

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

**J.B., *Student*, and M.S.,
Parent/Guardian,
Petitioners,**

DOCKET NO: 07.03-119086J

v.

**LEBANON SPECIAL SCHOOL
DISTRICT,
Respondent.**

FINAL ORDER

This contested case was heard in Lebanon, Tennessee, on February 21, 2013, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, pursuant to Tenn. Code Ann § 49-10-606 and Tennessee State Board of Education Rule No. 0520-1-9-.08. The Petitioner was represented by attorney Ray Akers. John D. Kitch, of the Nashville bar, represented the Respondent Lebanon Special School District (LSSD), which is the local education agency (LEA).

After consideration of the record and the arguments of the parties, it is determined that the request for relief should be **denied**. This determination is based upon the following.¹

¹On April 5, 2013, the Petitioner filed a "Motion to Strike LSSD'S Reply Brief," arguing that the post-hearing brief references facts not presented at the hearing and that the juvenile proceeding, concluded after the hearing, is confidential under State law. Since the decision in this case is based solely upon facts in evidence, this Motion and the legal arguments it implicates are not addressed herein.

ISSUE PRESENTED AND RELIEF SOUGHT

The Due Process Hearing Request Forms described the issue in the following verbatim language:

Child charged with Assault. School found action to be premeditated and not a manifestation, but prior to the alleged assault and immediately after Acts were a manifestation. *See records.

The Due Process Hearing Request Form asked for the following: “Reverse finding of no manifestation.” According to the language of the complaint, the only issue concerns the Petitioner’s request for a finding that all of the Petitioner’s conduct was a manifestation of his disabling condition. There was no dispute regarding the discipline imposed.

SUMMARY OF THE EVIDENCE

Nicky Hamlet, Education Specialist in the Special Education program of LSSD, was called to testify for the Petitioner. Two witnesses appeared on behalf of the Respondent: Lynn Cable, Director of Special Education for LSSD; and Gregri Love, special education teacher with LSSD.

Six exhibits were admitted into evidence:

| | |
|----------------------|----------------------------------|
| EXHIBIT 1 | Manifestation Review Form |
| EXHIBIT 2 | Resumé of Nickye Hamlet |
| COLLECTIVE EXHIBIT 3 | Photographs |
| EXHIBIT 4 | University Medical Center Record |
| EXHIBIT 5 | Resumé of Lynn Cable |
| EXHIBIT 6 | Resumé of Gregri Love |

FINDINGS OF FACT

1. The Petitioner J.B. is an LSSD student enrolled in Walter J. Baird school in the sixth grade. He receives special education services because of Emotional Disturbance and Other Health Impairment.

2. The Petitioner attends a self-contained comprehensive development class for special education students who need intensive academic support as well as intensive behavioral and emotional support.

3. The Petitioner's class is conducted by Gregri Love, who holds a master's degree and has taught special education classes for thirteen years.² Mr. Love has worked with the Petitioner for approximately one year.

4. The parents requested homework for the Petitioner, despite the fact that it was not required and that homework was not assigned to other students in the class. The school agreed to assign homework, even though Mr. Love knew that homework affected the Petitioner negatively and assigned it only at the parent's request. At that time, the Petitioner believed Mr. Love was responsible for the homework requirement.

5. The Petitioner's behavior episodes were often triggered by work avoidance since the Petitioner did not want to perform assigned tasks, particularly if he felt they were too difficult for him.

6. On the morning of November 7, 2012, the Petitioner entered the classroom in an agitated state, upset because he did not have any homework completed. Mr. Love told him that "we would take care of it, and we would review it."

7. The usual morning routine began. There was no work assigned to the Petitioner that morning. After about twenty minutes in the classroom, the Petitioner became uncooperative, refusing to stand for the Pledge of Allegiance, putting his arms on the desk, and banging his head on the desktop.

² Based upon his training and experience, and without objection, Mr. Love was designated as an expert witness in special education.

8. Since Mr. Love had experience with disabled students with behavior problems, and with this student in particular, he recognized that the Petitioner was entering a pre-crisis state. Although at that time Mr. Love felt that the Petitioner's behavior was minor, he followed the Petitioner's behavior plan in an attempt to avoid any escalation.

9. As the behavior plan specified for pre-crisis episodes, Mr. Love requested the presence of Nickye Hamlet, Educational Specialist for the Special Education Department for LSSD. She has training in crisis intervention, restraint tactics, and Professional Crisis Management.³

10. When Ms. Hamlet came into the room, the Petitioner had his head down on his desk and was kicking his chair. The student continued to peek up to see if others in the room were paying attention to him.

11. Upon the advice of Ms. Hamlet, the other students were removed from the room to give the Petitioner some "respect and dignity while he was going through this" problem.

12. The Petitioner then scooted his desk all the way to the teacher's podium, stood up, and began kicking the desk. He also started throwing desks, chairs, and electronic equipment, targeting the personal property of Mr. Love and items that the student knew were important to the teacher. He also began yelling, which Ms. Hamlet identified as more attention-seeking behavior. He appeared to be agitated and angry.

13. In an attempt to prevent further escalation, Ms. Hamlet approached the Petitioner and spoke to him to calm him down. The Petitioner wheeled around, looked Ms. Hamlet in the eyes, and punched her in the chest with his left arm.

14. In the opinion of Mr. Love and Ms. Hamlet, these actions were completely intentional: the student later told Mr. Love that he did it because he was mad about the

³ Ms. Hamlet was designated as an expert witness in crisis management and behavior disorders.

homework. Based upon their training and experience, both Mr. Love and Ms. Hamlet believe that the Petitioner could have controlled himself during this time, had he chosen to do so.

15. After the punch, the assistant principal and two members of the crisis team approached each side of the Petitioner to take him to the mat. The Petitioner entered full crisis mode at this time, and he was taken to a face-down, prone position on the mat. Gradually the Petitioner calmed down and was no longer in a crisis state. At this point, the restraint was gradually relaxed.

16. Ms. Hamlet was taken to the hospital after the assault, where she was examined, treated with pain medication, and released.

17. A short time after the incident, the student apologized to Ms. Hamlet for his behavior.

18. Lynn Cable, the LSSD Director of Special Education, is familiar with emotionally disturbed students in general and with this student in particular.⁴ According to Ms. Cable, students with emotional disturbance generally are able to control their conduct in certain circumstances and also have the capability to voluntarily engage in bad behavior. In other circumstances, students with this disability may not be able to control their conduct.

19. The Petitioner has a behavior plan which is modified by the IEP team as needed; this plan has been fairly successful in helping the Petitioner to control his conduct.

20. In Ms. Cable's experience, the Petitioner is generally able to control his own actions. However, his perception that a task may be too difficult for him and his lack of confidence in his own abilities may lead to a crisis state.

21. Ms. Cable, who has worked with the Petitioner for years and has observed him engage in volitional bad behavior as well as in crisis mode when he was not able to control his

⁴ Without objection, Ms. Cable was designated as an expert witness in special education.

actions. The Petitioner may first engage in intentional misconduct, designated as pre-crisis mode. Then, when a restraint becomes necessary, the Petitioner may go into a crisis state in which he is unable to control his behavior. For this reason, school personnel avoid a restraint situation if at all possible. In the past, the Petitioner has experienced pre-crisis in which he inflicted property damage, but then was able to de-escalate without going into a full crisis situation.

22. In the LSSD, both for general and special education students, crisis is defined as CASH: Continuous Aggression and/or Self-Injurious Behavior and/or High Magnitude Disruption.

23. Although the photographic evidence of the classroom after the incident may first appear to present High Magnitude Disruption, Ms. Cable explained that the Petitioner was still in pre-crisis until the time of the restraint. School personnel use restraint with the Petitioner only as a last resort, even if he engages in property destruction, since he may be able control his behavior as he has in the past. Furthermore, restraint may escalate the Petitioner from pre-crisis to crisis, where he is unable to hold back his bad behavior.

24. After this event, a manifestation determination meeting was held. With the exception of the parent, the team agreed that the behavior in question, until the time of the restraint, was “premeditated” or volitional on the Petitioner’s part; therefore, the actions were determined not to be a manifestation of the student’s disability, subjecting the student to discipline. After the restraint began, a period of time described on the manifestation determination form as “rest of the crisis,” it was concluded that the behavior was a manifestation of the Petitioner’s disability. For the voluntary poor behavior, including the property destruction and the assault, the Petitioner was assessed a two-day suspension from school.

25. Mr. Love, Ms. Hamlet, and Ms. Cable all participated in the meeting; they agreed, based upon their training and experience, that the Petitioner's behavior, including the property destruction and assault, resulted from the Petitioner's voluntary behavior and not from his disability. The crisis activity after the assault and during the restraint was determined to be a manifestation of the student's disability.

26. The parent disagreed with the team's conclusions regarding the volitional actions and filed a due process complaint, seeking only to change the determination that the behavior before the restraint was not a manifestation of the student's disability.

27. The Petitioner's Independent Educational Plan (IEP) and behavior plan were appropriate to meet his needs. The LEA properly and correctly implemented the IEP and the behavior plan. The parent did not challenge the content or the application of either.

APPLICABLE LAW

1. The Petitioners have the burden of proof in this matter, to show by a preponderance of the evidence that the relief they seek is warranted under state and federal law. *Schaffer v. Weast*, 546 U.S. 49, 62 126 S.Ct. 428, 163 L.Ed.2d 387 (2005).

2. 34 C.F.R. § 300.530(e) requires a manifestation determination meeting in certain circumstances:

(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. An appeal of a manifestation determination is governed by 34 C.F.R. § 300.532, the relevant sections of which include the following language:

(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 others.

4. 34 C.F.R. § 300.8(c)(4) defines Emotional Disturbance as follows:

(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

- (D) A general pervasive mood of unhappiness or depression.
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
- (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

ANALYSIS

The sole request for relief in this matter consists of a request to change the determination of LSSD that the majority of the Petitioner's actions on November 7, 2012, were not directly related to the Petitioner's disability of emotional disturbance. The Petitioner has the burden of proof, to show by a preponderance of the evidence that he is entitled to this relief under applicable state and federal law. The Petitioner failed to carry the burden of proof.

At the hearing, the Petitioner called only one witness, Ms. Nickye Hamlet, who was designated as an expert witness. Contrary to the Petitioner's assertion, Ms. Hamlet stated that the Petitioner's actions involving property destruction and assault were volitional acts on his part, and therefore were not a manifestation of his disability. It was only after the assault, when restraint procedures were implemented, that the Petitioner entered a crisis state in which he was unable to control his behavior because of his disability. There was a complete dearth of evidence to support the Petitioner's argument. In addition to Ms. Hamlet, two other witnesses, also designated as experts, stated that the Respondent's manifestation determination was correct. No evidence was presented at the hearing to contradict this assertion. Even had the burden of proof fallen upon the Respondent, the strong evidence would compel the same conclusion.

CONCLUSIONS OF LAW

It is concluded that the Respondent's manifestation determination was correct.

It is concluded that the LEA accorded to the student and his parents all procedural safeguards and due process rights to which they were entitled under state and federal law, a conclusion not challenged by the Petitioner and borne out by the evidence.

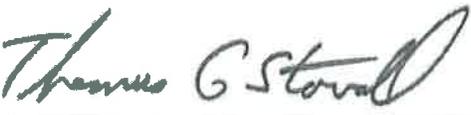
It is concluded that the Respondent Lebanon Special School District is the prevailing party in this matter.

Accordingly, based upon the foregoing, it is **ordered** that the Petitioners' request for a reversal of the manifestation determination is hereby **denied**.

This Final Order entered and effective this 16 day of April 2013.


Ann M. Johnson
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 16 day of April 2013.


Thomas G. Stovall, Director
Administrative Procedures Division