

**Individuals with Disabilities in Education Improvement Act
Before the Local Hearing Officer**

L.R. (Parent) on behalf of F.R. (Student),	)	
	)	
	)	
Petitioner,	)	
	)	
vs.	)	Final Order
	)	
	)	
	)	
Florence County School District One,	)	
	)	
	)	
District/Respondent.	)	

I. Background

A. Prior Proceedings

The current due process complaint/request ("DPR") ("*LR I*") grows from an earlier one submitted on January 16. ("*LR I*"). The State Review Officer ("SRO") resolved *LR I* on March 31. In *LR I*, Parent challenged the individualized education program (IEP) team's manifestation determination review ("MDR") about a December 14, 2022 fight. The SRO found that District did not comply with the IDEA's requirements for a behavioral intervention plan ("BIP") and a functional behavior assessment ("FBA").

The SRO focused on the fact that the BIP did not address fight-related issues that District documented before the December 14 fight. District personnel had referred Student for offenses such as bullying, hit/kick/punch, and for a threat. [SRO Order at 3-4 (citing Parent Exh. 14 at 1)]. Before the December fight, Student had been in a fight in October and had shown interest in getting help to control his temper. [*Id.* at 4]. The SRO noted further that, although the IEP team previously documented the need for an FBA, District did not obtain one at the time of the MDR. [*Id.* at 3, 6].

[A] District is responsible for completing a FBA when behavioral issues may arise from a disability. The District had plenty of notice that the Student had behavioral struggles. The Student had behavioral struggles in middle school. **The Student had more than 15 referrals in the first few months of the year for behaviors that were not addressed by the BIP, including bullying and threats.** The school-based therapist had found the Student to have Oppositional Defiance Disorder, and her notes indicate that the Student had recently expressed interest in receiving support in controlling his temper. Despite all of this notice, and despite no indication that the BIP (developed by another school) was informed by a FBA, **the IEP team neither sought to perform a FBA to understand more fully how the disability was manifesting in his behaviors, or to reconsider whether the BIP was adequate to meet the child's needs.** The only solution in the BIP was to complete a daily behavioral checklist.

[SRO Order at 11 (emphases added)]. The SRO added that the obligation to conduct an FBA and review the BIP arose in October when District found manifestation based on its prior failure to implement a BIP. [*Id.* at 11-12].

The SRO found that District failed to take these steps even after knowing that Student had fighting-related behavioral issues. [*Id.* at 12-13]. Because District did not take these steps, District lacked the information needed to conduct a proper MDR regarding the December fight:

Without a clearer understanding of **how the child's disability contributed to his behavior**, it was impossible for the IEP team or the LHO to make an informed decision of whether the December 2022 fight was a manifestation of the Student's disability. **The proffered justifications for the District's and LHO's decisions – that the Student had the opportunity to walk away from a fight and that the Student could, in some circumstances, control impulses leading to bad behavior – are inadequate** for reasons explained above. Neither the MDR nor the LHO was able to determine properly whether the behavior was a manifestation of the Student's disability without a FBA.

[*Id.* at 13 (emphases added)].¹

The SRO ordered that District take two actions. First, the SRO required that District conduct an FBA. [*Id.* at 14]. Second, the SRO ordered that the IEP Team conduct a new MDR within ten days of the FBA. [*Id.*]

B. The FBA and new MDR

1. FBA

District retained Dr. L. L. to conduct the FBA. District's special education coordinator ("SEC") instructed Student's case manager to provide information to Dr. L. The case manager never read the SRO's Order and testified that the IEP Team never discussed it. The SEC did not tell the case manager *why* the SRO ordered another FBA. All the case manager knew was that District would conduct the FBA and revisit the MDR conducted in January.

The case manager testified that she did not inform Dr. L. about either fight.² Nor did she provide Dr. L. with information about discipline that District issued to Student for bullying, or any other disciplinary issues, including Parent Exhibit 14 cited by the SRO.³

Dr. L. issued an FBA dated May 4. [Parent Exh. 21; District Exh. 11].

¹ The SRO also rejected District's argument that Student's improved behavior negated the need for an FBA. [SRO Order at 13].

² As discussed below, somebody informed Dr. L. about at least one of the fights as she mentions fighting in one sentence of the FBA.

³ District takes issue with the fact that I asked questions about this issue. District's arguments are unavailing. I did not raise a new issue in this matter, and my questioning followed from testimony elicited by the parties.

2. MDR

The IEP team met on June 7 to review the FBA and revisit the MDR determination. The IEP team again determined that Student's conduct in the December fight was not a manifestation of his disability.

C. Current DPR

Parent submitted this current DPR on August 10. District moved to dismiss the DPR, in part. After clarification from the parties, I denied Motion. The hearing began on September 28 and concluded on September 29.

II. Discussion

A. FBA and MDR

Parent alleges that District "pre-determined they wanted to prove my son disability was not the result of his actions causing the incident." Parent also complains that the BIP the District adopted added earpieces for music to justify not making any other changes. I agree with these contentions.

Dr. L. only mentions fighting once in the FBA: "Extremely concerning are the serious problem behaviors (e.g., physical aggression/fighting) reported outside the classroom." [District Exh. 11 at 44]. Although noted as "[e]xtremely concerning," no target behaviors in the FBA relate to fighting or serious aggression. District notes that there is a reference to "bullying and intimidation." [*E.g.*, Parent Exh. 21 at 1, 2]. The examples given, however, relate to Student making inappropriate comments and invading the space of other students. [*Id.* at 4]. Again, there is no example or mention of the "extremely concerning" and "serious problem behaviors" that include "aggression/fighting." The FBA also states: "Notable during this review period, [Student]

was placed on homebound academic services 1/13/23 through 4/16/23.” [*Id.* at 2].

More notable, however, is that the FBA never says why.

There were three fight-related issues in three months. [Parent Exh. 14 (entries for 9/14, 10/14, and 12/14)]. Because these issues served as the impetus for the SRO’s Order to conduct an FBA, District’s failure to convey the reason for an FBA is baffling.

District contends that Dr. L. “had sufficient information to address the antecedents to the conduct code violation at issue.” [Dist. Submission at 5]. So why didn’t she? The only clue is the phrase “reported outside the classroom” which describes the “physical aggression/fighting” to which Dr. L. referred. To the extent Dr. L. was instructed or inferred that she was limited to addressing issues “inside the classroom,” the divergence between what concerned the SRO and what District sought in an FBA becomes more apparent.

Dr. L.’s sole reference to fighting shows some level of communication of the issues on the front end. At the same time, District did not rectify the fact that the FBA did not address the issues raised by the SRO problem before submitting the FBA to the IEP team. The ASEC and the SEC knew why the SRO ordered an FBA. But nobody questioned why the FBA does not address the behaviors that necessitated it.

In sum, there were three points of failure here. First, District did not provide the necessary information to Dr. L. on the front end as to why the SRO ordered a new FBA. Second, in conducting the FBA, Dr. L. did not appropriately address fighting behaviors, even though she had at least some knowledge of them and of their seriousness. Third, after receiving the FBA, District failed to correct the situation when

it became clear that the FBA did not address the behaviors that both the SRO and Dr. L. recognized as important.⁴

The failure to conduct an appropriate FBA predictably led to another flawed MDR. Nothing in the FBA changed anyone's opinion on whether the December fight was a manifestation of Student's disability. The Principal again testified that he did not believe that Student's conduct in the fight was a manifestation of Student's disability because Student had the opportunity to walk away. That testimony is compelling proof that nobody considered the SRO's rejection of that very reasoning: "The proffered justifications for the District's . . . decision[] – that the Student had the opportunity to walk away from the fight and that the Student could, in some circumstances, control impulses leading to bad behavior – are inadequate" [SRO Order at 13].

District's failure to address Student's serious conduct issues also carries over to the IEP and BIP. District has posited that Student was meeting the behavioral goals in his IEP. [District Exh. 16]. Student had many referrals, which include three fights in as many months. If Student met his behavioral goals, there is something wrong with how the IEP team set behavioral goals.

District's actions threaten the integrity of the IDEA process. The SRO's decision finally resolved the issues put before her. 20 U.S.C. § 1415(i)(1)(A); 34 C.F.R. §300.514(a). The SRO was clear as to the problems with the prior MDR. The SRO left

⁴ In its Motion to Dismiss, District stressed the impropriety of relitigating issues decided in the prior proceeding. Honoring the finality of the Order is precisely the point. A party refuses to honor an SRO's Order whether it either seeks to relitigate issues or ignores the order altogether. Neither approach is valid.

no question that the issues underlying Student's fight-related conduct required evaluation and needed to be addressed by the IEP team. That did not happen.

I reverse the June 7 determination that the conduct on December 14 was not a manifestation of Student's disability.⁵ As discussed in Section III, I am ordering a new FBA and the development of a BIP and appropriate goals in the IEP.

B. Child Find

Parent raises two issues about District's identification of Student as OHI based on a diagnosis of attention hyperactivity disorder ("ADHD") – inattentive. Parent first alleges that the IEP team should have identified Student as a student with a disability before the Spring of 2022. Second, Parent also alleges a failure to identify Student's "impulsive and hyperactive behavior as a part of his disability in making their determination on 06/07/23 in the MDR." Parent states that the IEP team's failure to identify Student as "ADHD combined type" at the May 18 FBA meeting and at the MDR in June 2023 prevented him from getting the support he needs.

1. Failure to identify as child with a disability

There is insufficient evidence to find that District should have earlier identified Student as a child with a disability for IDEA purposes. In her post-hearing submission,

⁵ District makes the point that the SRO could have found manifestation based on the prior record if she believed the IEP team's finding was flawed. [Dist. Submission at 3, 8]. I agree with the premise that the SRO could have found a manifestation. I have no authority to review or question her decision to not make that finding. Contrary to District's assertion, which I do not understand, I do not sit, in any fashion, in an appellate position in this matter. [*Id.*] The SRO chose to require: (1) that District obtain information about the serious behaviors not previously considered; and (2) that the IEP review that information in conducting a new MDR. My role is not to review or question those directives. I only find that District did not follow them.

Parent contends earlier identification would have resulted in Student receiving extended school year ("ESY") services since 2021. I address any timely claims about ESY in Section II(E).⁶

2. Consideration of Student's underlying disabilities

As to the second allegation, Parent's concerns have greater merit. District is correct that medical diagnosis does not drive the determination of disability status for education purposes. District argues correctly that the issue is whether the IEP is reasonably calculated to address the child's needs, regardless of the underlying medical diagnosis. But in this case, the issue is not just one about diagnosis. The base issue here is why is Student engaging in the behaviors that impede his ability to function and learn. In other words, the question here is not about his education goals and accommodations. The issue is behavioral, and underlying medical diagnoses may be more relevant than in a pure education goal case.

There is evidence of Student's condition being more than just ADHD – inattentive. We need to get to the bottom of whatever is causing or contributing to his serious behaviors. Because more information is needed, I am ordering an independent educational evaluation ("IEE"). 34 C.F.R. § 300.502. I will address this further in Section III.

C. School Behavioral Therapist ("SBT")

It appears Parent is raising two concerns about SBT. First, she seems to complain District failed to provide SBT at certain times. Second, Parent questions the content of the SBT.

⁶ Because Parent submitted this DPR in August 2023, the two-year statute of limitations would only reach the summers of 2022 and 2023.

1. Failure to provide SBT

I agree with District that the SRO addressed this issue in the prior proceeding. There is no evidence that District stopped providing SBT after the period covered in the prior DPR.

2. SBT substance

Parent raises several criticisms of the SBT. I do not agree with Parent that SBT must focus only on the goals in an IEP. As the therapist testified, SBT should focus on whatever Student needs at the time so he can access educational services. [See, e.g., Feb 9 tr. at 129:21-22].

That said, I share one of Parent's concerns about whether that has occurred. After the December fight, the therapist did not meet with Student to discuss the issue because they didn't meet after that given the holidays. [*Id.* at 83:7-9]. Apparently, she also did not discuss the first fight, other than to discuss "decision making." [*Id.* at 84:19-20]. I fail to understand how the calendar precluded services when Student seemingly needed them the most.⁷

Because this issue is intertwined with what should be in the IEP and BIP, the substance of the SBT should flow from the evaluations I am ordering. The questions the SRO wanted answered are still unanswered. The answer to those questions should better document Student's needs that will help clarify what SBT is appropriate.

⁷ When viewed with the other evidence, I sense that District has somehow drawn a bright line between the fighting behaviors and special education issues. Or, as indicated by the FBA, it is drawing some between classroom and outside of classroom behaviors. If that is what is happening, District is putting the cart before the horse and assuming an answer that can only come from a proper evaluation and MDR.

3. Failure to provide adequate Prior Written Notice ("PWN")

Parent alleges that the PWN dated May 18, 2023 “is filled with false statements to cover up [District’s] failure to provide SBT as a behavior support service.” I agree with District that Parent has not explained the basis for this allegation. It appears to be a restatement of the SBT allegations addressed above. I find no violations concerning the PWN dated May 18, 2023.

4. Parent input

Parent alleges that the school psychologist denied her the right to add her input and my proposed suggestions for SBT, as well as supports. She again makes these allegations about the May and June meetings. Parent alleges she emailed the school psychologist multiple times since May 2023 but received no response.⁸

Again, there does not appear to be anything alleged that is different from the SBT issues addressed above.

D. Failure to follow IEP: Delayed release

The IEP calls for delayed release from classes so that Student is not with other students in the hallway during the transition. This was not followed, at least at times. For example, the evaluator noted noncompliance on three of the three observations she made, which relate to different classes. [Dist. Exh. 21 at Resp. 45].

District counters that Student “was not always willing to utilize this strategy.” [Dist. Submission at 6]. If Student slipped out the door to evade the teacher at the end

⁸ At the conclusion of the hearing, I urged Parent to specifically cite to exhibits to which she is referring to in support of her arguments. Parent does not cite the emails to which she is referring and does not explain how the school psychologist ignored her.

of a class (when the teacher presumably has several distractions), that is a behavioral issue that the IEP team needs to address. But nobody brought this to light or addressed it as a concern. No matter who is to blame for noncompliance with delayed release, the outside evaluator is the only person who documented that it was not happening.

District is correct that a failure to implement is not a substantive violation unless it constitutes a “material failure” to implement, which means a “failure to implement a material portion of the IEP.” *Sumter Cty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011). There is insufficient evidence that the failure to honor the delayed release requirement constituted a material failure.

Because this information needs to be collected and monitored, I order District to instruct the teachers to at least document when delayed release does not occur and that District provide this information to the IEP team.⁹

E. ESY

Parent alleges that in June 2022, the IEP team identified weaknesses but denied ESY due to the decision to create an IEP “before determining if ESY due to regression.” In her post-hearing submission, Parent claims there was “regression in MDR, discipline record, and teacher input.”

With due respect, I fail to understand the allegation or how the evidence supports the failure to provide ESY. The only MDRs I am aware of occurred after the summer of

⁹ Teachers cannot necessarily be blamed if Student leaves without permission or slips out with the other students. They can, however, be expected to document such instances. I do not offer any opinion as to whether District should discipline Student for failing to wait between classes. That is up to the school.

2022. Nor has Parent made clear what “regression” she relies on. “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *MM v. Sch. Dist.*, 303 F.3d 523, 537-38 (4th Cir. 2002); 34 C.F.R. § 300.106.

There is no evidence of gains made by Student that would be jeopardized by the lack of services over the summer. Parent has not proven that District violated the IDEA by failing to provide ESY during the Summer of 2022.

F. Access to information: The fight video

Parent alleges that she has repeatedly requested to review school surveillance camera, but District has refused to show it to her. Parent presumes that the video “will show if my son discipline record can be corrected with the additional data.”

District maintains that there is no surveillance video, and that the only video was different versions of video recorded by students, who circulated the video via AirDrop.¹⁰

There are two aspects of the video footage claim. First, did District violate the IDEA by failing to review or consider the information in school surveillance video? Second, assuming such video exists, did District violate the IDEA by failing to provide Parent access to it.

The record about the surveillance video is unclear and a bit troubling. The campus security officer (“CSO”) spoke to police after the fight. The police reports make clear that the CSO “stated to [the responding officer], the school do[es] have

¹⁰ <https://support.apple.com/guide/iphone/use-airdrop-to-send-items-iphcd8b9f0af/ios>

surv[eillance] cameras],” and that the officer “rev[ie]wed the school surveillance cameras.” [Parent Exh. 1 at 1]. The CSO not only stood by this statement at the last hearing, he said he compared two videos and found that the student’s iPad video was more illuminating. [*Id.* at 220:23 – 221:10]. The CSO also testified that, in addressing the other fight participant, he pointed to the surveillance cameras at the time: “I pointed at the camera when I walked over there. I did exactly this. I said, “Just so you know, there’s cameras, so we’re going to be looking at the cameras when we get time.” [*Id.* at 221:13-16].

It is hard to reconcile this testimony with the claim that no cameras exist in the area. First, the CSO would appear to be in the best position to know whether they exist. Second, what was he pointing at if not a camera? Third, he repeatedly claimed to have reviewed security footage, which he distinguished from the social media footage distributed by students.

Although I am concerned about this discrepancy, the Record does not establish that the footage would make any difference. The CSO also testified that the school footage “is just so we could see what was going on around [the incident.]” [*Id.* at 221:3-4]. Because the footage did not reveal much, the Record does not reflect a basis by which I could find that the footage would matter. In fact, neither party suggested during the hearing that I review the video taken by students that the CSO found to be more informative. In the end, what happened during the fight does not inform my decision here.

But that does not end the issue completely. Parent’s claim is not just about what the video would prove. She also complains that she was denied access to it. To the

extent she is correct, the failure to allow her to review the video would be, at best, a procedural violation. *R.F. v. Cecil County Pub. Schools*, 919 F.3d 237, 248 (4th Cir. 2019) (“The IDEA and its regulations grant the parents of a child with a disability certain procedural rights, including the right to ‘examine all records’ relating to that child and to ‘participate in meetings with respect to the identification, evaluation, and educational placement’ of the child.”) (quoting 20 U.S.C. § 1415(b) and citing 34 C.F.R. § 300.322).

Under [20 U.S.C.] §1415(f)(3)(E)(ii)(II), an [LHO] must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the [petitioners] “alleg[ed] a procedural violation,” (2) whether that violation “significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents’ child,” and (3) whether the child “did not receive a [FAPE]” as a result. *Id.* § 1415(f)(3)(E). Unless an [LHO] determines that a given procedural violation denied the child a FAPE, [h]e may only order compliance with the IDEA’s procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. See *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 n. 6 (2017) (“Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA’s] various procedural requirements.”).

Id.; *T.B. v. Prince George’s Cty. Bd. of Educ.*, 897 F.3d 566, 573-74 (4th Cir. 2018).¹¹

I cannot answer either the second or third question in the affirmative. For Parents’ ability to have been “significantly impeded,” the video would need to be

¹¹ There are differences between the test in *R.F.* and the one that appears in the statute itself. The three statutory elements are set apart with the disjunctive (“or”), meaning that a violation can be found if any of the three are met. The Fourth Circuit recitation of somewhat different elements are set apart with the conjunctive (“and”), meaning that all three of its elements must be present. The Fourth Circuit made the first statutory element (FAPE) its third element, thus making it a requirement along with the second element, which is the same as the second element in the statute. The first element in *R.F.* about pleading does not appear in the statute or regulation. Finally, the third statutory element (“deprivation of educational benefits”) does not appear at all in *R.F.*

instructive. For the reasons discussed above, there is no reason to believe that it is. See *R.F.*, 919 F.3d at 249. Further, the failure to provide any video did not result in a loss of FAPE.

At best, any failure to provide a video would result in an order to comply with the procedural requirements of the IDEA. 20 U.S.C. § 1415(f)(3)(E)(iii); 34 C.F.R. § 300.513(a)(3). I find that Parent has proven by a preponderance of the evidence that there at least was some form of surveillance footage of the fight. District must again review the issue with the CSO and the responding officer to determine whether it can be retrieved. If District can find or obtain the footage, it must provide Parent an opportunity to review it.¹² The IEP team should document the efforts and what steps have been taken to comply.

III. Conclusion and Order

For the reasons set forth above, I reverse the IEP team's MDR determination. By the deadlines and procedures below:

1. District shall obtain and provide Parent a copy of a new IEE of Student within thirty days of this Order.
2. District shall obtain and provide Parent a copy of an FBA within forty-five days of this Order.
3. Within ten days of the FBA, the IEP team shall meet to create a BIP and review the behavior goals in the IEP.

¹² District may treat any such video footage as records protected under FERPA as appropriate.

Within Fourteen calendar days of this Order, District must provide Parent a list of five names of individuals qualified to perform an IEE and an FBA. District will not include Dr. L. on the list.

Parent will have seven calendar days to choose an evaluator from the list. If necessary, there can be more than one evaluator. If Parent fails or refuses to select an evaluator, District must proceed with its own selection.

Within five calendar days of Parent's selection, District will contact the chosen evaluator(s) and arrange to retain him or her. The evaluator should let Parent know within three days of his or her appointment if he or she cannot meet the deadlines established in this Order. If Parent consents to different timelines requested by the evaluator, those agreements should be documented and they will control. Otherwise, within three days of being informed that the evaluator could not meet the deadlines of this Order, Parent should notify District of her next selection from the list. The same deadlines will apply in determining whether the second (and so on) choice can timely complete the evaluations.

The evaluator(s) shall have complete access to all academic and disciplinary records and to all staff and faculty.¹³ District will provide the evaluator(s) with a copy of the SRO Order and a copy of this Order. Further, the evaluator(s) must provide Parent an opportunity to provide input and information.

If the deadline for any action in this Order falls on a Saturday or Sunday, the deadline will be extended through the adjacent Monday. Otherwise, the term "calendar

¹³ This would not include any confidential treatment records of Student's therapist unless the therapist agrees that they can be disclosed with Parent's consent.

day” includes all calendar days except November 23 and 24, regardless of whether such days are school days according to District’s calendar.

Any change to the deadlines agreed to by the parties must be confirmed in writing, which may include an email exchange that reflects agreement to the changes.

As discussed in Section II(D), the IEP team must instruct teachers to document and report noncompliance with the delayed release requirements of the IEP.

District shall promptly provide a copy of this Order to any LHO addressing any pending DPR involving Student.

IV. Notice of Appeal Process¹⁴

Any party may appeal this ruling. A party seeking to appeal this ruling must do so **in writing** and **within ten (10) days** of receipt of this Order. The written appeal must be addressed to:

The South Carolina Department of Education
Office of General Counsel
1429 Senate Street
Rutledge Building
Columbia, SC 29201

s/Brian P. Murphy
Brian P. Murphy
Local Due Process Hearing Officer

Dated October 9, 2023

¹⁴ I will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to him by the SRO or the District Court. No email, letter, or other written communication will be construed or considered as either a Motion to Reconsider or as a Motion to Alter or amend this Order. Further, no such communication may toll or extend the time limit above for filing an appeal.