

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT
STATE-LEVEL APPEAL**

STATE OF SOUTH CAROLINA	)	
	)	
	)	
L.R. (Parent) on behalf of F.R.,	)	
(Student)	)	
	)	
Petitioners,	)	
	)	MITCHELL YELL
v.	)	STATE-LEVEL REVIEW OFFICER
	)	
	)	
Florence County School District One,	)	
	)	
District/Respondent	)	DECISION
	)	
	)	
	)	
	)	

This matter is before me pursuant to an appeal of the Local Due Process Hearing Officer (“LHO”), Bruce J. Smith’s Final Order dated November 17, 2023. The South Carolina Department of Education (“SCDE”) received the Parents’ appeal of the LHO’s orders on November 20, 2023.

On November 20, 2023, I was appointed as the state-level review officer (“SRO”) in the appeal. Parents and District were notified of my agreement to serve as SRO on the same day. Petitioner (“Parent”) represented her minor son, F.R., (“Student”) and Florence County School District 1 (“District”) was represented by Susan Fittipaldi, Esq. and John M. Reagle, Esq. The

SCDE notified the parties that in accordance with the Individuals with Disabilities Education Act (IDEA) and federal regulations¹ the state is required to ensure that no later than thirty days after the receipt of a request for a review, a final decision is reached in the review and a copy of the decision is mailed to each of the parties. Based on SCDE's receipt of the request for appeal on November 20, 2023, the due date for the final decision on appeal was established as December 20, 2023.

As the SRO, I have jurisdiction in this matter pursuant to a letter of appointment from the SCDE. I have the knowledge and ability to render and write decisions in accordance with the appropriate, standard legal practices. To ensure the rights of the parties pursuant to the IDEA, on November 21 2023, I emailed the District and Petitioners (copied to the SCDE) a request that the parties adhere to the following schedule in submitting briefs to me: Parents brief due December 4, 2023, District brief due December 6, 2023, Parent's reply brief, if needed, due December 8, 2023. Parent requested another day to complete her brief. There was no objection, so I agreed to extend the due date for Parent's brief until December 5, 2023, District's brief until December 7, 2023, and Parent's reply brief until December 9, 2023. I received Parent's, District's, and Parent's reply briefs and exhibits in a timely manner.

STANDARD OF REVIEW

In the two-tier due process system used in South Carolina, the SRO's (Tier Two) review of an LHO's (Tier One) ruling is limited to the issues appealed.² An SRO is to make an independent decision, although the decision must be based on the record of the hearing, the exhibits presented, and the applicable law and regulations. According to the U.S. Court of Appeals for the 4th Circuit, if the LHO and SRO arrive at different conclusions, the SRO must provide sound reasons for departing from the LHO's ruling.³

PROCEDURAL HISTORY

October 12, 2023	Parent filed due process hearing requests.
November 7, 2023	LHO conducted a one-day hearing.
November 17, 2023	LHO issued his final order.

¹ 34 C.F.R. § 300.515(b).

² 34 CFR §300.514.

³ Springer v. Fairfax County School Board, 134 F.3d 659, 663, 4th Cir. 1998

November 20, 2023	Parent appealed LHO ruling.
November 20, 2023	The SCDE notified Parent and District that the notice of appeal of the LHO's order had been received and that Dr. Yell was the appointed SRO. The SCDE also notified parties that December 20, 2023, was the deadline for issuance of the SRO's decision.

FINAL ORDER OF THE LHO

In his final order of November 17, 2023, the LHO examined the issues in this case.

ISSUES ADDRESSED IN THE ORDER

The LHO identified the following issues in the Parent's due process request:

Issue #1: The manifestation determination. "Did the District fail to make a proper determination that F.R.'s behavior on the two bus incidences were not related to his disability or the results of side effects from the medication for his disability" (LHO Final Order, p. 2).

Issue #2: Failure to Implement the BIP and IEP. "Did the district fail to provide therapy support per F.R.'s Behavioral Intervention Plan (BIP) and Individualized Education Program (IEP): that is, did the District fail to meet F.R.'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 his daily behavior logs, and
- follow delayed release procedures outlined in his IEP" (LHO Final Order, p. 2).

LHO's FINAL ORDERS AND REMEDIES

The LHO 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 manifestation determination review (MDR) team erred in determining the student's behavior was not a manifestation of his disability are not substantiated through the testimony and evidence presented by the Petitioner...the Petitioner failed to meet her burden of

proof, which is necessary to justify the determination. As a result, Petitioner’s request for remedies, which include but are not limited to a reversal of the decision of the MDR, to order the district to outside counseling through her requested provider, and for reimbursement for print and advocate fees are denied compensatory reimbursement” (LHO Final Order, pp. 10, 11).

Noting that “the District must not simply think it can shake off its responsibility to fully implement the student’s IEP” (LHO Final Order, p. 8), the LHO ordered the District to take the following actions: (a) Review and more effectively implement the District’s communications with the parent, (b) provide training to F.R.’s teachers and teachers within 30 days of the issuance of the LHO’s decision of November 17, 2023 (the training must be provided by December 17, 2023), (c) “convene the student’s IEP team to ensure FBA, including the administration of any other independent educational evaluations (IEE) 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” (LHO Final Order, p. 11), and (d) the IEP team must then reconvene and revise the student’s IEP and BIP to address how to effectively implement the current accommodations and strategies or to develop alternative accommodations and strategies to address all of the Student’s needs.

Moreover, the LHO ordered that District officials “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 (LHO Final Order, p. 11). Forty-five calendar days from the LHO’s final order is January 4, 2024.

DISCUSSION

As the SRO, it is my task to examine the entire hearing record and arrive at an independent decision.⁴ Additionally, the SRO must exercise plenary review and make an independent decision while giving due deference to the LHO’s findings unless the evidence in the record justifies a contrary conclusion.⁵ The LHO or SRO should not substitute their own notions of sound educational policy for those of local school authorities.⁶

⁴ 34 C.F.R. § 514 (b)(2).

⁵ *Doyle v. Arlington County School Board*, 953 F.2d 105 (4th Cir. 1998).

⁶ *M.S. ex.rel Simchick v. Fairfax County School Board*, 553 F.3d 315, 326 (4th Circ. 2009).

I reviewed the transcripts, briefs, exhibits, and LHO's final order of November 17, 2023. I find that the hearing was conducted by LHO, Bruce J. Smith, consistent with the requirements of the IDEA.⁷

Prior to turning to the ruling, I will comment on the four issues of importance that inform my decision. First, as the LHO noted, the burden of proof⁸ in this case lies with the parents. According to the U.S. Court of Appeals for the 4th Circuit,⁹ when a statute, such as the Individuals with Disabilities Education Act (IDEA), is silent as to the burden of persuasion, the burden is normally placed on the party initiating the proceeding and seeking relief. The U.S. Supreme Court affirmed the 4th circuit's decision.¹⁰ Thus, in this hearing Parent bears the burden of persuasion. The LHO, however, found that in this matter the "Parent did not meet her burden of proof" (LHO Final Order, p 8).

The second issue is regarding Parent arguing this matter pro se. This is perfectly permissible and although pro se parties are held to less stringent standards and their pleadings should be liberally construed,¹¹ they must provide facts to support the claims made during the hearing. In Parents reply brief of December 9, F.R.'s parent wrote "I am not an attorney and I am doing the best that I can do..." (Final Parent Reply, p. 1). The parent is to be commended for her strong advocacy for her son, nonetheless, the facts she presented and the testimony she elicited were not sufficient to convince the LHO that the District incorrectly found that F.R.'s behavior on the bus was a manifestation of his disability. Much of this testimony in this hearing revolved around the relationship between F.R.'s ADHD, the medication F.R. was taking, and the behavioral incidences on the bus. However, facts were not presented. According to the LHO

The name of the medication was never stated. In addition to not sharing any information regarding the type of medication the Student was reporting taking to address his diagnosis..., the petitioner did not present any testimony from medical professionals or from her own testimony that was more than an

⁷ 34 C.F.R. § 514 (b)(2)(ii).

⁸ The burden of proof refers to two related concepts, the burden of production and the burden of persuasion. Citing McCormick on Evidence, Justice Sandra Day O'Connor in writing the majority opinion in *Shaffer v. Weast* (2005) noted that the case addressed only the burden of persuasion but that the opinion sometimes used the term "burden of proof," to refer to the burden of persuasion.

⁹ *Weast v. Shaffer*, 377 F.3d 449 (4th Cir. 2004).

¹⁰ *Shaffer v. Weast*, 468 U.S. 49 (2005)

¹¹ *Card ex rel JD v. Citrus County School Board* 65 IDELR 3 (MD FL 2015).

indication that his medication “could” or “might” have side effects that influence his behavior. The petitioner did not present the name of the medication; any reports from any publications or other sources regarding the unnamed medication and possible side effects, in general or specific to the Student; or elicit testimony from witnesses to relate specific or generalized behavior to any specific medication. The Petitioner simply made speculative statements about the possibility that an unnamed drug “could” or “might” negatively impact the Students. (LHO Final Order, p. 7).

The third issue is IEP implementation. The IEP is the primary mechanism for ensuring the provision of FAPE and plays an important role in a manifestation determination. It has been described by the U.S. Supreme Court as the *modus operandi*¹² and the centerpiece¹³ of the IDEA. The IDEA requires that students’ FAPE be “provided in conformity” with a student’s IEP.¹⁴ This requirement, which involves the accuracy of implementation of a student’s IEP, has been called the third dimension of FAPE under the IDEA.¹⁵ Student also had a BIP.

Stressing the importance of implementation, the U.S. Courts of Appeals for the 9th Circuit,¹⁶ noted that “an IEP, like a contract ...embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP.”¹⁷ The IEP is not a contract in the sense that it does not guarantee that a student will achieve all the goals written in the IEP; rather it is like a contract because school personnel are obligated to provide the services agreed to by parents and school personnel in the IEP meeting. An additional passage from the 9th circuit’s ruling in this case is interesting in light of the issues in this case.

Moreover, in enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formulation* (italics in original)...Under the IDEA, parental

¹² School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359, 363 1985.

¹³ Honig v. Doe, 484 U.S. 305, 311 1988.

¹⁴ 34 C.F.R. 300.17(d), 2006.

¹⁵ See Zirkel, P.A. (2017). Failure to implement the IEP: The third dimension of FAPE under the IDEA. Journal of Disability Policy Studies, 28 (3), 174-179.

¹⁶ M.C. v. Antelope Valley Union High School District, 858 F.3d 1189, 9th Cir. 2017.

¹⁷ Id at 1197.

participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive.¹⁸

The U.S. Court of Appeals for the 4th Circuit cited the 5th,¹⁹ 8th,²⁰ and 9th circuit court rulings²⁰ that a school district denies FAPE only when it fails to implement a material, significant, or essential element of a student's IEP. According to the 9th circuit court, a material failure to implement "occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."²¹ The 4th circuit court concluded "that a material failure to implement, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA."²²

The fourth issue informing my opinion are the procedural and substantive requirements of the IDEA, specifically school district violations of these requirements. In *Board of Education v. Rowley*,²³ the U.S. Supreme Court decision solidified the dichotomy between the procedural and substantive FAPE requirements of the IDEA and provided a framework by which courts could analyze these different types of FAPE violations. The IDEA includes many procedural requirements to which school district personnel must adhere. Although the IDEA is not clear on substantive requirements and does not distinguish between what constitutes a procedural and a substantive violation, the U.S. Supreme Court in *Endrew F. v. Douglas County School District*²⁴ clarified the definition of FAPE when it held that "to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress in light of his circumstances."²⁵

Congress further codified this procedural and substantive distinction in the 2004 amendments to the IDEA. According to the law, when hearing officers hear disputes about the provision of a FAPE, they are to base their decisions upon substantive grounds of whether a student received a FAPE. According to the IDEA, in matters alleging a procedural violation of the IDEA, a hearing officer may only find that a student did not receive a FAPE if the procedural

¹⁸ Id at 1198.

¹⁹ *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

²⁰ *Van Duyn v. Baker School District*, 502 F.3d 811 (9th Cir. 2007).

²¹ Id at 822.

²² *Sumter County School District 17 v. Heffernan*, 642 F.3d 478.452 (4th Cir 2011).

²³ *Board of Education v. Rowley*, 458 U.S. 176 (1982).

²⁴ *Endrew F. v. Douglas County School District Re-1*, 580 U. S. 386 (2017).

²⁵ Id at 400.

violations (a) impeded a student's right to a FAPE, (b) significantly impeded a student's parents' opportunity to participate in the decision-making process regarding their child's FAPE, or (c) deprived a student of educational benefits.²⁶

RULING

Issue #1: The manifestation determination. “Did the District fail to make a proper determination that F.R.’s behavior on the two bus incidences were not related to his disability or the results of side effects from the medication for his disability” (LHO Final Order, p. 2).

A manifestation determination is a review conducted by the local education agency (LEA), a student's parent(s), and relevant member of the student's IEP team. The team “must review all relevant information in the student's file, including the child's IEP, any teacher observations, and additional information provided by the parents.”²⁷ A careful review of a student's records will aid the MDR committee in determining the nexus between the student's misbehavior and a school's code of student conduct. Specifically, the task of the committee is to determine if the conduct that gave rise to a student's violation of the school's code of student conduct, (a) was caused by, or had a direct and substantial relationship to, a student's disability, or (b) if the behavior in question was the direct result of the school district's failure to implement a student's IEP.²⁸

A MDR must be conducted within 10 days of a change in placement due to disciplinary actions a school district takes to address a student's violation of the school's code of conduct,²⁹ although the IDEA permits MDRs to be conducted in other situations when a student's behavior violates the school's code of conduct.³⁰

If the committee determines that the problem behavior was directly and substantially related to a student's disability, the student's IEP team must either conduct an FBA, unless an FBA had already been conducted, and implement a BIP or review and revise an existing BIP to address the behavior in question.³¹ Moreover, the student has to be returned to the placement

²⁶ 20 U.S.C § 1415 [f][3][E][ii].

²⁷ 34 C.F.R. § 300.530(e).

²⁸ 34 C.F.R. § 300.530(e)(i)-(ii) 2006.

²⁹ 34 C.F.R. § 300.530(f)(1)(i)-(ii).

³⁰ U.S. Department of Education, Office of Special Education and Rehabilitative Services, “Questions and Answers: Addressing the Needs of Children With Disabilities and IDEA's Discipline Provisions, Question F-2, July 19, 2022.

³¹ 34 C.F.R. § 300.530(e).

from which the student was removed, unless the student's parent and the school district determines that a change of placement is needed as part of the modified BIP.³² If the committee determines that the misbehavior was the direct result of a failure to implement the IEP, the school district must take immediate steps to remedy the deficiencies. According to the U.S. Department of Education, such steps could include, (a) meeting with each of the student's teachers or other service providers to review their specific responsibilities in implementing the student's IEP, (b) verifying that the specific accommodations, modifications, and supports required for the student are being implemented, and (c) determining any compensatory services needed to address the school district's failure to implement the child's IEP.³³

If the committee determines that the behavior was not a manifestation of the student's disability, school personnel may apply the same disciplinary procedures to students with disabilities in the same manner and duration as are used with students without disabilities.³⁴ In such instances, school district must continue to provide FAPE to the student with disabilities when the resulting change in placement exceeds 10 consecutive school days, except that the FAPE will be provided in an interim alternative educational setting.³⁵ The FAPE-related services that are provided by the school district must enable the student "to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."³⁶ Additionally, the student must "receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."³⁷

In this matter, Parent filed for the due process hearing alleging that the District violated the IDEA when the MDR team found that Student's violation of the District's code of conduct was not a manifestation of his disability. This particular MDR involved violations of the code of conduct in two incidences on the school bus on September 8 and September 11, 2023. The two incidences involved Student taking students' cell phones, stomping on one, and threatening another student. The incidences were captured on video. The Student's behavior in these

³² 34 C.F.R. § 300.530(f)(2).

³³ U.S. Department of Education, Office of Special Education and Rehabilitative Services, "Questions and Answers: Addressing the Needs of Children With Disabilities and IDEA's Discipline Provisions, Question F-4, July 19, 2022.

³⁴ 34 C.F.R. § 300.530(d)(1).

³⁵ 34 C.F.R. § 300.530(d)(2).

³⁶ 34 C.F.R. § 300.530(d)(1)(i).

³⁷ 34 C.F.R. § 300.530(d)(1)(ii).

incidences is not in question; the relationship of the misbehavior and Student's disability is. Student's parent contends that her son's ADHD and medication contributed to his behavior in these incidences and that his IEP was not being followed and his teachers were not properly trained.³⁸

To determine if the school district's MDR was properly conducted, I analyzed the following four issues:

(a) Did an appropriately constituted team conduct the MDR? The IDEA requires that the team that conducts the MDR include the LEA, the parent, and relevant members of the IEP team (as selected by the parents and the LEA).³⁹ According to Parent exhibit 3, the MDR team consisted of Student, Parent, Assistant Superintendent of Exceptional Children, guidance counselor, General education teacher, special education teacher, school-based therapist, LEA Representative, and psychologist. Unfortunately, only the titles or roles of the participants were provided. Although space on the MDR form was included to provide participants' names and signatures, this section was not completed. **Although it would have been useful to have the form dated and with names of attendees, I conclude that the MDR team was properly constituted.**

(b) Was the manifestation determination based on a review all relevant information in the student's file, including the child's IEP, any teacher observations, and additional information provided by the parents," as required by the IDEA?⁴⁰ Parent exhibit 3 was the manifestation review of 09/22/2023 following Student's behavioral incident on the bus. According to the District's MDR form, Student had a diagnosis of Other Health Impaired (OHI) and a documented diagnosis of ADHD. Student was determined to be eligible for special education services on 05/03/22. The MDR team reviewed the following information: Student's BIP, information provided by Student and Parent, information provided by Student's teachers, direct and indirect observations, incident reports. Student's IEP was not listed as a document reviewed for the MDR. Failing to list a review of the IEP in the MDR form may have been an oversight, nonetheless it would at most be a procedural error and the MDR team consisted of personnel

³⁸ Parent's appeal brief, December 9, 2023, pp. 1-6.

³⁹ Supra note at 27.

⁴⁰ Supra note at 27.

well acquainted with Student. **Therefore, I conclude that the team used important and relevant information in arriving at their decision.**

(c) Was Student’s conduct in question caused by, or did it have a direct and substantial relationship to Student’s disability? The IDEA uses relatively direct language regarding the manifestation determination and requires that LHO’s, in this instance, determine what is a direct and substantial relationship. The language used in the IDEA is similar to language used by the U.S. Court of Appeals for the 9th Circuit in 1986.⁴¹ According to the 9th circuit court, a child with a disability conduct is caused by or has a direct and substantial relationship only if the disability “significantly impairs the child’s behavioral controls...it does not embrace conduct that bears only an attenuated relationship to the child’s (disability).⁴² Much of the hearing revolved around the bus incidence, Student’s ADHD, and the medication that he was taking; therefore, the question boils down to is this: Did Student’s ADHD or medication impair his behavioral control?

I note that during the hearing a number of references were made to Student’s diagnosis of Oppositional Defiant Disorder (ODD),⁴³ in Parent’s Due Process Complain (October 10, 2023) and testimony during the hearing. however, in exhibits this diagnosis was only brought up in Parent exhibit 9, services log.⁴⁴ In the record of the transcripts, Parent asserts that the manifestation determination was decided incorrectly on this issue primarily because of Student’s ADHD and possible effects of the unnamed medication.⁴⁵ District responds that the conduct in question was not a manifestation of Student’s disability.⁴⁶ Moreover, in the hearing transcripts, District personnel testified that there was no direct and substantial relationship between Student’s conduct on the bus and Student’s ADHD or the side effect of medication because Student’s actions were not impulsive but rather showed choice, planning, ability to control impulses, and

⁴¹ Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

⁴² Id at 1481.

⁴³ In the Diagnostic and Statistical Manual, 5th edition (DSM-5TR, 2023), the American Psychiatric Association defines the disorder as a pattern of anger, irritable, argumentative, defiant behavior, or vindictiveness usually targeted toward peers, parents, teachers, and other authority figures (Diagnosis 91.3, p. 522).

⁴⁴ Parents exhibit 9 is the service log from service dates 7/24/2023 through 9/1/2023 logged by Ms. Cogdell Quick, the school-based therapist. In addition to the diagnosis of ADHD, combined type (F90.2), Ms. Quick lists a diagnosis of Oppositional Defiant Disorder (F91.3, see footnote 43).

⁴⁵ See Parent Due Process Complaint (IOctober 10, 2023), Parent DPH Appeal, Parents Reply Brief, and Hearing Testimony, pp. 157-165.

⁴⁶ Respondent’s Brief on Appeal to the State Review Officer, December 7, 2023, p. 9.

intentionality.⁴⁷ **I agree with the District that Student's actions on the bus involved forethought and planning, which is not consistent with the impulsivity and inattention problems present in ADHD. I conclude therefore, that the District was correct in the MDR when they found that Student's conduct in the bus incidences was not directly and substantially related to Student's disability.**

(d) Was Student's conduct in question the direct result of the LEA's failure to implement the IEP? In 2004, Congress changed the questions that would guide the MDR process. Prior to the 2004 amendments, the MDR team had to determine if the IEP and placement were appropriate and if the IEP, including behavior interventions, had been implemented agreed upon. However, in 2004, Congress made the MDR language simpler, and some would argue more school friendly. The new language did not require the MDR team to determine appropriateness of a student's IEP and placement; rather it required that the MDR team determine if a student's misbehavior was the direct result of the LEA's failure to implement. Using the language in *Doe v. Maher*, did the failure to implement Student's IEP impair Student's behavioral controls?

There were problems with implementation of Student's IEP that were brought out in the hearing; nonetheless district personnel testified that they did not find any such failure to implement Student's IEP or the BIP to be directly related to Student's misbehavior. **I agree with the LHO that Student's conduct was not the direct results of the LEAs' failure to implement Student's IEP and BIP.**

Overturning a school's MDR decision that there is not a direct relationship between disability and misbehavior requires that a parent meet a high bar in providing evidence that there is a direct and substantial relationship between the conduct that resulted in the MDR and a student's disability or the LEA's failure to implement an IEP. The testimony and evidence introduced at the hearing must be such that the party seeking to overturn the MDR persuades the trier of fact of the correctness of their position. That did not happen here; the Parent did not meet the burden of persuasion. **Thus, I affirm the LHO's finding that Students conduct was not a manifestation of his disability and neither was it due to the LEA's failure to implement students IEP. I also affirm the LHO's denial of the Parent's remedy that the District**

⁴⁷ See testimony of School Psychologist William McElveen (Hearing Transcript pp. 91, 92, & 94), Student's case manager & teacher, Ladrica Jones (Hearing Transcript pp. 117-120), principal, Dr. Eric Robinson (Hearing Transcript p. 141), Dr. Laura Lapin (Hearing Transcript p. 192), assistant principal, Shadaris Bradley, Assistant Superintendent for Special Needs, Brian Denny (Hearing Transcript pp 259-259).

provide outside counseling services through her requested provider and that Parent receive compensatory reimbursement for printing and advocacy fees.

I agree with the LHO's admonishment, however, that the District "must not simply think it can shake off its responsibility to fully implement the Student's IEP" (LHO Final Order, p 8). This leads to the second issue raised by Parent.

Issue #2: Failure to Implement the BIP and IEP. Did the district fail to provide therapy support per Student's BIP and IEP: that is, did the District fail to meet Student's needs in the LRE by failing to provide:

- school behavior therapy support per the student's BIP and IEP,
- completion of his daily behavior logs, and
- follow delayed release procedures outlined in his IEP (LHO Final Order, p. 2).

The fundamental premise of the IDEA is that all eligible students with disabilities would be provided with a FAPE. In 1978, three years after the passage of the Education for All Handicapped Children Act, which was renamed the IDEA in 1990, Senator Robert Stafford, an author of the original law, wrote "we in Congress did not attempt to define 'appropriate' in the law but instead, we established a base-line mechanism, a written document called the Individualized Education Program (IEP)."⁴⁸ According to the Senator, Congress chose not to define appropriate in the definition of FAPE because legislators believed it should be up to a student's parent and school-based teams to determine what was appropriate to include in the student's IEP.

The collaborative process between Parent and District has broken down. Parent testified and included information regarding this problem in her original due process hearing requests and briefs. She does not believe the IEP team listens to her concerns. According to the LHO, District needs to review and more effectively implement Parent/District communications (LHO Final Order, p. 2).

An option available to the school district is to contact the South Carolina Office of Special Education Services (OSSES) and inquire about obtaining the services of an IEP facilitator. Either Parent or District may request a facilitators to assist IEP process. IEP facilitation is

⁴⁸ Robert T. Stafford, Education for the handicapped: A senator's perspective Vermont Law Review, 3, 75 (1978)

available at no cost to parents and school districts and is a voluntary process that both parties must agree to. The goal of IEP facilitation is to assist the team in discussing issues and reaching consensus. It can be useful when there are trust and communication issues between IEP team members.

There are legitimate concerns about the development and implementation of Student's IEP that arose during hearing testimony. Specific issues include the provision of the services of a school-based therapist, the implementation and communication of the daily behavior log, delayed release, check in-check-out, and other accommodations listed in Student's IEP. Were these services implemented as agreed upon by the IEP team? Student's IEP is not a list of suggestions; rather it is the blueprint of a student's FAPE. Because Student's goals and services, and accommodations are largely designed to address Student's behavioral issues, a failure to provide these services and accommodations would seem to be material deviations from Student's IEPs.

It is also concerning that District placed Student on home-based instruction from mid-January 2023 to mid-April 2023. Moreover, Student's IEP of 5/18/2023 lists "Home-based" as Student's "Placement Setting and Delivery Model" yet the IEP included special education services, related services, accommodations, and transition programming⁴⁹ that seemed extremely difficult to provide in a home-based setting. Were the special education services/specially designed instruction of 90 minutes weekly of direct services and specialized instruction in behavior provided as per Student's IEP? Similarly, was the related service of behavior therapy by the school-based therapist in the school-based therapist room provided as per the IEP when Student was on home-based instruction? According to Parent's reply brief of 12/9/2023 during home-based instruction Student only received math instruction by the home-based teacher. Is this the only general education curriculum content Student received when on home-based? The appropriateness of home-based instruction must be assessed on a case-by-case basis; nonetheless, it seems unlikely that such a setting would satisfy the IDEA's requirement to continue (a) participating in the general education setting, (b) progressing toward meeting the goals in the student's IEP, and (c) receiving the services listed in his or her IEP.

⁴⁹ Parent Exhibit 1, Individualized Education Program, 5/18/23. P. 9 of IEP, p. 12 of Parent exhibit 1. The transition IEP written on 5/18/2023⁴ is p. 1 of Parent' exhibit 1.

I affirm the order of the LHO requiring the District to reconvene Student's IEP team to review and revise Student's IEP/BIP and ensure an appropriate FBA, including administration of any other evaluations to gather the necessary data to develop a more appropriate BIP. I also affirm the LHO's ruling that the district provide training to Student's teachers and other staff on correctly implementing the student's IEP. I also suggest that some amount of training include Student's bus driver. The testimony of the bus driver indicated that she did not know Student had a disability, had no knowledge about disabilities, and that Student's behavior could pose a danger while she was driving. Moreover, the bus driver believed that the Student should be taken to and from school on a bus designated for special education students. The LHO aptly noted that this responsibility belongs to the principal, assistant principal, teacher, and the Assistant superintendent of Exceptional Children and ordered that the District provide documentation of full implementation of his order to the South Carolina Department of Education, Office of the General Counsel as soon as possible, but no later forty-five calendar days of the issuance of this decision.

The LHO reported that there was no indication that the District has followed through with the orders in a previous case. I have had a similar experience with District. I was not aware that District had not complied with my order in the case until the petitioner-oriented send an email to all parties asking why the District special education staff had not been trained as I ordered.

Because the LHO's order was appealed and the District may have not yet complied with the order, District, if it has not already done so, has forty-five calendar days of the issuance of the SRO's decision on December 20, 2023, to comply with this order. The forty-five calendar days will not begin until the Student's return to school on January 3, 2024. District, therefore, must provide documentation of full implementation of his order to the South Carolina Department of Education, Office of the General Counsel by March 14, 2023. I excluded the Martin Luther King holiday (March 8) and the President's day intersession (March 23) when determining the date that full documentation is due.

NOTICE OF APPEAL RIGHTS

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision.⁵⁰



Mitchell L. Yell, Ph.D.
State-Level Hearing Review Officer
December 20, 2023

⁵⁰ 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516; S.C. Code Regs. § 43-243(V)(17).