

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court in the county in which the petitioner resides or the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of this Final Order. In appropriate cases, the reviewing Court may order that this Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of *Tennessee Code Annotated* §49-10-601(h)(1).

ENDNOTES

No. 06-05

1. 20 U.S.C. §1232(g).

2. Exhibit 8. Page 9. Sometimes abbreviated "SED" or "ED," classification number 06.

3. Exhibit 1, Page 3.

4. Record, Page 1.

5. The expedited due process hearing was recorded by a stenographer, but because 20 U.S.C. §1415 (k)(4)(B) requires a decision within ten (10) days following the hearing, the transcript of the hearing, which will be filed as part of the record of this proceeding, was not available before publication. References to testimony refer only to the witness whose testimony supports the finding for which is cited.

6. Exhibit 4.

7. Exhibit 8. Page 8.

8. Exhibit 8, Page 5.

9. Exhibit 8, Page 1.

10. Exhibit 8, Page 5.

11. Exhibit 8. Page 7.

12. Exhibit 8, Page 8.

13. Exhibit 9, Page 1.

14. Exhibit 9. Page 5.

15. Exhibit 9, Page 6.

16. Exhibit 9. Page 6.

17. Exhibit 9. Page 8.

18. Exhibit 8, Page 9.

19. Exhibit 10. Page 1.

20. Exhibit 11, Conference Summary dated March 4. 2005.

21. Exhibit 11, Conference Summary and Manifestation Meeting Summary, both dated March 4. 2005.

22. Exhibit 11. Conference Summary dated March 4. 2005.

23. Testimony of Student's Mother. The expedited due process hearing was recorded. but because 20 U.S.C. §1415(k)(4)(B) requires a decision within ten (10) days following the hearing, the transcript of the hearing, which will be filed as part of the record of this proceeding, was not available before this Opinion is published.

24. Testimony of Teacher's Assistant and Self-Contained Classroom Teacher.

25. Collective Exhibit 1, Page 2, Manifestation Meeting Summary. Critical Behavioral Event.

26. A uniformed sheriff's deputy assigned to patrol the school.

27. Testimony of Teacher's Assistant.

28. Testimony of Teacher's Assistant.

29. Testimony of Assistant Principal.

30. Testimony of Self-contained Classroom Teacher. Teacher's Assistant. Assistant Principal and the Student's School Counselor.

31. Exhibit 1. Page 3.

32. *The Act has been amended and reauthorized since its initial enactment in 1970. This Opinion refers to the original Education of the Handicapped Act. 20 U.S.C. §§ 1400-1485 and all of its amendments, as well as its re-authorization as the Individuals with Disabilities Education Act (IDEA-97; IDEA-2004). as IDEA.*

33. 20 U.S.C. §1412(1).

34. 20 U.S.C. §1412(2)(C).

35. 20 U.S.C. § 1401(18).

36. 20 U.S.C. §1401(16).

37. 20 U.S.C. §§1401(19) (defining IEP), §1414(a)(5) (requiring an IEP).

38. *Georgia Ass'n of Retarded Citizens v. McDaniel*. 716 F.2d 1565, 1570 (11th Cir. 1983), vacated in part on other grounds, 468 U.S. 1213. 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983). reinstated in relevant part, 740 F.2d 902 (1984), cert. denied. 469 U.S. 1228. 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985).

39. *Honig v. Doe*. 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

40. No code of conduct was introduced at the expedited due process hearing, but *Tenn.CodeAnn.* §49-6-3401(a)(3) authorizes assistant principal's to suspend a pupil for threatened violence against the person of any personnel attending any public school.

41. Testimony of Assistant Principal.

42. Exhibit 1, Page 3.

43. §1415(k)(1)(G) provides as follows:

> (G) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. in cases where a child -
>
> (i) carries or possesses a weapon to or at school. on school premises, or to or at a school function under the jurisdiction of a State or local educational agency:
>
> (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises. or at a school function under the jurisdiction of a State or local educational agency; or
>
> (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

The School System's authority is limited in this case because (i) the Student did NOT carry a weapon to school, to school premises or at any school function, or possess a weapon at school, on school premises. at any school function. (ii) the Student did NOT possesses or use illegal drugs or sell or solicit the sale of a controlled substance, while at school. on school premises or at a school function: and (iii) the Student did NOT inflict serious bodily injury upon another person while at school, on school premises or at a school function. Pursuant to 20 U.S.C. §1415(k)(1)(B) and (G), the School System could not remove the Student to an interim alternative educational setting for more than ten school days unless the Student's behavior was determined not to be a manifestation of the child's disability.

44. Exhibit 8, Page 5.

45. Exhibit 9, Page 6.

46. Exhibit 9, Page 5.

47. Exhibit 9, Page 8.

48. Exhibit 8, Page 5-6; Exhibit 9, Page 8.

49. Exhibit 5, Page 5.

50. Testimony of Teacher's Assistant and School Psychologist.

51. Exhibit 11, Conference Summary and Manifestation Meeting Summary, both dated March 4, 2005.

52. Exhibit 10, Page 1-2.

53. *See*, 20 U.S.C. §1415(k)(1)(E)(i)(II).

54. Exhibit 3.

55. In any event, the School System did not follow its own plan in this case. Had the issue not been pretermitted by the ALJ's manifestation determination, there would have been a finding that the Student's conduct was the direct result of the School System's failure to implement the BIP included in the IEP within the meaning of 20 U.S.C. §1415(k)(1)(E)(i)(II).