COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Student v.
Boston Public Schools &
Ivy Street School

BSEA# 1808494

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

This matter comes to the BSEA as Parent's Expedited Hearing Request[1] received on March 29, 2018 seeking a BSEA Order to reverse and vacate a manifestation determination entered on April 27, 2016 regarding a disciplinary incident occurring earlier that month. If she prevails, Parent seeks amendment of Student's record.

The Hearing was held on April 13, 2018, at the offices DALA/ BSEA, One Congress St., Boston, Massachusetts, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Parent/Legal Guardian[2]	*In absentia*
Andrew Hofffman, Esq.	Attorney for Parent/Student
Charles Ortolani	LCSW, Home For Little Wanderers
Anthony Cichello, Esq.	Attorney for Ivy Street School
Hannah Rogers	Education Director, Ivy Street School
Alainna Milkey	Teacher, Ivy Street School
Ashley Constantine	MSW, LICSW, Clinical Director, Ivy Street School
Carolyn Weisman, Esq.	Attorney for Boston Public Schools
Jennifer Sweeney	Boston Public Schools
Christy Camara,	Special Education Coordinator, Boston Public Schools

The official record of the hearing consists of documents submitted by Parent marked as exhibits PE-1 and PE-2, Boston Public Schools (Boston) documents marked as exhibits SE-1

1 Consistent with IDEA, Expedited Hearings must be held within 20 school days of the date the Hearing Request is received and the decision must be issued within 10 school days after the Hearing. See 20 USC §1415 (k)(4)(B). I note that April 16 through April 20, 2018 was school vacation week in Massachusetts.

2 Parent was not present at the Hearing due to Student having to undergo an urgent medical procedure. She however, requested through her attorney that the matter proceed in her absence.

through SE-12, and documents submitted by Ivy Street School (Ivy) marked as exhibits IE-1 through IE-16; recorded oral testimony, and oral closing arguments. The record closed on April 13, 2018 at the conclusion of the Hearing.

ISSUE FOR HEARING:

1. Whether the manifestation determination entered on April 27, 2016, was incorrect in finding that the incident for which Student was disciplined was not a manifestation of Student's disabilities.

POSITIONS OF THE PARTIES:

Student's Position:

Parent asserts that the incident for which Student was disciplined in April of 2016 was a manifestation of his disability. She asserts that Student presents with significant disabilities and disagrees with the Team's determination that the conduct was not caused by, nor did it have a direct and substantial relationship to Student's disability. Parent simply wants Student's disciplinary record to be amended to reflect that the conduct was a manifestation of Student's disability. She does not take a position as to Ivy's implementation of the IEP.

Parent seeks a BSEA Order to reverse and vacate the April 27, 2016 findings of the manifestation determination meeting.

Boston's Position:

Boston asserts that it did not procedurally or substantively violate any provision of state or federal special education laws in handling Student's manifestation determination review and therefore, the manifestation determination should not be vacated or reversed. Thus, Student's record need not be amended.

Boston asserted that Student had failed to state a claim upon which relief can be granted, or a prayer for relief consistent with state and federal law. Boston objected to the portions of the hearing which went beyond the statute of limitations and noted that accepted IEPs are not actionable after expiration.

Ivy's Position:

Ivy Street adopted Boston's position, denied that it was a proper party and challenged the BSEA's jurisdiction to order any relief against it. Like Boston, it denied that it violated any procedural or substantive provision of state or federal law.

FINDINGS OF FACT:

1. Student, is a twenty-one-year-old resident of Boston who has been diagnosed with Attention Deficit Hyperactivity Disorder, Combined Type, Mood Disorder, NOS,[3] Oppositional Defiant Disorder, and a nonverbal learning disability (PE-1; SE-1; IE-1). Over the years, he has had several psychiatric hospitalizations as a result of physically assaultive and self-injurious behaviors and auditory hallucinations. He takes psychotropic medications. Student's December 2015 IEP notes that he was taking Clozapine, 50 mg once per day, Lamictal, 100 mg once a day and Topamax 200 mg once a day (SE-1; IE-1). According to Mr. Ortolani, clinical social worker/clinical supervisor at the Home for Little Wanderers, Student takes the Clozapine (also known as Clozaril) to address psychotic symptoms. A few years back Student experienced hallucinations/ hearing voices although at present he appears to be properly medicated and presents no psychotic symptoms (Ortolani).

2. Student's cognitive abilities fall in the significantly to moderately below average range (PE-1). Over the years academic gains have been slow and he has been diagnosed with Intellectual Impairment and a Communication Disability (SE-3).

3. Student's projective profile has been "significant for interpersonal problems, negative mood, aggressiveness, assaultiveness, auditory hallucinations and paranoia" (PE-1). He has a history of violent outbursts and has required physical restraints (SE-3).

4. Parent is Student's legal guardian (Hearing Request- *Decree and Oder of Appointment of Guardian For an Incapacitated Person*).

5. Student is eligible to receive special education services until his 22nd birthday as a result of an Emotional impairment, an Intellectual and a Health disability (PE-1; IE-1).

6. On October 21, 2014, Boston conducted a psychological evaluation of Student as part of his three year reevaluation (PE-1). The evaluation was performed by Agnes A. Martin, PhD, NCSP (*Id*.).

7. Dr. Martin administered the Adaptive Behavior Assessment System- Second Edition (ABAS-II), Behavior Assessment System for Children- Second Edition (BASC-2) Teacher Form- Adolescent, Beck Depression Inventory- Second Edition (BDI-II), Draw a Person task, Informal Written Expression Task, Wechsler Adult Intelligent Scale- Fourth Edition (WAIS-IV), Wechsler Individual Achievement Test- Third Edition (WIAT-III) (Selected Subtests). She also consulted with staff at the Seaport Academy where Student was then placed and reviewed pertinent school records (PE-1).

8. During the psychological evaluation Student had difficulty processing complex and multi-step verbal tasks, he struggled to express his thoughts and knowledge orally, and he

[3] See generally IE-14 and IE-15.

forgot newly learned information. He benefitted from prompting, frequent praise, repetition and simplified instructions when processing visual information (PE-1).

9. The report of the psychological evaluation notes that Student's scores in adaptive behavior skills as per the ABAS-II fell mostly in the extremely low, borderline or low average classifications. Teachers placed him in the "at risk" range for hyperactivity, aggression, conduct problems, anxiety, attentional problems, atypicality and for his social skills, leadership, study skills and functional communication. They rated him within the Clinically Significant range for aggression, learning problems and adaptability, and rated him within the average range for depression, somatization and withdrawal (PE-1).

10. Overall, Student's academic performance and cognitive functioning fell within the Extremely Low ranges. Dr. Martin noted a discrepancy between Student's cognitive and functioning abilities. Social skills were found to be an area of strength although his ABAS-II results (Borderline range) indicated that Student's adaptive skills were developing at a slower rate. In the BRIEF demonstrated deficits with executive functioning. Dr. Martin noted significant concerns in Student's

> ability to inhibit impulsive responses, adjust to changes in routine or task demands, modulate emotions, initiate problem solving or activity, sustain working memory, plan and organize problem solving approaches, organize his environment and materials and monitor his own behavior's (PE-1).

11. Dr. Martin further noted that Student was likely to be withdrawn and that he possessed limited social skills to create and manage meaningful relationships with peers. Dr. Martin made recommendations to address Student's academic, programmatic and social-emotional needs (PE-1).

12. Boston initiated Student's out-of-district day placement at Ivy on or about September 8, 2015 (SE-3). Ivy is a therapeutic day and residential school for student between the ages of 13 and 22 who present with cognitive and behavioral health deficits (IE-12).

13. Student's Team convened on December 11, 2015, Boston offered to continue support of Student's out-of-district, day placement at Ivy under an IEP covering the period from December 11, 2015 through December 10, 2016 (SE-1; IE-1). Parent accepted the IEP on December 23, 2015 and the placement on January 16, 2016 (*Id*.).

14. The Present Levels of Educational Performance in this IEP identifies social emotional and behavior as Student's areas of need and contained social, reading, mathematics and transition goals. This IEP also offered Student individual and group counseling services twice per week for sixty minutes with access to the counselor throughout the day for "support in processing incidents and solving problems throughout the day as needed" (SE-1; IE-1). The IEP's Social goal notes under current performance level:

> [Student] displays many successful anger management techniques in school. He is able to communicate when someone is bothering him on a frequent basis, and ask for staff support occasionally. [Student] has occasional difficulty communicating with staff when he becomes very angry, and will sit alone quietly rather than check in with staff (SE-1; IE-1).

15. The Present Levels of Educational Performance section of the IEP notes that Student's

> …social and emotional needs hinder his ability to progress across the curriculum. He requires additional time to process information and struggles with comprehension of text, recall, decoding and written tasks. He struggles with independently asking for assistance and will lose focus, requiring frequent prompts and frequent one-to-one support to remain on task. All materials require modification and differentiation (SE-1; IE-1).

Moreover, this IEP further states that in order to make effective progress Student requires

> Small structured therapeutic program with problem-solving focus and opportunities to practice verbalizing concerns and solving problems with one-to-one support as needed, process incidents one-to-one throughout the day, frequent feedback, daily behavioral check-in and support for positive behavior (SE-1; IE-1).

16. The Student Strengths and Key Evaluation Results Summary notes Student's slow processing abilities and notes that he can become frustrated or overwhelmed and when this happens he withdraws rather than ask for assistance. It further states that when upset or annoyed, Student benefits from a few minutes of playing basketball at the gym, or listening to music (SE-1; IE-1).

17. The Transition Planning Form (TPF) in this IEP notes his diagnoses stating that Student's emotional challenges impact him socially, academically and behaviorally. He struggles to verbalize his emotional state and can display verbally and physically aggressive behaviors (SE-1; IE-1).

18. Ashley Constantine, (Ivy's Clinical Director), began working at Ivy in or about February of 2016. In the two months during which she and Student coincided at Ivy she did not offer him direct services, nor did she observe Student during individual or group counseling. Ms. Constantine supervised Hannah Fish's supervisor. Hannah Fish was Student's clinician at Ivy (Constantine).

19. Student's Self-Advocacy goal progress report for the period through March 1, 2016 notes that when unsure of class material or frustrated, Student tends to withdraw, watching a video or listening to music on his phone as a way to cope with his emotions

(IE-2). He will accept help from staff if offered three out of four times, but does not ask for help when he needs it. When feeling frustrated or angry regarding issues with peers or social/emotional issues, he tends to remain silent which has led to instances of serious explosive behaviors. While still occurring, serious incidents of explosive behavior have diminished. A previous progress report dated July 2015 notes that after a cooling-off period, if asked, Student was able to verbalize his emotional states half the time. He, however, still lacked the ability/skill set to propose alternative ways in which to resolve conflict during collaboration with staff (IE-2). Similarly, his Social goal progress report for the same period notes that Student had a tendency to keep things that bothered him inside until his emotions become overwhelming. This inability to effectively communicate what bothers him makes it difficult for Student to resolve conflicts when they arise. Improvement had been seen in this area and in his ability to remove himself from the room when he became angry or frustrated by a situation. Student's participation in the therapeutic process had also increased. It was expected that Student would meet his goals by the end of the IEP period (IE-2).

20. Hannah Fish, BSW, was Student's clinician at Ivy. On March 28, 2016, she completed a psychosocial assessment of Student (SE-3; IE-3). In it she indicates that Student was participating in individual and group therapy to discuss self-management skills and learn new coping skills to address violent outbursts. She noted that through therapeutic groups Student was improving his social functioning and learning more about his challenges. According to Ms. Fish, Student described his issues as finding it difficult to use his coping skills when he was frustrated or emotionally overwhelmed, becoming increasingly angry according to his perception the severity of the situation. These anger episodes were usually triggered by interactions with peers whether in person or through social media. Ms. Fish noted that Student was excusing himself from class approximately twice per week because of feeling emotionally overwhelmed so he could use his self-management skills. Occasionally, Student was noted to engage in perseverative or negative interactions with peers whether at Ivy or in past placement (SE-3; IE-3).

21. According to Ms. Fish, by March 2016, Student was learning to ask to take space when feeling overwhelmed and was working to improve his self-advocacy skills (SE-3; IE-3). She noted that his

> …risk factors include a lack of self-awareness, which [is] attribute[d] to his difficulty identifying his feelings and noticing the thoughts and physical sensations that occur as he begins to get agitated. This is something he has practiced in previous placements and has been able to improve, resulting in less frequent outbursts at school and home. With regard to [Student's] anger concerns, though [Student] is able to proactively remove himself from situations where he feels emotionally deregulated, it is difficult for him to communicate when something is bothering him or to resolve conflicts when they arise (SE-3; IE-3).

22. At approximately 2:35 p.m. on April 11, 2016, Student was involved in a behavioral incident for which he was later disciplined (SE-4; IE-5). According to Ms. Camara, the day before, Student had been bullied by a couple of students. On the day of the incident, April 11, 2016, Student had carried a knife to school (Camara).

23. Ivy's incident report for the events of April 11, 2016 report elopement and physical threat of violence as the problem behaviors. It notes that the immediate staff response was to "block", 911 was called and Student was transported to an area hospital via emergency transport. It further notes that peers were involved in the incident and that no injury was reported (SE-4; IE-5). The incident report notes that the staff allowed Student "space in a quiet place until he was ready to return to the program" but this fact is not corroborated by the testimonial evidence. The report's incident narrative states that

> While playing basketball in the gym with peers, [Student] tripped over his peer's foot. He became very angry and left the gym stating he was going back to class. He then started coming back toward the gym stating he was a "Crip" and threatening to hurt his peer. Staff blocked [Student] from entering the gym and offered to check in with him. [Student] then went out to the front parking again saying he was in a gang and threatening to kill his peer and anyone around him. He then pulled a 4 inch pocket knife from his bag and opened it in front of staff. Staff immediately stepped aside and went back into the building as [Student] left the property. Staff members then called the police and followed him from a distance until police arrived. The police and staff made the decision to transport [Student] to the hospital rather than arresting him (SE-4; IE-5).

24. Student's perception of the situation was that two students were supposed to be playing basketball but instead were throwing the ball against a wall trying to hit other students in the head. The two students deliberately tripped Student twice and the ball hit him in the nose. Student became upset and stormed out of the gym and then walked out of the school building. He was followed and stopped in the parking area by Ivy staff who tried to talk him down and return to the school building. Student, who was very agitated, told them to stay away, pulled out a knife and brandished it at Ivy staff. He left the school grounds, was intercepted by the police and brought to the Brigham and Women's Hospital (PE-2; Milkey). Alainna Milkey and Hannah Rogers witnessed Student leaving the building and later what had occurred in the parking, as they both responded to a call over the walkie-talkie warning staff that Student was trying to elope (Milkey, Rogers).

25. According to the Police Report, Student was compliant with police when he was intercepted and the knife was retrieved from him (SE-5; IE-6). Student stated to the police that he had been agitated by another student who had claimed to be a "Crip" (a large street gang). Student stated that because of this, he had brandished the knife to protect himself (SE-5; IE-6).

26. The Brigham and Women's Hospital report notes Student's statement that earlier in the day he had felt agitated but by the time of his psychiatric interview he was calm and non-combative (SE-11). Student explained that he was playing basketball when two other students, who were throwing the basketball against the wall attempting to strike other students in the head, hit Student in the nose and also intentionally tripped him twice. Student stated that the other students picked on him because they were in different gangs (Crips and Bloods). Student reported that for months he had tried to stay calm when the incidents happened, but overtime he had become angrier and finally told the other student to meet him outside. Once outside, Student brandished the knife and threatened to use it if the other student continued to harass him, though he denied any intention to actually use the knife to harm others. Student further reported that the other students were in a gang and that they had been picking on Student for months (SE-11). Student further stated that he carried a knife because he lived in a dangerous area,

> …he has felt bullied by this other student – sic – on several occasions including today, and the other student was "messing" with him so he told him to come outside, at which point he pulled the knife and made a threatening statement to the other student. Was picked up by BPD soon after and brought to ED. Denies that he ever intended to use the knife. Denies any past hx of violence beyond hitting with fists, which reportedly has not occurred in many years. Denies current or recent psychiatric symptoms –no mood changes, psychotic symptoms, racing thoughts, adamantly denies SI/HI. Feels remorse that he pulled the knife and realizes "I am going to get yelled at by my mom, and everyone will know" and states he does not plan to bring a knife to school any longer. Denies access to a gun or thought to harm anyone further including the other students with whom he does not get along at school. Pt denies not feel he needs psych hospitalization or changed in med management, and reports that he has been stable on his current regimen for years. Is able to articulate coping mechanisms for not acting on his anger and is able to walk away from conflict, which he did today (SE-11).

27. Ivy St. Hospitalization incident report dated April 11, 2016, notes that Student went home with his mother, that he was suspended and that Ivy would seek emergency termination (IE-5). The following day, Ivy informed Parent of the emergency suspension and up-coming disciplinary hearing (IE-7). Attached to the letter was a waiver of Right to Disciplinary Hearing which Parent did not sign (*Id.*).

28. On April 14, 2016, Laura Miceli, Ivy's Education Director, wrote to Christy Camara (Boston's Out-of-District Coordinator/ SESS Coordinator) notifying her that Ivy was seeking Student's emergency termination (SE-7; IE-8). Ms. Miceli noted that a suspension hearing had been planned for April 13 and postponed to April 14, 2016 at Parent's request. Ivy also notified Ms. Camara that the manifestation determination hearing would occur later in April 2016 (SE-7; IE-8; Camara). Following a suspension

hearing on April 14, 2016 Student was given a 10 day suspension (effective April 13 through April 27, 2017) because of having brought a knife to school (SE-8; IE-9; IE-10).

29. On April 14, 2016, Boston issued an invitation to a manifestation determination review on April 27, 2016[4] at 11:30 a.m. (SE-6; IE-11; Camara). Those invited to attend were: Student, Parent, Hannah Fish, Hannah Rogers (Ivy's Curriculum Specialist/Coordinator) and Christy Camara (Boston's Out-of-District Coordinator/ SESS Coordinator) (SE-6; IE-11).

30. On or about April 15, 2016, Boston began sending referral packets to alternative approved out-of-district placements (SE-10).

31. A letter dated April 21, 2016, authored by Ashley Constantine and Hannah Fish describe the April 11, 2016 incident and notes in pertinent part that

> It is possible that [Student's] experience of symptoms of Oppositional Defiant Disorder contributed to his difficulty managing his emotions appropriately and safely during this incident. However, it is unlikely that [Student's] decision to bring a weapon to school while knowing it is against school policy coupled with his expression of gang-related threats and involvement are the result of his current diagnoses (IE-12).

32. A manifestation determination review (MDR) meeting was convened at Ivy on April 27, 2016 (SE-2). Present at the meeting were: Laura Miceli (Ivy's Educational Director), Hannah Rogers, Ashley Constantine (Ivy's Clinical Director), Hannah Fish, Parent, Charlotte Spinkster (Urban Pride- Parent's advocate) and Christy Camara (SE-2; Camara).

33. At the MDR Student's IEP, a March 28, 2016 psychosocial assessment, medical information involving Student's diagnoses and medications, observations, the year's incident reports, and information provided by Parent and her advocate were reviewed (SE-2; Camara, Rogers). Dr. Martin's psychological evaluation of Student dated October 21, 2014, was not reviewed by the MDR Team (Camara). Similarly, Hannah Fish's psychosocial assessment was also not available for review at the MDR (Constantine). The only individual at the meeting providing direct services to Student was Hannah Fish, Student's counselor, who did not state her opinion when the participants were polled on whether the incident was a manifestation of Student's disability (Camara). Ms. Camara testified that she was aware that Student had outside therapies, participated in an afterschool program and held a part-time job, but was not sure that Student maintained a therapeutic relationship with Mr. Ortolani (Camara). At the meeting, Parent denied that Student had any gang involvement and according to Ms. Constantine, this did not play any role at the MDR (Constantine). By report, Ms. Constantine was aware that Student

4 Boston's calendar for the 2015-2016 school year shows that April school vacation was April 18 to April 22, 2016 (SE-12).

was struggling socially and academically at the time of the incident but she had no knowledge about Student's previous psychotic episodes or evaluative data other than what was discussed at the MDR. Ms. Constantine testified that she was just getting to know Student's case when the incident occurred (Constantine).

34. The April 2016 MDR Team entered a determination that the conduct for which Student was being disciplined lacked direct and substantial relationship to Student's disability on the basis that Student:

> Demonstrated the ability to follow class and school rules.
> Demonstrated adequate communication skills to acceptably express his or her needs.
> [Did not demonstrate] the specific misbehavior across multiple settings.
> [Did not demonstrate] the specific misbehavior over a specific period of time (SE-2).

Similarly, the Team concluded that the conduct was not the direct result of Ivy's/ Boston's failure to implement the IEP. Ms. Constantine opined that the incident was not a manifestation of Student's disability because he had chosen to bring the knife to school and brandish it at staff, Parent opined that it was a manifestation of Student's disability noting that Student possessed explosive potential and had worked with Ms. Fish and her supervisor on developing a safety plan which was then in place (SE-2; Camara; Constantine).

35. On May 5, 2016, Ivy St. wrote to Parent notifying her that Student would be discharged from its program due to the serious nature of Student's behavior. The discharge was effective retroactive to April 27, 2016 (IE-13).

36. Boston implemented home tutoring immediately and sent referral packets to out-of-district placements. Shortly thereafter, Student was accepted at Seaport Academy (Seaport) and Boston offered Student an out-of-district placement at Seaport. Parent accepted this placement on May 18, 2016 (SE-9).

37. On April 27, 2017, Student's former clinician, Charles Ortolani, LICSW, Clinical Supervisor at the Child and Family Counseling Center, The Home for Little Wanderers, wrote a letter noting his opinion that the incident involving Student bringing a knife to school and brandishing the knife was related to Student's "emotional, cognitive and developmental limitations" (PE-2). Dr. Ortolani commented on the results of Dr. Martin's psychological evaluation of 2014 which found Student to present difficulty processing complex and multi-step verbal tasks and struggling to orally express his thoughts and knowledge. He similarly remarked on the test report that Student struggled to "inhibit impulsive responses, adjust to changes in routine or task demands, modulate emotions and initiate problem solving" (PE-2).

38. Further relying on Parent's description of the incident, the police report and the Brigham and Women's Hospital Mr. Ortolani noted that Student was much younger developmentally than his age (19 at the time of the incident). He noted that in less predictable situations involving a perceived or real threat, or high level of stress, Student's "cognitive and executive functions overwhelm his ability to make more adaptive choices in the moment" (PE-2). At those times, Student was likely to act impulsively or engage in behavior that he had not thought through, nor would he have considered the consequences (PE-2). Mr. Ortolani found it likely that Student would then act childishly with impaired judgment.

39. Mr. Ortolani opined that Student brandishing the knife was a defensive reaction one by which he was trying to appear as a tough guy to stop others from harassing him. He further opined that this was not an aggressive or antisocial act. Rather, Student, whose IQ and ability to reason are quite impaired, was frightened and in the moment failed to consider how else to react. Mr. Ortolani noted that

> It is reasonable to think of the incident as resulting from emotional (developmental delays leading to reacting to things as a young child would) and cognitive impairments – both of which come into play when planning for his education. That the behavior is uncharacteristic of him does not preclude that it also reflects how he makes decisions and solves problems. And thinking and reasoning under stress is very difficult for someone like [Student] (PE-2).

40. Mr. Ortolani had known Student since 2013, when Student participated in an afterschool program run by DMH for students unable to attend other afterschool programs because of their profile. At the time, Dr. Ortolani saw Student for clinical services twice per month, but this decreased to once per month or so when Student attended Ivy because he was receiving his therapeutic interventions at Ivy where the staff could process incidents in the moment (Ortolani). He explained that Student had great difficulty reconstructing a sequence to retell what had happened to him (*Id.*).

41. Mr. Ortolani testified that when he first met Student, Student was having issues related to dysregulation, acting out, breaking objects, losing control and hitting walls. Because of his cognitive limitations it was difficult for him to explain in detail what he was experiencing which combined with his concrete thinking and difficulty explaining his feelings made counseling difficult. According to Mr. Ortolani, Student was able to describe the tools he had to use when he felt overwhelmed but he could not access them when under stress at which time he engaged in more impulsive behaviors. Mr. Ortolani noted that Student had been bullied in previous schools and that he had difficult interactions with peers and had a tendency to avoid peers out of school (Ortolani).

42. Mr. Ortolani testified that Student was now properly medicated but in the past Student had expressed psychotic symptoms involving hearing voices. Student's responses when overwhelmed was to talk about being tougher than he really was when afraid, threatened,

or when he perceived a danger even if none existed. According to Mr. Ortolani, Student had a tendency to misread cues and distort a situation. In this respect, he found it possible that Student may have believed the two Ivy students with whom he had problems to be gang members and once that thought entered his mind he could not get it out. The more stressed he was, the more impaired Student would have been in his assessment of the situation. Mr. Ortolani opined that Student lacked self-awareness and did not understand his disabilities well. He noted that Student went through the world confused and scared. Transitions were difficult for Student to manage because his thinking was rigid and inflexible. He further opined that at the time of the incidents in 2016, Student's intellectual limitations were more debilitating to his judgment than psychotic symptoms (Ortolani).

43. Alainna Milkey, Ashey Constantine and Hannah Rogers, all of whom testified at Hearing, only knew Student in passing, indirectly and had only had casual contact with him while he was at Ivy (Milkey, Rogers, Constantine).

44. Ms. Rogers testified that Ivy staff met after the incident to discuss the event. However, no one from Ivy met with Student to debrief with him (Rogers). According to Ms. Rogers, prior to the April 11, 2016 incident Student followed the school rules for the most part and only had engaged in a few incidents of classroom refusal (Rogers). Ms. Rogers opined that Student had brought a knife to school with intention to harm another student or a staff. In cross examination she conceded that she had never checked Student's backpack (which he brought to school daily) so she did not know whether Student regularly carried the knife for protection because he thought that his neighborhood was unsafe (Rogers).

CONCLUSIONS OF LAW:

The sole issue before me is whether the MDR reached the correct determination. The Parties do not dispute Student's termination from Ivy or anything else.

As the moving party, Parent carries the burden of persuasion pursuant to *Schaffer v. Weast,* 546 U.S. 49, 126.S.Ct.528 (2005), and must prove her case by a preponderance of the evidence.

I note that in rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Parent has met her evidentiary burden of persuasion that Student's behaviors involving elopement from school and brandishing of the knife on April 11, 2016, was a manifestation of his disability and as such, the MDR must be overturned and Student's record amended to reflect the same. My reasoning follows.

First, I address Boston's challenge that Parent's request falls outside the statute of limitations applicable to IDEA matters. 20 U.S.C. §1415(b)(6)(B) specifically provides that any party may file a Hearing Request

> Which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.

The two year timeline for requesting a Hearing can also be found at 20 U.S.C. §1415(f)(3)(C).[5] Massachusetts has adopted the federal two-years statute of limitations.[6] I note that the IDEA and Massachusetts also provide two exceptions to the statute of limitations neither of which is relevant here.

Parent's Hearing Request was received on April 6, 2018 and in it, Parent challenges the result of a MDR which occurred on April 26, 2016 from an incident occurring on April 11, 2016. Clearly, all of the occurrences that bring Parent to this forum fall squarely within the two years statute of limitations. As such, Boston's argument in this regard is without merit.

Second, Parent seeks to overturn the result of a MDR and wishes the Student's record to reflect that the incident leading to the disciplinary action was a manifestation of the Student's disability. These requests fall within the powers granted the BSEA through federal and state laws as discussed below.

The IDEA at 20 U.S.C. §1415(k)(3)(A) specifically allows the parent of a child with a disability who is being disciplined the right to appeal any decision regarding the manifestation determination or placement of a child. The federal statute further allows the school district to access the appeal process if it considers that keeping the student in the then current placement is likely to result in injury to the child or to others.[7]

Moreover, 20 U.S.C. §1415(k)(3)(B) grants the hearing officer the power to hear and make appropriate determinations in the context of cases involving the discipline regarding:

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5 "Timeline for Requesting Hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.] in such time as the State law allows". 20 U.S.C. §1415(f)(3)(C).

6 603 CMR 28.08(2) notes that "the requirements set forth in 603 CMR 28.00 are in addition to, or in some instances clarify or further elaborate, the special education rights and responsibilities set forth in state statute (M.G.L. c. 71B), federal statute (20 U.S.C. §1400 et seq. as amended), and federal regulations (34 CFR §300 et seq. as amended)." Additionally, 603 CMR 28.08(3)(a) provides that "A parent or a school district, except as provided in 603 CMR 28.08 (3)(c) and (d), may request and/ or a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities…".

7 "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 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 other, may request a hearing." 20 U.S.C. §1415(k)(3)(A).

(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.

It is therefore clear that once the MDR reached its determination, Parent could access the BSEA, the forum responsible to adjudicate these disputes in Massachusetts, to challenge the manifestation determination. Similarly, Boston and Ivy could have also requested a hearing if they considered that Student's then continued presence at Ivy would have been likely to result in harm to Student or others. In the instant case, only Parent appealed. In light of the aforementioned I find that Boston's assertion that Student has failed to state a claim upon which relief can be granted is not persuasive.

I next turn to Ivy's argument that it is not a proper party. In 2016, Ivy was the private school responsible for the implementation of Student's IEP. Student's attendance was funded by Boston. I note that none of the Parties offered evidence as to where Student's records are maintained although 603 CMR 28.09(10)[8] would suggest responsibility on the part of the private as well as the public schools.

Pursuant to Rule I.J. of the *Hearing Rules for Special Education Appeals* addressing joinder, participation of a party in a BSEA proceeding is necessary "where complete relief cannot be granted" in that party's absence, or, the party "has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence". Since, as explained later in this decision, Parent is entitled to the relief she is seeking, and since it is not clear where Student's records are maintained, I find that relief cannot be granted in Ivy's absence. As such, Ivy is found to be a necessary party in this proceeding.

Lastly, Ivy's assertion that the BSEA lacks jurisdiction over private schools is misplaced, as under certain circumstances private schools serving publicly funded individuals may fall under the jurisdiction of the BSEA consistent with federal IDEA legislation (cited *supra*) and 603 CMR 28.08(3)[9].

8 "Student Record. Approved special education scools shall keep current and complete files for each publicly funded enrolled student and shall manage such files consistent with 603 CMR 23.00: Student Records and M.G.L. c. 71, §34H. 603 CMR 28.09(10).

9 "**Bureau of Special Education Appeals: Jurisdiction**. In order to provide for the resolution of differences of opinion among school districts, private schools, parents, and state agencies…" 603 CMR 28.08(3).

Manifestation determination reviews are processes to be taken seriously and ones in which the federal statute charges districts with very specific requirements.

20 U.S.C. §1415(k)(1)(E) addressing manifestation determination charges school districts with the responsibility to convene a manifestation review within ten (10) school days of any decision to change a student with a disability's placement when there is a violation of the code of Student conduct. The record shows that the incident occurred on April 11, 2016. The following week was April school vacation in Massachusetts. The MDR was convened on April 27, 2016, within seven (7) days of the date on which Student's placement was altered (SE-6; SE-12).[10]

20 U.S.C. §1415(k)(1)(E)(i) and (ii) further require that

> (i) …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.[11]
>
> (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. (Emphasis supplied).

20 U.S.C. §1415(k)(1)(F) further requires that if the behavior was a manifestation of the student's disability the IEP Team must conduct a functional behavioral assessment and implement a behavioral intervention plan. 20 U.S.C. §1415(k)(1)(F)(i). If the IEP Team had previously developed a behavioral intervention plan for the student, the plan must be reviewed and modified as needed to address the problem behavior. 20 U.S.C. §1415(k)(1)(F)(ii). Excepting "special circumstances" (as were present in the instant case), the student must return to the placement from which he was removed unless the parent and the school district agree to a change in placement as part of a modification to the student's behavioral intervention plan. 20 U.S.C. §1415(k)(1)(F)(iiii).

10 The record is unclear as to whether Ivy fully complied with the emergency termination procedures set forth in 603 CMR 18.05.7 (c) or (d) and 603 CMR 28.09 (12), but this issue is not before me.

11 By all accounts, this section does not appear to be relevant here.

Federal law defines "special circumstances" 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…. 20 U.S.C. §1415(k)(1)(G)(i).

Once the decision to discipline the student is made, the IDEA requires the school district to notify the parent of the decision, and provide the parent with the procedural safeguards granted under this section of the IDEA, including the right to appeal before the BSEA. 20 U.S.C. §1415(k)(1)(G). With this guidance I turn to the facts in the case at bar.

While Boston convened the MDR Team within the ten school days, the record shows that Ivy had already determined to terminate Student *before* the manifestation determination review. In an email from Ms. Miceli to Ms. Camara dated April 15, Ms. Miceli informed Ms. Camara that at the suspension hearing Parent had been informed that Ivy sought an emergency termination of Student's enrollment, something also reflected on a letter issued by Ivy on April 14 (SE-7; SE-8). Given that Student was found in possession of a knife, he would have met the federal criteria for "special circumstances" under which Ivy/ Boston could have removed him to an alternative placement for up to 45 school days as discussed later in this Decision.

The record shows that Boston and Ivy failed to include relevant members of the IEP Team at the MDR. The record shows that the only Ivy staff who actually knew and had offered services to Student was Ms. Fish (SE-2; SE-3). By their own testimony, Ms. Miceli, Ms. Rogers and Ms. Constantine, only knew Student in passing, never worked with him or otherwise observed him within the context of his program. Ms. Constantine had only begun her employment at Ivy a couple of months prior to the April incident and while she supervised Ms. Fish's supervisor, her knowledge of Student was third-hand at best.

Nothing prevented Ms. Miceli, Ms. Rogers and Ms. Constantine from attending the MDR meeting, however, given their lack of first-hand knowledge about Student, they can hardly be considered "relevant members" of Student's IEP Team. Individuals such as Tara Considine (Student's teacher), Shauna Boesch (vocational coordinator), Linda Yee (reading teacher), all of whom participated in the development of Student's IEP in December 2015, would have been "relevant members" of the Team (SE-1). Ms. Fish was the only member of Student's

IEP Team in attendance at the MDR. The only relevant members of the Team in attendance at the MDR were, Parent, her advocate, Ms. Camara and Ms. Fish.

It is troubling that Ms. Fish (a bachelor level social worker), who had authored Student's psychosocial assessment (IE-3) did not respond when the members of the MDR were voicing their opinion as to whether the behaviors in question were substantially related to Student's disability. In light of her silence, the relevant members of the Team should not have so easily concluded a lack of substantial nexus between the behavior and Student's known disabilities.

Moreover, relevant information in Student's file was not considered by the MDR Team. According to Ms. Miceli, Ms. Constantine, Ms. Camara and Ms. Rogers, only Student's IEP, the March 28, 2016 psychosocial assessment, medical information involving Student's diagnoses, incident reports and information provided by Parent were reviewed.

Dr. Martin's psychological assessment was not considered even though it was available and was the only psychological evaluation available on Student since 2014. No teacher was in attendance, it is unclear what observations, if any, were considered. Similarly, Ms. Constantine (who had just initiated her employment at Ivy a couple of months prior to the April 2016 incident) lacked awareness of Student's complete psychiatric/social/ emotional profile, did not know the reasons for which Student was taking psychotropic medication, and did not know that Student was being followed outside school by Mr. Ortolani. The contributions of Parent and the Advocate are unknown except for the excerpt noted in SE-2 regarding their belief that the behavior was a manifestation of Student's disabilities and Parent's alleged comment that Student "ha[d] explosive nature [and] was working with Hannah and Tara to develop [a] safety plan" (apparently in place) (SE-2).

The record shows that even when relevant information was available in Student's record (such as Dr. Martin's psychological report), this information was ignored at the MDR. Moreover, it is unclear whether critical information in Ms. Fish's psychosocial assessment, noted in this Decision, was discussed. Since it appears that the MDR participants disregarded critical information, may not have properly discussed valuable information before them, and lacked first-hand knowledge of Student and his disabilities (with the exception of Ms. Fish), one cannot conclude that the Team reached the correct conclusion.

The record is clear that Mr. Ortolani was not present nor did he participate in the MDR meeting. He however, had the opportunity to review the same records that were available to the Team reaching a different conclusion.

Mr. Ortolani was the only witness at Hearing who had actually worked with Student. Following his review of the documentation of the incident, Student's IEP, Dr. Martin's

psychological report and in light of his first-hand knowledge of Student, he concluded that the behaviors in question were a manifestation of Student's disability. As the only witness with actual knowledge and perspective on Student's medical, psychological, social and educational history, I credit his testimony which I find to be insightful, candid and credible. As such, I rely substantially on his opinion.

Ms. Constantine testified that she did not know about Student's relationship with Mr. Ortolani and that the MDR did not discuss this at all (Constantine).

Student's diagnoses include Mood Disorder, ADHD, Oppositional Defiant Disorder and a nonverbal learning disability (SE-1; IE-1; IE-3). He qualifies for special education on the basis of emotional impairment and an intellectual disability (*Id*.). Student takes a number of medications including psychotropic medications.

As explained by Mr. Ortolani, given Student's cognitive deficiencies and his emotional and social deficits, it is necessary to consider Student's state of mind and his perception of the situation. Mr. Ortolani explained that when Student believed something it was very difficult for him to shift his thoughts. Dr. Ortolani further testified that Student's past history as a target of bullying may have played a role in his perception that he was unsafe and needed to protect himself (Ortolani).

Dr. Ortolani further agreed with Dr. Martin's evaluation in that it is difficult for Student to "inhibit impulsive responses, adjust to changes in routine or task demands, modulate emotions and initiate problem solving" (PE-2; Ortolani). When Student found himself in situations where he experienced high level of stress due to real or perceived threat, his "cognitive and executive functions overwhelm his ability to make more adaptive choices in the moment" (PE-2). Moreover, Student had a tendency to misread cues and distort a situation (Ortolani).

Student's psychosocial assessment notes Student's description of his problem as "having difficulty utilizing coping skills when he becomes emotionally overwhelmed or frustrated… as he becomes increasingly angry depending on his perception of the severity of the situation. [Student's] anger is usually a result of a difficult interaction with a peer… [he] has been experiencing these anger management difficulties for a number of years and has worked to improve his self-soothing techniques…he will excuse himself from class approximately twice a week to utilize his self-management skills…" (IE-3). The report identifies Student's lack of self-awareness skills, difficulty identifying feelings and noticing his thoughts and physical sensations as he begins to feel agitated as risk factors for Student. The report further states that Student has practiced and is able to remove himself from situations where he feels emotionally dysregulated as it was difficult for him to communicate things that upset him or resolve conflict (IE-3).

Review of the information regarding Student's state of mind in early April 2016 shows that Student reported that he was being bullied by two other students prior to April 11, 2016, whom he perceived to be gang members. As described in the Brigham & Women's Hospital report and the police report, Student reported that two students were supposed to be playing basketball but instead were throwing the ball against a wall trying to hit other students in the head. Student believed that the two students deliberately tripped him twice and the ball hit him in the nose. Student became upset and stormed out of the gym and then walked out of the school building.

It would appear that Student was using his self-soothing technique; extricating himself from the situation and attempting to find a quiet place away from others.

In the parking area, he was stopped by Ivy staff who tried to talk him down and have him return to the school building. Student, who was very agitated, told them to stay away, pulled out a knife and brandished it at Ivy staff (PE-2).

According to Mr. Ortolani, brandishing the knife was a defensive reaction by which Student was trying to appear as a tough guy to stop others from harassing him. He further opined that this was not an aggressive or antisocial act, but one in which Student's impaired judgment, cognitive limitation and compromised ability to reason, combined with feeling frightened prevented him from considering more appropriate ways to react (PE-2). There being no credible contrary clinical evidence in the record, I agree, and find that Student's behaviors on April 11, 2016, were a manifestation of his disabilities.[12] As such, Student's record shall be amended to so reflect.

I note that Parent solely requests a finding regarding the manifestation determination, not review of the district's right to have removed Student to a an alternative educational setting, failure to conduct a functional behavior assessment or any other determination. I further note that Parent was offered and she accepted placement of Student at Seaport shortly after Student's removal from Ivy. Parent also did not seek Student's return to Ivy and as such, I therefore make no rulings concerning Student's entitlement to those remedies.

12 The record lacks evidence that a functional behavioral assessment was performed at any time, or that as a result of one a behavior intervention plan had been developed and was being implemented for Student. Similarly, there is insufficient evidence to enter a determination as to whether Student's IEP was being properly implemented.

ORDER:

The determination at the April 27, 2016, MDR is overturned. Boston and Ivy shall amend all existing Student's record to reflect the same forthwith.

By the Hearing Officer,

_____

Rosa I. Figueroa
Dated: May 4, 2018

May 4, 2018

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

BOSTON PUBLIC SCHOOLS &

IVY STREET SCHOOL

BSEA # 1808494

BEFORE

ROSA I. FIGUEROA
HEARING OFFICER

ANDREW HOFFMAN, ESQ., ATTORNEY FOR STUDENT/PARENT
CAROLYN A. WEISMAN, ESQ., ATTORNEY FOR BOSTON PUBLIC SCHOOLS
ANTHONY CICHELLO, ESQ., ATTORNEY FOR IVY STREET SCHOOL