

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF FLORENCE	)	LOCAL DUE PROCESS HEARING
	)	HEARING OFFICER, VERNELL I. SCOTT
	)	
In the Matter of:	)	
L.R., on behalf of F.R.,	)	
	)	
	)	
Petitioner	)	
	)	
vs	)	DECISION
	)	
FLORENCE ONE SCHOOLS,	)	
	)	
Respondent.	)	

I. PROCEDURAL HISTORY

Petitioner initiated this process by filing an Expedited Due Process Hearing Request dated January 16, 2023.

This matter is before me pursuant to a request initially received via email on January 23, 2023 inquiring as to my availability to serve as the Local Due Process Hearing Officer in this matter. I accepted the appointment on January 26, 2023.

Thereafter, Respondent filed the Response to Petitioner's Expedited Due Process Hearing Request, dated January 27, 2023.

II. FACTUAL SUMMARY

A. Background

1. The Student (FR) is a fifteen-year-old male high school student in the District. He transitioned from a District middle school with a

Behavioral Intervention Plan (BIP) completed on March 4, 2022, implemented on March 7, 2022, and modified on September 14, 2022. (Testimony of multiple witnesses and Petitioner's exhibit #16.)

- 2. The Student receives special education services in a resource model in the area of his disability, which is Other Health Impairment {OHi}, because of a medical diagnosis of attention deficit hyperactivity disorder {ADHD}. He was also found to qualify for services with BIP. {Testimony of multiple witnesses and Petitioner's and School District's exhibits.}**
- 3. The Student was involved in a fight that occurred on the school grounds, at the end of the school day, on December 14, 2022. {Florence County Sheriff's Office Incident Report; Petitioner's Exhibit 1; and Video}. Parent/Petitioner was notified of the incident on December 14, 2022. FR's Disciplinary Removal began on December 15, 2022.**
- 4. Procedural Safeguards were sent to Parent: January 5, 2023.**
- 5. Date of Manifestation Determination Review (MDR): January 13, 2023.**
- 6. Parent filed an Expedited Due Process Hearing Request: January 16, 2023, alleging: Denial of FAPE – 34 CFR §300.532(a).**
- 7. Per §300.532 Appeal**

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§300.507 and 300.508(a) and (b).

Petitioner cited the following

III. ISSUES

The Petitioner/Parent filed this action on behalf of the Student, alleging that under the Individuals with Disabilities Education Act (IDEA):

- 1. The District failed the student by not providing school-based counseling records, daily behavior log checklists, and school camera footage related to the incident on December 14, 2022; and**
- 2. The District and the individualized education program (IEP) Team failed to consider the student's medical information while conducting the MDR; and**
- 3. The IEP Team failed to consider the student's ADHD diagnosis; and**
- 4. That the Student's medical diagnosis of "ADHD" being the cause of his impulsive and hyperactive behavior was the result of him fighting on December 14, 2022"; and**
- 5. The District failed to implement the Student's IEP as it was written by not emailing the daily logs and checklist (provided to assist the Student with his behavior concerns) to Parent per IEP.**

IV. PROCESS

On February 1, 2023, I emailed my acceptance/confirmation of appointment letter introducing myself to all parties. That email also included a discussion regarding the need for establishing a schedule for the expedited hearing requested. On February 3, 2023, a Pre-Hearing Conference call was held. The Hearing date was set to begin on February 9, 2023 and to continue on February 10, if necessary. A Pre-Hearing Conference Order was mailed via USPS to all parties on February 4, 2023.

However, on the Pre-Hearing Conference call, Petitioner raised an objection to the issuance of a subpoena to Respondent for the student's medical records and the issue of Petitioner's advocate submitting requests in her own name was also raised. Neither matter was addressed in the original

Pre-Hearing Conference Order; therefore, an Amended Pre-Hearing Conference Order, dated February 4, 2023, addressing the additional two issues was emailed to all parties.

The Hearing convened on February 9, 2023 and continued all day; the Hearing continued on February 10, 2023, ending at about 4:00 pm. Present were Petitioner/Parent, appearing Pro-Se; and the advocate. Appearing for Respondent/District were Vernie L. Williams, Esquire and Kimberly Blackburn, Esquire, both with Halligan Mahoney & Williams, P.A.; and the District's Assistant Superintendent for Florence School District One.

An on the record pre-hearing conference was held before the Hearing commenced to articulate the issues to be considered and to determine the order the witnesses would be called. The parties were allowed until midnight on Wednesday February 15, 2023 to submit post hearing written statements/briefs/arguments. Both parties timely submitted written post hearing documents.

Testimony began following the pre-hearing conference and continued for the rest of the day and the following day. Based on this testimony and upon documentary evidence presented, the following facts are accepted to be true:

V. FACTUAL BACKGROUND

The Student is a fifteen-year-old male high school student. He transitioned from middle school with a BIP completed on March 4, 2022, implemented on March 7, 2022, and modified on September 14, 2022. (Testimony of multiple witnesses and Petitioner's exhibit #16.)

The student receives special education services in a resource model and is determined eligible as a student with a disability under the category of other health impairment (OHI) because of behaviors and a medical diagnosis of ADHD and was determined to need a BIP.

(Testimony of multiple witnesses and Petitioner's and School District's exhibits.)

- 1. The summary statement of behavior review, dated September 14, 2022, provides in part the following:
"[The Student] currently has an IEP due to diagnosis of ADHD, combined type, Inattentive and impulsive. [The Student] has also been diagnosed with Major Depressive Disorder Recurrent Mild and Generalized Anxiety..."**
- 2. The Prior Written Notice (dated September 14, 2022) provides the following: "The team proposes to implement the BIP that was previously written for [the Student's] 504 Plan with his current IEP. The behavioral observations from the staff of WHS (are) consistent with the behaviors that were previously being targeted through the 504's BIP. Based on this data, the team agreed to write the BIP since it was not rewritten when FR transitioned from the 504 plan to an IEP."
"The team rejected the action of not writing a new BIP for FR due to the behaviors that have been witnessed since he started attending WHS."**
- 3. The Student was involved in an earlier fight on the school's campus on October 14, 2022. That fight was caught on video. (Petitioner's exhibit #12). The team concluded in the resulting MDR that**
 - a. "[The Student] (is currently) served as a student with an Other Health Impairment (OHI) based on historical diagnosis from Seasons Psychology that diagnosed him with Major Depressive Mood Disorder, ADHD, and Generalized Anxiety Disorder."**
 - b. The team met on October 26, 2022 and held a MDR and concluded that because of the incident that occurred, the Student was recommended for expulsion.**

But, the IEP team found that the Student's behavior was a manifestation of his disability "due to the BIP not being implemented completely. The BIP mentions a self-monitoring checklist for [the Student] and that was not implemented. Therefore, the team determined the incident was a failure of the LEA to implement his IEP".

- c. The team agreed to return the Student to WHS and to "place him on a day probationary period..."**
- 4. This action is a direct result of the Student's involvement in another fight that occurred on December 14, 2022. (Florence County Sheriff's Office Incident Report; Petitioner's Exhibit 1; and Video). Parent/Petitioner was notified of the incident on December 14, 2022. The Student's Disciplinary Removal (out of school suspension) began on December 15, 2022. (Testimony of multiple witnesses and Petitioner's and School District's exhibits.)**
- 5. On January 3, 2023, the District convened a MDR for the Student and held an IEP meeting.**
 - a. Parent, Student, his sister, and advocate attended the MDR.**
 - b. That MDR was facilitated through the State Department of Education.**
 - c. The MDR team determined that**
 - i. the conduct in question was not caused by nor had a direct and substantial relationship to the Student's disability; and**
 - ii. the conduct in question was not a direct result of Florence Ones Schools' failure to implement the Student's IEP; and**
 - iii. the behavior was determined not to be a manifestation of the Student's disability; and**
 - iv. The team determined that the Student would remain in an alternative educational setting (IAES) until April 3, 2023; and**

- v. Parent ultimately rejected the Student's placement at the alternative school (Rush Academy) in favor of placing the Student in a homebased program.**
- 6. On January 16, 2023, Petitioner filed an Expedited Due Process Hearing Request, and this process was initiated.**

VI. ANALYSIS

Burden of Proof: General principle

- a. The party filing the due process hearing request bears the burden of proof. See Schaffer v. Weast, 546 U.S. 49 (2005).**
- 1. An MDR must be performed when a District proposes disciplinary measures that will result in the change of placement for a child with a disability. 34 CFR §300.530(e).**
 - 2. Pursuant to 34 CFR §300.530(e)(1) conduct must be found to be a manifestation of the child's disability under the following circumstances:**
 - i. the conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or**
 - ii. the conduct in question was the direct result of the district's failure to implement the IEP.**
 - 3. The MDR was appropriately and thoroughly conducted:**
 - a. The team was properly constituted, all the team members had input; and the team reviewed relevant information.**
 - b. The meeting was facilitated by the State Department of Education "to optimally encourage the opportunity for all members to participate".**
 - c. The team discussed the Student's performance and his then current levels and the details of the altercation over the course of the meeting – which lasted over five hours.**

- d. The team viewed a video of the fight and heard directly from the Student, the only person on the team who witnessed the fight firsthand, as he described that he "engaged in the fight as self-defense".
 - e. The team proposed that the incident was not directly related to the Student's OHI and proposed a placement on a homebased setting for a period of 45 days.
- 4. The MDR standard was properly applied, and the conclusions of the team were appropriate. This finding is based on the following:
 - a. The issue in a challenge to a MDR is whether the Petitioner has established that the student's conduct was related to the disability, which requires a showing as follows:
 - i. That the student's disability directly and substantially caused the conduct in question; or
 - ii. That the student's conduct was the direct result of the Local Educational Agency's (LEA's) failure to implement the student's IEP.
 - b. In this case Petitioner did not meet either standard and has failed to carry her burden of proof.
- 5. The MDR team concluded that the Student's behavior and involvement in the fight was not caused by nor had any direct and substantial relationship to his disability and that
 - a. The fight was not due to hyperactivity, impulsivity, or lack of attention that may be attributable to ADHD.
 - b. With regard to the first question it is important to note that the question is not an attenuated "could AOHO have contributed to the conduct ...," or "could AOHO generally or conceivably be related to the conduct."
 - c. The legal standard is "more fine-tuned than that: the question is was the conduct "caused by", or did it have a "direct and substantial relationship" to the student's disability.
 - d. In this case, Petitioner presented no evidence that the December 14, 2022, fight would not have occurred if the student did not have ADHD, and to the contrary, the evidence and

**testimony presented supports the opposite conclusion.
(Numerous witnesses and exhibits from both parties.)**

6. Petitioner's primary challenge in this matter is related to the Student's ADHD; however, she made no mention of the Student's other diagnosis of oppositional defiant disorder (ODD) either in the MDR or in the Expedited Due Process Hearing Request. Instead, Petitioner focused on hyperactivity and impulsivity. Granted that her position is largely speculative, especially when she alleged that FR's conduct was either based on his undiagnosed impulsive or hyperactive behavior. Significantly, it was Petitioner who introduced into the record a list (Parent's Exhibit #6) of diagnostic criteria from DSM-V for ADHD, including typical symptoms of ADHD such as hyperactivity and impulsivity. The symptoms listed in Exhibit #6 do not include any of the conduct that led to the Student's disciplinary consequences. At the MDR meeting that the Student attended; he provided input to the team. The Student stated that he fought the other student because the other student hit him and that "he was not going to let anyone hit him without hitting back in self-defense".

- a. There is no indication that this fight would not have occurred if the Student did not have ADHD; and to the contrary the evidence presented supports the opposite conclusion.**
- b. The fight was not due to an act of defiance nor to a challenge toward anyone who was present and in a position of authority as such behaviors "may be attributable to Oppositional Defiance Disorder".**
 - i. Petitioner did not present any evidence or testimony to underpin her allegation or theory that FR's fight with another high school student, a peer, was caused by or directly related to the student's interactions with authority figures and defiance.**
 - 1. The school psychologist., testified that ODD primarily relates to a student's interactions with authority figures and defiance.**

- ii. In this case, the Student's fight did not involve any authority figures. Testimony presented during the Hearing and the video shown, taken with a student's telephone camera, of the fight shows, that no adults were present at any point during the fight. The principal, stated during his testimony that the fight occurred after school in an area where no students are authorized to be at that time of day (See Testimony Principal; staff spoke with Petitioner after the incident; altercation captured on a student's phone= Video).
- iii. Several team members articulated during their testimony their basis for concluding that the Student's behavior was not caused by nor was substantially related to his disability.
 - 1. The Student was described as a student who tends to make bad decisions on purpose. (Testimony of general education teacher; and multiple witnesses.)
 - 2. The general education teacher stated that some students cannot distinguish their actions but the Student repeatedly demonstrated in her class that he can distinguish between good behavior and bad behavior. She described him as a natural leader because he had the ability to change his behavior at will as well as he can take authority to help other students regain control of themselves when necessary.
 - 3. She further testified that when the Student's behavior was negative that she would often hesitate to make an official written referral regarding the Student – that she would tend to contact Petitioner instead.
 - 4. The school based therapist, testified that when she spoke with the Student following the incident he told her that he would not let anyone hit him.
 - 5. She testified that after she spoke with him she was convinced that ¹⁰ the fight did not just happen; she

described the Student as very bright, clear about what he wants and about what he does. She stated that he makes "decided choices".

iv. It was reported that the Student stated during the MDR that he was acting in self-defense. He was not present at the hearing. (Testimony numerous witnesses.)

- 7. The evidence presented in the hearing demonstrates that the Student's conduct the fight - was not directly caused by nor did it have a substantial (not attenuated) relationship with impulsivity, hyperactivity, inattention, defiance, or any issues with authority, neither was it directly the result of a failure to implement his IEP. Moreover, several teachers testified that the Student demonstrated from the beginning of the year that he could make progress, after his last disciplinary referral he repeatedly demonstrated that he could control his behavior; and he further demonstrated that his behavior was directly under his control. Testimony from his teachers and the school's counselor/therapist illustrated that the Student's behavior was improving over the course of the several weeks before the incident occurred. "He simply made a bad choice on 12/14/2022 and while students with ADHD may make bad choices, bad choices are not necessarily directly caused by ADHD".**
- 8. Petitioner has failed to carry her burden of proof to demonstrate that the Student's participation in a fight was a manifestation of his disability.**
- 9. Additionally, Petitioner alleged that the District's failure to send her the Student's daily school logs or his daily behavior logs checklists; or his school based counseling records violated his IEP and as a result significantly contributed to his behavior and involvement in the fight.**
- 10. Several teachers offered testimony that established that in an attempt to help the Student be more responsible he was given the responsibility for taking his daily logs home so that Petitioner could sign the logs. To ensure that Petitioner would receive the daily logs in a timely manner**

she was provided the documents by email as well. However, the record also reflects that on occasion Petitioner did sign multiple log pages when FR did eventually take the logs home for signature. (See Testimony of multiple witnesses; disciplinary history and Parent's Exhibit #14.)

11. Before the December 14, 2022 fight/incident occurred the testimony established that several of the Student's teachers had an established habit of emailing the logs to Petitioner after the Student repeatedly failed to take the records home.
12. The Principal also testified that the daily log would not have been sent home to the Petitioner earlier in the day before the fight occurred.
 - a. However, there was no evidence that the incident was connected in any way to the implementation of the Student's IEP or the requirement that the log be sent home either by email or transported physically by the Student.
 - b. The fact that Petitioner executed multiple days of the Student's daily log when requested to do so by the Student negates that argument - especially given that there had been no reported interaction between the other student and FR prior to the fight.
 - c. The Student's prior history of fighting is the most damaging behavior demonstrated by the Student - making his return to the general education setting prior to the end of his probationary period on 04/03/2023 very hard to reconcile.

V. CONCLUSION

The evidence presented in this hearing demonstrates that the Student's conduct - his involvement in the fight - was not directly caused by nor did it have any substantial relationship with impulsivity; hyperactivity, inattention, defiance to authority or other any other issues dealing with authority; nor was it related to any failure of the District to implement his IEP. In this case, Petitioner did not bear her burden to demonstrate that the fight was a manifestation of the Student's disability nor has she established that receipt of

the daily logs and emailed records in any way deterred the Student from being involved in the fight on 12/14/2022.

I, therefore, find in favor of the District.

VI. NOTICE OF APPEAL RIGHTS

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

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

All parties should note that the undersigned will not accept, read, or consider any further argument about the merits of this matter unless it is remanded to her 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 Decision. Further, no such communication may toll or extend the time limit set forth above for filing an appeal.

s/Vernell I. Scott
Vernell I. Scott
Local Due Process Hearing Officer

February 24, 2023
Beaufort, South Carolina