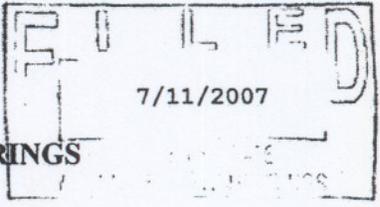


07-017601



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

_____, by and through his parents,)
_____. and _____,)
Plaintiffs,)
v.)
FULTON COUNTY SCHOOL)
DISTRICT,)
Defendant.)

Administrative Action No:
OSAH-DOE-CPEXP-0711129-60-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, for Plaintiff.
Christy E. Calbos, for Defendant.
GATTO, Judge

I. INTRODUCTION

This matter came before the Court pursuant to a complaint filed by Plaintiff _____ and his parents under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.* (main ed. and Supp. 2005), and its associated federal regulations, 34 C.F.R. Part 300 (2006),¹ and Georgia regulations, Ga. Comp. R. & Regs. r. at Chapter 160-4-7 (2007),² alleging that the District erroneously refused to consider _____'s Oppositional Defiant Disorder ("ODD") diagnosis in a manifestation determination. _____ is seeking an order finding that the District wrongfully failed and refused to consider all of his disabilities, parent provided information, and his prior psychological evaluation in the manifestation determination review meeting; that the District be permanently enjoined from failing to consider all of his disabilities, parent provided

¹ Citations to the federal regulations are to the 2006 federal regulations implementing IDEA (2004), which became effective on October 13, 2006.
² Citations to the Georgia regulations ("GaDOE Rules") are to the 2007 state regulations implementing IDEA (2004), which became effective on July 1, 2007.

information, the potential harm versus the potential benefit of an alternative placement, and prior psychological evaluations in any and all manifestation determination review meetings; and that the District be required to provide the educational programming denied to him while he was at the alternative school.³ For the reasons indicated below, this Court agrees with ██████ that the District erred when it refused to consider his ODD diagnosis in the manifestation determination review.

II. FINDINGS OF FACT

On May 12, 2005, ██████ was found to be eligible under the IDEA as a child with "Other Health Impairment" ("OHI"), with deficits in vitality and alertness resulting in his educational performance being significantly affected in the area of pre-academic/academic functioning and social/emotional development. (Trial Tr. 98, 106-111, June 7, 2007; J. Ex. 34, 35.)⁴ An IEP was prepared for ██████ indicating that he had been diagnosed with Attention Deficit Disorder ("ADD") and ODD, listing his primary exceptionality as OHI and recommending services for "OHI/Emotional/Behavioral Disorder Primary."⁵ (J. Ex. 36 at 206, 207.)

The District psychologist reported at the eligibility meeting that there are still signs that ██████ may have depression and that the medication had not delineated the anger that he has. (J. Ex. 35 at 194.) ██████'s IEP also indicated that his behavior was considered as a "special factor" since it impeded his learning or that of others and that his main area of concern was his

³ Although ██████ also challenged the District's alternative placement, the parties subsequently, reached an agreement as to an alternative placement. Further, the only relief available under IDEA to remedy an erroneous manifestation determination would be to require the District to either conduct a functional behavioral assessment, review and modify one that already exists, as necessary, or return the child to the placement from which the child was removed, unless the parent and the District agree to a change of placement as part of the modification of the behavioral intervention plan. 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f); GaDOE Rule 160-4-7-.10(4).

⁴ The parties stipulated to the admission of Defendant's Exhibits as the parties' Joint Exhibits "J. Ex."

⁵ ODD is a psychiatric disorder involving refusals to comply with adult requests or rules. Students suffering from this disorder are often angry, have temper tantrums, blame others for their mistakes, are not at fault, and have a lot of rage and anger. (Tr. at 20-21.) The aggression seen is usually verbal, including threats to others, telling others they are hated, threatening to kill others, coupled with a lot of cursing. (*Id.* at 21.) For ██████, his ODD impacts his education more than his ADD. (*Id.* at 22.) ██████'s ODD history was noted in kindergarten when he threatened to kill or hurt people at school and home. (*Id.* at 22, 33.) ██████'s ODD currently presents by making threats to teachers, peers, and parents, and demonstrate rage at times. (*Id.* at 23.) Making threats is typical of children with ODD, which is one reason ██████ is diagnosed with ODD. (*Id.*) It is not typical for a child with ODD to move from threatening into actual attempts to carry out the threats. (*Id.*) ██████ does not carry out his threats. (*Id.* at 24.)

oppositional behavioral. (*Id.* at 207, 208.) Dr. LeNora Ashley, [REDACTED]'s child psychiatrist, indicated that his medical diagnoses impeded his academic performance due to his weak ability to sustain attention, weak organizational skills, increased distractibility, stubbornness and refusal to participate in class, verbally or academically. (J. Ex. 34 at 180; *see also* J. Ex. 35 at 198.) Nonetheless, when the District evaluated [REDACTED] on April 18, 2005, it reported that [REDACTED]'s intellectual functioning appears to be in the High range, as evidenced by his GCA IQ score of 128, which the District reported to be in the 97th percentile.⁶ (J. Ex. 34 at 185-186.) As part of the 2005 District evaluation, [REDACTED]'s teacher and parent were provided behavior-rating scales to complete, and the District psychologist reported that both parent and teacher rated [REDACTED] to have clinically significant issues with depression, conduct problems, atypicality, and withdrawal. (*Id.* at 189.) [REDACTED]'s teacher and parents reported that he would state, "I want to kill myself," "I want to die," and "I wish I were dead." (*Id.*) In the District's 2005 psychoeducational report, the school psychologist stated that on the Screening Procedure for Emotional Disturbance test, [REDACTED]'s drawings indicated a T score of 79, which fell at the 99.8th percentile, strongly indicating the presence of emotional disturbance and the need for further evaluation. (J. Ex. 34 at 190.) On the Children's Self-Report and Projective Inventory test, [REDACTED] stated, "This is my teacher - homework, homework, homework. Sometimes I want to strangle her. No, it's not a frustration feeling. I just really want to strangle her." (*Id.*)

On August 11, 2005, an IEP meeting was held and [REDACTED]'s IEP was amended. (J. Ex. 38 at 226.) This IEP listed [REDACTED]'s primary exceptionality as OHI and recommended services for "Emotional/ Behavioral Disorder Primary." The IEP also indicated that [REDACTED]'s behavior affected his ability and the ability of other students in the classroom to receive educational benefit even after he was provided supplemental aids and services. (*Id.*) The diagnoses of ADD and ODD were again listed on [REDACTED]'s IEP, as were his medications of Concerta and Paxil, and it again stated that [REDACTED]'s main area of concern was his ODD. (*Id.* at 227, 228.)⁷

⁶ OHI is not a program itself; therefore, it has to be served through another special education category. Since [REDACTED] has very high cognitive functioning, academic test scores, and academic performance, he is not served through LD because he doesn't have any learning disabilities. Instead, he is served through an EBD program because although [REDACTED] did not have the "emotional" component, he exhibits some behaviors -- for example, the behavior of decreased concentration and attention -- that would affect how he learns in the classroom, i.e., the "behavior" component, which needed to be addressed in the classroom. (Tr. at 113.)

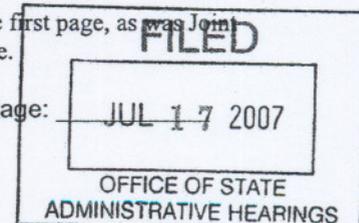
⁷ A second version of the IEP prepared on the same day recommended "Other Health Impaired serviced through Emotional/Behavioral Disorder Primary" in Joint Exhibit 39 at 236. (Emphasis added.) It is unclear which version

On March 22, 2006, an IEP meeting was held and an IEP was prepared listing [REDACTED]'s primary exceptionality as OHI and recommending services for "Other Health Impairment through /Emotional/Behavioral Disorder Primary." (J. Ex. 41 at 253.) Although [REDACTED] had shown improvement from his IEP and BIP as well as a reward program his case manager had instituted, his work completion issues were still a problem, and his behavior still negatively impacted his school performance. (*Id.* at 255, 259.) In September 2006, a behavioral intervention plan was prepared for [REDACTED]'s noncompliance, stating he would refuse to follow directions, become angry, shut down, clench his fists, grit his teeth, or pull his shirt or jacket over his head. (J. Ex. 40 at 247-248.)

On October 20, 2006, [REDACTED]'s teacher and case manager reported that [REDACTED] was assigned to write a five to seven sentence paragraph about a specific topic and [REDACTED] refused and tried to pull out a book, which the teacher told him to put away. (J. Ex. 46 at 273.) Afterwards, it was reported that [REDACTED] verbally threatened to kill the teacher. (*Id.*; *see also* J. Ex. 47 at 274.) In his written statement about the incident, [REDACTED] confirmed that he had said he was going to kill the teacher, and supplied multiple different graphic details, adding "I could laugh like a maniac till I couldn't breath after killing him." (*Id.*) The two boys who allegedly heard what [REDACTED] said reported only that he wanted the teacher to die. (J. Ex. 48; J. Ex. 50.) One week prior to this incident, [REDACTED] threatened to kill himself at school. (Tr. 33.) [REDACTED] has a history of threatening him and others, and threatened to kill his teacher at the private school, his father, and his sister. (*Id.* at 33-36.) [REDACTED] also has a history of making up stories that are not true, coming up with creative stories any time he is forced to do any type of work, and embellishing. (*Id.* at 36-37, 42.)

[REDACTED] subsequently received a disciplinary referral charging him with obscene, abusive or inappropriate language and verbal threats or abusive language toward or in the presence of an employee or school official. (J. Ex. 52 at 282.) On October 23, 2006, [REDACTED] met with Principal Schroerlucke and admitted to talking about killing the teacher, "through gritted teeth, still very angry." (J. Ex. 53 at 283.) For his statements, [REDACTED] was initially suspended in school for ten days, prohibited from participating in school-sponsored activities, and prohibited from being on

was prepared last; however, Joint Exhibit 39 was not file stamped as "Received" on the first page, as was Joint Exhibit 38. Thus, the Court concludes that Joint Exhibit 38 was the official IEP in place.



the school campus. (J. Ex. 60 at 300.) On October 26, 2006, [REDACTED]'s parents waived a tribunal hearing and admitted his guilt. (J. Ex. 61.)

On November 11, 2006, a manifestation determination review was held. (J. Ex. 66 at 308.) Significantly, at the manifestation determination review, school staff only considered whether [REDACTED]'s "diagnosis of ADD impaired his ability to understand the impact of his behavior", even though the District psychologist stated that during a manifestation determination review, all diagnoses should be considered. (J. Ex. 66 at 311; Tr. at 131, 132.) [REDACTED]'s parents were not allowed to discuss [REDACTED]'s ODD or present the information they had brought regarding ODD. (Tr. at 47.) After discussing [REDACTED]'s ADD, his parents dissented from a determination that [REDACTED]'s acts were not a manifestation of his disability and that he was to be placed in an alternative school called "[REDACTED]." (Tr. at 51-52.) [REDACTED]'s successful teacher and case manager from the year before stated she did not believe [REDACTED]. "understood the magnitude of the consequences of his behavior" and abstained from voting "because of her concerns regarding possible retribution." (J. Ex. 66 at 311-312.) The District did not discuss [REDACTED]'s past history of threats or the prior psychological evaluations. (Tr. at 52.) There was no one present who was an expert in ODD. (*Id.*)

III. CONCLUSIONS OF LAW

One protection afforded by the IDEA is that a student with a disability may not be punished without receiving the benefit of a "manifestation determination." 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e); GaDOE Rule 160-4-7-.10(3)(a).¹ At the manifestation determination meeting, the parent and relevant educators review the student's file and behavior to evaluate whether the conduct at issue "was caused by, or had a direct and substantial relationship to, the child's disability" or "was the direct result of the local educational agency's failure to implement" an individual education plan for the student. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1); GaDOE Rule 160-4-7-.10(3)(a). If the student's behavior is deemed to have been a manifestation of his disability, the student will be restored to his regular educational

program.⁸ 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2); GaDOE Rule 160-4-7-.10(4)(a).

A child with a disability means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in the IDEA as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.⁹ 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1), GaDOE Rule 160-4-7-.05(1).

According to the IDEA regulations, OHI means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

⁸However, 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 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, 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 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. 20 U.S.C. § 1415 (k) (1)(G); 34 C.F.R. § 300.530(g); GaDOE Rule 160-4-7-.10(5)(a).

⁹The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(B); 34 C.F.R. § 300.8(b). Georgia has opted to include children with significant developmental delay in its definition of a "child with a disability". See GaDOE Rule 160-4-7-.05(1)(h).

34 C.F.R. § 300.8(C)(9); GaDOE Rule 160-4-7-.05, Appendix G. In some cases, heightened awareness to environmental stimulus results in difficulties with starting, staying on and completing tasks; making transitions between tasks; interacting with others; following directions; producing work consistently; and, organizing multi-step tasks. GaDOE Rule 160-4-7-.05, Appendix G. However, a child must not be determined to be a child with OHI if the determinant factor for that determination is emotional disturbances. *Id.*

In the present case, Plaintiff was determined to be eligible for special education services under OHI because of his ADD medical diagnosis and the District properly determined that [REDACTED]'s conduct at issue was not caused by, or had a direct and substantial relationship to, his ADD. Nonetheless, [REDACTED] argues that the District erred in its failure to consider his medical diagnosis of ODD in the manifestation determination. According to the IDEA regulations, 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.

34 C.F.R. § 300.8(C)(4)(i); GaDOE Rule 160-4-7-.05, Appendix D.¹⁰

¹⁰ Georgia's regulation provides that a child with EBD is a child who exhibits one or more of these emotionally based characteristics of sufficient duration, frequency and intensity that interferes significantly with educational performance to the degree that provision of special educational service is necessary. GaDOE Rule 160-4-7-.05, Appendix D. Emotional disturbance also includes schizophrenia. However, the term does not apply to children who

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EBD is an emotional disorder characterized by excesses, deficits or disturbances of behavior. GaDOE Rule 160-4-7-.05, Appendix D. However, a child whose values and/or behavior are in conflict with the school, home or community or who has been adjudicated through the courts or other involvement with correctional agencies is neither automatically eligible for nor excluded from EBD placement. *Id.* Classroom behavior problems and social problems, e.g., delinquency and drug abuse, or a diagnosis of conduct disorder, do not automatically fulfill the requirements for eligibility for placement. *Id.*

Therefore, the regulatory framework under IDEA delineates no fewer than four specific conditions a student must satisfy in order to qualify for special education services for being seriously emotionally disturbed: the student must demonstrate that he has (1) exhibited one of the five listed symptoms, (2) "over a long period of time," and (3) "to a marked degree," and (4) that this condition adversely affects his educational performance. Finally, the definition excludes students whose behavior is attributable to social maladjustment, unless they also suffer an independent serious emotional disturbance. See *Brendan K. v. Easton Area Sch. Dist.*, 2007 U.S. Dist. LEXIS 27846 [*32] (E.D. Pa. Apr. 16, 2007).

Courts and special education authorities have routinely declined to equate conduct disorders or social maladjustment with EBD. See *Brendan K. v. Easton Area Sch. Dist.*, 2007 U.S. Dist. LEXIS 27846 [*32] (E.D. Pa. Apr. 16, 2007); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 664 (4th Cir. 1998); *A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991); *Doe v. Board of Educ.*, 753 F. Supp. 65, 71 n. 8 (D. Conn. 1990). The fact "[t]hat a child is socially maladjusted is not by itself conclusive evidence that he or she is

seriously emotionally disturbed." *A.E.*, 936 F.2d at 476. Indeed, the regulatory framework under IDEA carves out "socially maladjusted" behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a "bad conduct" definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education. *Springer*, 134 F.3d at 664.

Here, however, [REDACTED] was not determined to be eligible under the EBD eligibility category when he was evaluated in 2005 and his parents have not appealed that determination. The question presented then is since he was not determined to be eligible under the EBD eligibility category, whether ODD was nonetheless required to be considered as part of the manifestation determination. The Court concludes that it was in this particular case. The local educational agency, the parent, and relevant members of the IEP Team are required to 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 if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability.¹¹ 20 U.S.C. § 1415(k)(1)(E)(i) 34 C.F.R. § 300.530(e)(1); GaDOE Rule 160-4-7-.10(3)(a).

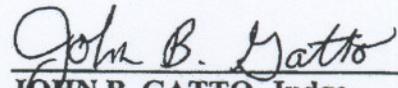
¹¹ They may consider any unique circumstances on a case-by-case basis when determining whether a change in placement is appropriate for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 530(a); GaDOE Rule 160-4-7-.10(2)(a).

Although [REDACTED] was not determined to be eligible under the EBD eligibility category, his May 12, 2005 IEP listed his primary exceptionality as OHI and recommended services for "OHI/Emotional/Behavioral Disorder Primary." The IEP reported that [REDACTED]'s main area of concern was his oppositional behavior. It also stated that [REDACTED]'s behavior impeded his learning or that of others. Thus, the Court concludes that [REDACTED]'s conduct was directly related to his ODD, which in turn may have "had a direct and substantial relationship" to his disability. Therefore, the District inappropriately excluded this relevant information from consideration at [REDACTED]'s manifestation review. The Court concludes that the appropriate remedy in this instance is to require that a new manifestation determination be held. Accordingly,

IV. CONCLUSION

IT IS HEREBY ORDERED THAT a new manifestation determination shall be held where the District shall review all relevant information in [REDACTED]'s file, including but not limited to his IEP, any teacher observations, any relevant information provided by the parents, [REDACTED]'s prior psychological evaluations, and since he is being served through an EBD program, consideration of whether [REDACTED]'s conduct resulting from his ODD had a direct and substantial relationship to his OHI disability.

SO ORDERED THIS 11th day of July, 2007.



JOHN B. GATTO, Judge