

STATE OF SOUTH CAROLINA	)	
	)	
FLORENCE COUNTY	)	LOCAL DUE PROCESS HEARING
	)	HEARING OFFICER BRUCE J. SMITH
In the Matter of:	)	
	)	
L. R., on behalf of F. R.	)	
	)	
Petitioner,	)	
	)	FINAL ORDER
v.	)	
	)	
Florence School District One	)	
<u>Respondent.</u>	)	

PROCEDURAL HISTORY

This Expedited Due Process Hearing is before me pursuant to a request, initially received via email on October 12, 2023, that I serve as the Local Due Process Hearing Officer (LHO). As a result of the parties' failure to fully resolve this dispute during the resolution period, a pre-hearing conference call was conducted on October 30, 2023. Both parties participated in the conference call at the request of the hearing officer to verify the exchange of documentation and logistics for the hearing. The time and date for the hearing was set for November 7, 2023, at 9:30 a.m. at a Florence One School District (District) meeting room located at 319 S. Dargan Street in Florence, SC.

SUMMARY

The Petitioner/Parent filed this action on the basis that the District violated the Individuals with Disabilities Education Act (IDEA) when the manifestation determination review (MDR) team found the Student's violation of District's code of conduct on September 8, 2023, and September 11, 2023, was not a manifestation of his disability.

PROCESS

This hearing was conducted according to a preset format that was presented to both parties and reviewed at the outset of the hearing. The hearing began at approximately 9:30 a.m. and proceeded until approximately 4:15 p.m. on November 7, 2023.

Both parties were offered the opportunity to begin the hearing with an opening statement. This was followed by the presentation of the Petitioner's case and the calling of nine witnesses. Both parties had an opportunity to cross-examine the witnesses and offer rebuttal witnesses.

Afterwards, each party offered and presented the hearing officer with a written closing statement. Additionally, the Hearing Officer had an opportunity to have a second viewing of the videos of the two incidents on the bus and the Respondent emailed an audio of the MDR.

ISSUES

1. Did the District fail to make the proper determination that the Student's behavior on the two bus incidents were not related to his disability or the result of side effects from the medication for his disability.
2. Given the Student's disability, did the District fail to provide therapy support per the Student's Behavioral Intervention Plan (BIP) and Individualized Education Program (IEP): that is, did the District fail to meet the Student's needs in the least restrictive environment (LRE) by failing to provide:
 - school behavior therapy support per the Student's BIP and IEP,
 - identify how symptoms of his attention deficit hyperactivity disorder (ADHD) and/or medication contributed to his behavior,
 - completion of daily behavior logs, and
 - follow delayed release procedures outlined in his IEP.

FINDINGS

Testimony, supporting evidence, and arguments presented at the hearing were all considered in my findings as they related to the issues set forth above.

1. The Student is a 16 year, 4-month-old male student who qualifies for special

education and related services under the category of Other Health Impairment (OHI) based on his ADHD and also Oppositional Defiant Disorder (ODD).

2. The Student is a high school sophomore at a high school of the District who is working toward earning a high school diploma. His psychoeducational evaluation indicates his achievement is consistent with (and even exceeds) his cognitive or intellectual ability.
3. The Student was involved in two (video recorded) behavior related incidents on the after-school bus on Friday, September 8, 2023, and the following Monday, September 11, 2023.
4. A MDR was conducted on September 22, 2023, relative to the above two incidents. During the MDR, the team determined the Student's behavior was not a manifestation of his disability and proposed that he should continue his home-based placement until December 4, 2023.
5. The Petitioner's expedited due process hearing request was initiated to challenge the Student's MDR team's decision on September 22, 2023, that the Student's violation of District's code of conduct on September 8 and 11, 2023, were not a manifestation of his disability under the IDEA.

STANDARD OF REVIEW

A MDR is an evaluation of a child's misconduct to determine whether that conduct is a manifestation of the child's disability. The IDEA regulations specifically require that a District must conduct a MDR whenever it proposes disciplinary measures that will result in a change of placement for a child with a disability. The MDR must be performed within ten school days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct." 34 C.F.R. § 300.530(e).

Pursuant to 34 C.F.R. § 300.530(e)(1), conduct must be found to be a manifestation of the child's disability if:

1. The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
2. The conduct was the direct result of the district's failure to implement the IEP.

The burden of proof in this case lies with the Parent for her claim, as the respective party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 346 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

DISCUSSION

The hearing officer led off the hearing with a summary of prior due process activity relative to the Student as emailed to all prior to the hearing from the Respondent. That summary was not challenged or expanded on by either party.

During the one-day due process hearing, the LHO heard testimony from nine witnesses. The Petitioner presented her case first with direct examination of District staff and educators for the purpose of establishing the issues listed above. Before any formal staff testimony, videos of the two incidents that occurred on September 8 and 11, 2023, involving the Student were viewed by all who were present.¹

The first incident on September 8 lasted over several minutes, during which time the Student not only refused to return one student's phone, but also took a second student's phone and then proceeded to stomp on one of the phones. Prior to the incident, the Student was sitting in his seat calmly for several minutes without interference with or from other students. According to the testimony of L. L., PhD, Board Certified Behavior Analyst, this demonstrated that he was able to control his behavior and that his behavior was intentional to gain attention. She also testified that upon conducting the Student's FBA, she determined the Student's behaviors were related to either trying to "gain attention and to get out of doing something" She also testified that "he sat very calm for several minutes before anything happened" "whereas some kids... with ADHD ... one thing you really see is the inability to sit." (Tr. Pg. 182, 183). Dr. L. further testified that her involvement with the Student was relative to observations, i.e.: "So (I) did that (observations) across three different days and took the information from the interviews with the team members, the observations, and kind of summarize everything in the functional behavior assessment to

¹ *Because the videos contain images of other students, it is requested that those videos be protected from disclosure pursuant to protections under the IDEA confidentiality provisions and the Family Educational Rights and Privacy Act (FERPA). To that end, it was requested that copies of the videos not be used, disclosed, or re-disclosed to anyone outside of the court reporter and decision makers in this matter.*

look at kind of why he has those skill deficits and then make recommendations that would go towards the development of a BIP.” (Tr. Pg. 187)

Moreover, during the incident, the first student walked away to seek the assistance of the bus driver, to deescalate the situation, but still the Student did not return the phone; instead, he took another student’s phone. The witnesses at the hearing, testified the continuation and further escalation of the incident, refusal to return the phones, and stomping on a phone was not impulsive behavior, or otherwise directly and substantially related to his disability. Rather, the Student’s behavior reflected some level of forethought and planning- not impulsivity. Dr. L. credibly testified that his behavior during the September 8 incident was intentional “as opposed to impulsive behavior that’s a product of his ADHD.” (Tr. Pg. 192).

Similarly, with regard to the threat to the male student on the bus on September 11, the Student was sitting on the bus without incident. As he got up from his sit to leave the bus, walking by the male student - the same one the Student took the phone from on September 8th - he stopped and threatened the student with a fight. The threat was loud enough to be recorded on the bus video surveillance camera. Again, the testimony shows this misconduct required some level of forethought and planning and bears no indication of impulsivity or inattention connected to ADHD. Dr. L. again testified that the threat was purposeful behavior and, in her opinion would “not say that it’s related to his ADHD.” (Tr. Pg 191) to his disability. The Student told the student that he better meet him outside and that he was going to “light his ass up.” Brian Denny, Assistant Superintendent of Special Education, who has a lengthy background as a school psychologist, also opined that this behavior was not related to the Student’s disability and that it was clearly a threat meant to intimidate the other student. There was some testimony from the Petitioner to suggest that the male student whom the Student threatened had said something to him earlier in the day. The Assistant Superintendent of Special Education testified (Tr. Pg. 277) that assuming that’s true, it even more clearly demonstrates that the Student’s threat was deliberate and intentional.

The Assistant Principal testified that the “mom of the student F.R. threatened was afraid to send her child to (school) because of the threat that was made on the bus.” (Tr. Pg. 227) As a result, the other student did not come back to school for a couple of days. That parent also testified that the boy’s phone that was taken on September 11, 2023, was never returned.

On direct examination, the school bus driver was asked by the Petitioner, “Is he defiant?” She replied, “He's very defiant. When you tell him to sit down, he look at you and he -- mug -- at me, like he threatening me.” (Tr. Pg. 23). When asked by the Petitioner about the Student’s typical behavior on the bus, the driver responded “... get up and stand up in the bus like this, walks through the bus, like he's having a meeting with everybody. Takes phones and collect the phones, and – and I got to constantly say, sit down, put those phones away before something -- what happened on that bus, ..., but he should never have been out of the seat.” (Tr. Pg. 23). The frequency of that behavior was not presented nor was it clear that the school was informed about the incidents.

When asked if the Student was attacked by the female student, that is: “Did you feel a student threatening my son?” Ms. Wallace replied, “I felt the student was defending herself... Because he initially hit her in the head first.” (Tr. Pg. 26) Through further testimony the Petitioner attempted to argue that the bus driver did not intervene to try to stop the cell phone incident, but she was driving the bus at the time and was obligated to continue driving until she could get to the next stop where she could safely pull over. In the video recording from the bus, as soon as the bus driver sees the female student stand up as the incident unfolds, she can be heard telling the student to sit down and then she tries to calm her down.

There was lengthy testimony (Tr. Pgs. 260-276 and elsewhere) about the medication that the Student was taking and an implication that the side effects of that medication could have contributed to the Student’s behavior in the bus incidents. Mr. Denny testified “Again, you mentioned medication and asked even in our MDR whether or not medication could have caused behavior. We've never been told what medication he's taking. You haven't indicated that to us, just as you haven't indicated that to us today.” (Tr. Pg. 268) That conversation relative to the medication as possibly contributing to the Student’s behavior on the bus concluded with the following response by the Assistant Superintendent of Special Education, “You said he's taking medication. I believe you. The document says he's being treated. Treated in what way, I don't know. But I'm assuming if he's taking medication... You haven't indicated what that medication is. If you're trying to say that the medication he is taking affects his behavior, causes it, I don't know, because I have no idea what medication it is. That could make -- determinate -- a lot of determinations. We have no idea. Even here again, asking that question, you haven't said what it is. And then, we'd need a medical opinion about whether this medication causes the behavior.”

(Tr. Pg. 275) The name of a medication was never stated.

In addition to not sharing any information regarding the type of medication the Student was reporting taking to address his diagnoses during Mr. Denny's testimony, the Petitioner did not present any testimony from medical professionals or from her own testimony that was more than an indication that his medication "could" or "might" have side effects that influence his behaviors. The Petitioner did not present the name of a medication; any reports from any publications or other sources regarding the unnamed medications and possible side effects, in general or specific to the Student; or elicit testimony from witnesses to relate specific or generalized behaviors to any specific medication. The Petitioner simply made speculative statements about the possibility that an unnamed drug "could" or "might" negatively impact the Student.

Although the Petitioner states the District failed to fully implement the requirement to provide school behavior therapy services in the due process complaint, there was nothing notable in the record or testimony that directly addressed or supported the suggested failure of availability of school behavior therapy support per the Student's BIP and IEP. The Petitioner asked the Principal "In the M.D.R. making a decision to determine if the ... I.E.P. was implemented, was data provided to show my son was seeing the school based therapies weekly?" To which the Principal replied, "I think we proved that, Yes. He was seeing the school based therapist at beginning of the school year up until the time..." (Tr. Pg. 133-134)

The testimony regarding the alleged failures of the Respondent to implement the Student's IEP, which the Petitioner alleged, contributed to his behavior did not focus on school behavior therapy. One suggested failure was the improper follow-through and inconsistent implementation of a delayed release accommodation. (Tr. Pg. 191-196) One teacher was not familiar with the accommodation and another stated the Student "bolted for the door and he went out ahead of everybody. It was like he pushed his way to get out the door before everyone else." (Tr. Pg. 196) Further testimony from the Principal was that delayed release would not work at the end of school day. "...we can't force him to stay in the room and he quite frequently leaves. The teacher ... said that they tried the delayed release, but he constantly leaves." She indicated staff could not keep someone from exiting the room. (Tr. Pg. 73)

Another suggested failure to implement the IEP was the Petitioner's contention that the District was not emailing her on a daily basis regarding the Student. Daily behavior reports were

provided electronically by the Assistant Principal after the first week of school, on August 9, 2023, to the Petitioner through a Google form. The Assistant Principal testified that the Student's four teachers regularly filled out and submitted the daily parent communication forms, though there were a few times when a teacher did not complete the form. "I set up a Google calendar to remind the teachers every day to send the communication forms." "And to the best of my knowledge did all of them do it every day? No." "Did they do it for the most part? Yes." (Tr. Pg. 219)

CONCLUSION

From the evidence and testimony there is no evidence showing that the MDR team's decision that the Student's behavior on the two bus incidents were related to his disability because of the District's failure to implement his IEP. The allegations of the failure to fully implement the Student's IEP relative to delay release from his classes and communicating with the Petitioner daily were admitted by District personnel through their testimony. The Petitioner, however, failed to present any testimony that linked these violations of the Student's IEP as contributing factors to the Student's behavior on the bus that triggered the MDR. Additionally, the Petitioner did not present any evidence regarding the unnamed medications that she indicated the Student is taking or the possible side effects, in general or specific to the Student.

While the Parent did not meet her burden of proof relative to connecting these admitted violations to the Student's behavior on the bus, the District must not simply think it can shake off its responsibility to fully implement the Student's IEP. When staff, as testified in this instance, do not find specific accommodations that are in the IEP as effective, or are having trouble implementing what is in the IEP, it is the staff's responsibility to reconvene the Student's IEP team to review and revise, as necessary any services, accommodations, supports, and/or interventions that may be more effective.

The responsibility belongs to the Principal, Assistant Principal, Teacher, and Assistant Superintendent of Exceptional Children's responsibility. It is also the District's responsibility to conduct, or obtain, an analysis of the root cause of the behaviors so that the District does not just say we have a BIP. The expectation is to then gather data from all environments where the Student is engaging in problems behaviors, including the bus, but rather to develop a BIP that appropriately targets the Student's problem behaviors. The goal of a good BIP is to decrease or

prevent the recurrence of the Student's behaviors, regardless of whether the behaviors are taking place in the classroom or on the bus. Therefore, the District must reconvene the Student's IEP team to review and revise effective accommodations and provide support and training for staff on the implementation of the requirements in the Student's IEP, if necessary, to ensure.

However, as hearing officer I introduce hearing officer exhibit 2 (Summary of [the Student's] due process activity) and read the following into the record: "I'm going to read the summary ...

- 4/3/22, parent's first due process request. Request was eventually withdrawn
- 1/16/23, parents second due process hearing request. This one was expedited, based on...an M.D.R. decision related to a fight that occurred on 12/14/22. The local hearing officer determined that the district correctly determined that the fight was not directly caused by, or substantially related to his disability or due to the district's failure to implement his I.E.P.
- This order was appealed. The S.R.O. determined that the district should not have made that a decision of the M.D.R. meeting without a F.B.A. and ordered the district to conduct a F.B.A. and then, reconvene and re-evaluate the M.D.R. The district did so and reached the same conclusion.
- 8/10/23, parent third due process hearing request, related to (in) some ways, to the second request. The local hearing officer order – order dated 10/9/23, found that the F.B.A. was not sufficient and therefore, overturned the decision that the fight behavior was not related to his disability. Parent appealed the district and the district is crossed appealing currently on appeal.
- 9/19/23, parents fourth due process hearing, request expedited. This one challenged the M.D.R. decision regarding the fight that occurred on 9/1/23. The hearing was scheduled for October 26, '23. [The Parent] withdrew her request on October 20th, '23. ...
- 10/10/23, parent's fifth due process hearing request, expedited, is one -- this one is challenging M.D.R. decision regarding an incident that occurred on the school bus on 9/8/23 and a comment/threat the Student made on 9/11/23. ...

Being that I was asked to serve as the LHO for parents' 4th and 5th hearing requests, I was presented a copy a 10/9/23 Order by LHO Brian P. Murphy. That Order stated "District shall

promptly provide a copy of this Order to any LHO addressing any pending DPR involving the student.”

Neither party had any update. Testimony and exhibits do not indicate that the Respondent has followed through on the orders issued in the October 9, 2023, Order i.e., 1. District shall obtain a new IEE....2. District shall provide Parent a copy of an FBA within 45 days....3. Within 10 days of the FBA the IEP team shall...create a BIP and review behavior goals in the IEP.

THEREFORE, IT IS ORDERED, that the Petitioner’s contention that the District’s failure to fully implement the Student’s IEP resulted in a denial of a free appropriate public education (FAPE) to the Student and the MDR team erred in determining the Students’ behavior was not a manifestation of his disability and are not substantiated through the testimony and evidence presented by the Petitioner.

During the hearing, the Petitioner failed to make a connection between the District’s failure to always complete the daily communication tool and ensure the Student’s delayed release from class and the Student’s behaviors on the bus, which is what was addressed during the MDR. Therefore, the Petitioner failed to meet her burden of proof, which is necessary to justify overturning the determination that the Student’s behavior was related to his disability. As a result, Petitioner’s request for remedies, which include, but are not limited to a reversal of the decision from the MDR, to order the District to outside counseling services through her requested provider, and for reimbursement for printing and advocate fees are denied compensatory reimbursement.

It is also my decision, however, that the District’s communication with the Parent needs to be reviewed and more effectively implemented. The District must also provide training to the Student’s teachers and staff within thirty days of the issuance of this decision to avoid similar procedural errors in the future.

Additionally, the District must reconvene the Student’s IEP team to ensure an appropriate FBA, including the administration of any other required independent educational evaluations (IEEs) are conducted to gather the necessary information and data to develop a more appropriate BIP to address the Student’s problem behaviors that occur in both the school setting and on the bus. Once the necessary assessments are administered and data gathered, the IEP team must reconvene to review and revise the Student’s IEP and BIP to include to address how to effectively implement the current accommodations and strategies or to develop alternate

accommodations and strategies to address all of the Student's needs.

The District must provide documentation of full implementation of this Order to the South Carolina Department of Education, Office of General Counsel as soon as possible, but no later than forty-five calendar days of the issuance of this decision.

APPEAL PROCEDURE

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

November 17, 2023

s/ Bruce J. Smith
Bruce J. Smith, Local Due Process Hearing Officer