

I incorporate the procedural history laid out by the LHO in her decision dated February 24, 2023. The Due Process hearing was held in person on February 9 and 10, 2023. The Parent appealed the case on March 1, 2023. The transcript and exhibits were made available on March 9, 2023. The Parent submitted a brief on March 12, 2023. The District submitted a response on March 19, 2023. The Parent did not submit a reply brief.

2. Factual Background

The Student enrolled at Wilson High School for the 2022-2023 year. The previous year, in a middle school in the same district, the Student had an IEP and a Behavioral Intervention Plan (“BIP”) under the classification of Other Health Impairment (“OHI”) for Attention Deficit and Hyperactivity Disorder, combined type. He also has been diagnosed with Generalized Anxiety Disorder and Major Depressive Disorder. (Parent Exhibit 5, District Exhibit 1).

On August 22, 2022, the IEP team met to conduct a special review of the Student’s plan. They agreed to add a school-based therapist to the IEP and discussed ways to help the Student transition between classes. (Parent Exhibit 5).

On September 14, 2022, the school met to update the Student’s BIP. (District Exhibit 1). The school had not been implementing the BIP up to that point. In this meeting the Parent asked for school-based therapy and the team agreed, but did not add it to the BIP because “of documentation concerns” that the Parent had not yet signed the paperwork agreeing to therapy services. (District Exhibit 1). Despite that, the school did begin providing school-based therapy services.

The BIP targeted behaviors of disrespect, inappropriate language, and disruptions, saying that these behaviors were present 3-6 times per class period. The BIP asked for a check-in and check-out daily with the counselor, delayed release between classes, supervision during lunch and recess, and a self-monitoring checklist to be kept by the Student, his counselor and teachers. It said that a Google form would be shared with the teachers and Parent documenting the Student's behaviors and that the Parent would be informed via a daily checklist and email. (District Exhibit 1).

Between the start of the school year and October 11, 2022, the Student received 16 referrals for behavior, including "Refusal to Obey/Defiant," "Bullying," "Hit/Kick/Push," and "Threat." (Parent Exhibit 14).

On October 14, 2022, the Student was in a fight. (Parent Exhibit 14). On October 24, 2022, the IEP team met for a Manifestation Determination Review ("MDR") related to this fight. (Parent Exhibit 12). The IEP team determined that the fight was "a manifestation of his disability due to the BIP not being implemented completed." (Parent Exhibit 12). Specifically, the School had not been implementing the self-monitoring checklist for the Student, and therefore "the team determined the incident was a failure of the LEA to implement his IEP." During the hearing, the therapist said that this decision was a "technicality" as the Parent was receiving behavior updates despite the checklist not being sent home.

Importantly, the MDR documentation noted that the BIP had been created on March 4, 2022 and modified on September 14, 2022, and says that a functional behavioral assessment ("FBA") "was not completed prior to the date of this incident." (Parent Exhibit 12), despite the June 22, 2022 IEP noting that "The student exhibits behavior that requires a Functional Behavioral Assessment" (Parent Exhibit 5). It does not appear, further, that the IEP team

considered whether developing a FBA was needed, despite behavioral challenges (bullying, threats, fighting) that were not targeted behaviors in the BIP (disruption, inappropriate language and disrespect).

After the October 24, 2022 MDR, the District implemented daily behavioral checklists. A staff member at the school handed the Student a chart at the start of each week. The Student was responsible for bringing the chart to each teacher after class and then bringing it to meetings with their school-based therapist to discuss progress. The Student was also responsible for bringing the checklist home to be signed. The school asked the Student to be responsible for the checklist getting signed.

The Student received school-based therapy in fall 2022. The school-based therapist conducted a behavioral screening on the first date and determined that the Student had Oppositional Defiance Disorder (“ODD”) and a previous diagnosis of ODD. The therapist’s notes indicate that the Student had recently expressed interest in receiving support in controlling his temper. (Parent Exhibit 7). Notably, this insight from the Student did not inform any changes in his BIP or other actions by the District.

After the October 14, 2022 fight, the District recorded zero referrals for the Student. (Parent Exhibit 14). Behavioral challenges continued, however. During this time period when teachers were completing the behavior logs, at least one teacher said that “...before I would write [Student} up for a referral, I would communicate to the mom to express what was done and how we can address the situation without writing the referral.” His behavior logs during this time period showed some excellent days (with all 3s) and some inconsistent days (with some

3s, 2s, and 1s). The week prior to the December fight included a day where a teacher marked him as a 0. (Parent Exhibit 11). Emails between a teacher and the Parent also indicate that there were some incidents during this time period. (District Exhibit 4). For example, he was sent to the SRO after putting his head down and took a break when finishing a test. (District Exhibit 4). On December 14, 2022, the Student met with his school-based therapist at 2:00pm and discussed an incident with a teacher that had occurred that included behaviors that included “defensive, negative, and disrespectful attitude and words, and became aggressive in play with classmates inappropriately and he was very dismissive.” (Parent Exhibit 7).

On December 14, 2022, the Student was involved in a fight. This fight took place after school on the side of the school building with fewer surveillance cameras. According to the Student’s report, the Student and another child verbally yelled back and forth to each other on the bus lot. The other student was reported to have said “you want to fight a thug” and the Student said that he would get the last word. The other Student followed him, and then the two moved to the side of the building and fought with each other. (Parent Exhibit 17). No adults witnessed the fight, but they later viewed the fight on a cell phone recording of another student.

The IEP team determined that the behavior was not a manifestation of the Student’s disability. (Parent Exhibit 17). In testimony, the school staff members reported that they did not believe the fight was a manifestation of his disability because the Student had the ability to walk away from the fight and chose to fight anyway and therefore was not impulsive behavior as they would expect from his ADHD diagnosis.

Further, because no adults were present, it was not defiant behavior as would be defined by his ODD diagnosis. At no point in this discussion did any member of the team reference a FBA. The Parent disagreed and argued that the behavior stemmed from the disability. Further, the Parent and her advocate argued that the behavioral checklists were not being completed with enough frequency and also that the Google document mentioned in the BIP was not implemented, and therefore the District had not appropriately implemented the IEP and the behavior stemmed from that lack of implementation.

The Student did not appear in school on December 15, 2022, and the Student was suspended on December 15, 2022 (Parent Exhibit 17). The MDR took place on January 13, 2023. After the MDR, the team also met to update the IEP. After determining that the behavior was not a manifestation of his disability and that the school had not failed to implement the IEP, and thus upholding the suspension, the school gave the Parent two choices for alternative placement, and the Parent chose the home-based option.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer (“SHO”) who must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High*

Sch. Bd. Of Educ. v. P.S. ex rel. P.S., 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

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).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO and does not rehear evidence and generally does not admit or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO found that the MDR, facilitated by the State Department of Education, was appropriately and thoroughly conducted. She found that the team was properly constituted, all team members had input and the team reviewed relevant information. The team heard from the Student and viewed the video of the fight.

The LHO found appropriate the MDR conclusion that the Student's behavior and involvement in the fight was not directly caused by nor had any direct and substantial relationship to his disability. Further, she found that "Petitioner presented no evidence that the

12/14/2022 fight would not have occurred if the student did not have ADHD.” She found that the symptoms listed in Parent Exhibit 6 of diagnostic criteria from DSM-V for ADHD does not support her claim that ADHD caused his involvement in the fight, as 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.’” The LHO also found that the Student often was able to distinguish between good and bad behavior and that he had made significant progress in his behavior and thus demonstrated that he could control his behavior.

The LHO found that the school had followed the behavior log practices and that there was no evidence that the incident was connected to the implementation of the IEP.

5. Discussion

Before the LHO, the Parent argued that the manifestation determination team did not appropriately consider a number of factors in the Student’s ADHD in determining that the behavior did not stem from the disability. She also argued that the school had not appropriately followed the BIP because it had not consistently delivered the behavior checklists and never shared the google document with her, and that also contributed to the Student’s behavior.

The Parent raises these same arguments in this appeal. Recognizing that the Parent was *pro se* (her advocate is not an attorney) and thus may not make arguments with the precision expected of legal counsel, I understand the Parent to challenge both the manifestation determination and the appropriateness of the District’s actions in reaching that determination. On the facts of this case, that includes the procedural history outlined here, including the District’s various decisions and actions through the fall of 2022 which shaped the manifestation decision in

December 2022. Those actions were discussed in evidence submitted by the Parent and thus fairly raised in this case.

The LHO's Opinion

The Parent also challenged specific factual statements in the LHO's opinion. The most relevant ones for the purpose of a clear procedural history are listed below.

- “The final decision states that I was notified on December 14, 2022. I was notified on December 15, 2022.” The District's records indicate that the Parent was notified on December 15, 2022.
- The LHO's opinion, p. 6, states that the MDR was held on January 3. The MDR was held on January 13, 2023. (Parent Exhibit 17).

In addition to those errors, I find several aspects of the LHO's opinion to be concerning. First, she found that “In this case, Petitioner presented no evidence that the 12/14/2022 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.” (LHO Opinion, p. 12). This sentence seems to suggest that the standard for an MDR determination is not just whether the disability caused the behavior, but also whether the behavior would have occurred without the disability – an unduly difficult claim to prove, and one that appears to inappropriately narrow protection for children with disabilities. Indeed, the IDEA regulation's plain text does not require causation to conclude that a behavior is a manifestation of a child's disability. While the District's brief correctly states that an “attenuated” relationship does not suffice to establish a manifestation, a

behavior is a manifestation when it “had a direct and substantial relationship to the child’s disability.” 34 C.F.R. § 300.530(e)(1).

Second, the LHO went into detail to explain why she agreed with the school that the behavior did not stem from the disability – but without any basis for understanding the disability itself and the behaviors caused by it. Her rationale was that teachers described the Student as someone who “tends to make bad decisions on purpose,” that the Student “can distinguish between good behavior and bad behavior,” and that he was “bright, clear about what he wants and about what he does.” It seems as if the LHO’s standard for whether a behavior is caused by a disability is whether or not the Student has any awareness of the behavior or any control over it. Children may be aware of the behavior and even able to control it in certain circumstances, yet still be unable to control it in the circumstances at issue. That concern is particularly apt for a child with ADHD, which makes impulse control challenging. Indeed, IEPs commonly recognize that a child may be able to achieve a particular goal, even if they cannot do so with 100 percent proficiency. IEPs frequently set goals that a child perform a particular academic or behavioral task with increasing proficiency, especially when their disability causes difficulty with the particular task. If the child then fails to complete that task on a single instance – even if they can complete it on other occasions – the child’s disability very possibly has a “direct and substantial” relationship to the behavior.

The MDR & the BIP

Much of this case revolves around whether the BIP was appropriately followed and involved a lot of confusion as to what behaviors the Student exhibits that his disability causes. A baseline understanding of this question is essential to making the manifestation determination

accurately and fairly. And it is the school district's responsibility to develop such an understanding as part of the IEP process. Yet the school appears to have failed to meet this responsibility in this case. None of the evidence presented gives an indication of how the Student's diagnosis affects his behavior. In particular, the record lacks any evidence of the district performing a FBA. I find the lack of a FBA to be problematic, and not in compliance with the IDEA.

First, 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.

34 CFR Section 300.530 states that "If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must –

(1) Either

- (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
- (ii) If a behavioral intervention plan already has been developed, review the behavior intervention plan, and modify it, as necessary, to address the behavior;

The overall duty of the District under this provision is to evaluate or, if necessary, reevaluate how a child's disability contributes to misbehavior and how the school should address it when such behavior manifests. That duty was triggered after the District determined in October 2022 that its failure to implement the Student's IEP contributed, if not caused, the Student's participation in a fight that month. A logical precondition for that conclusion is the recognition that the Student's disability contributed to the behavior at issue. Though the team reported that this finding was a mere "technicality," its agreement that the school failed to implement the IEP was a de facto acknowledgement that his disability contributed to his behavioral challenges and the school had not been helping the child with his disability adequately. This acknowledgement triggered the school's obligation under this regulation. Moreover, the large number of disciplinary referrals that early in the school year coupled with the Student's disability classification should have triggered any IEP team to consider the root causes of the behavioral challenges and how the school could best address them.

The school did not meet its obligation triggered in October 2022. The school did not conduct a FBA – despite the fact that no FBA was in the Student's record, and despite the fact that the IEP review in September 2022 marked that a FBA was necessary. As importantly, there was no comparable tool identifying how the Student's disability contributed to his behavior. Nor

did the school “review . . . and modify [] as necessary” the Student’s BIP. A BIP was in place already, and the District agreed to implement it, but they did not modify it. However, the BIP that was in place was not developed appropriately because it was not based on a FBA or some other equivalent tool to understand how the child’s disability contributed to behavioral challenges. And the District neither identified nor remedied this shortcoming.

That failure infects the District’s decision that the December fight was not a manifestation of the Student’s disability. 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.

The District asserts that the Student’s behavior was improving in the two months leading up to the fight and argues this indicates that they were appropriately meeting the Student’s needs. One might argue that such improvement would make a FBA unnecessary. A complete review of the evidence, however, does not demonstrate this improvement. Referrals decreased, but it is also not clear whether teachers were not referring the Student anymore or if they were simply sending the Student to the SRO or contacting the Parent for negative behavior instead of writing referrals. While the behavior logs indicated some good days, they also continued to have subjects where the Student did not behave, and no previous data exists to compare and demonstrate trendlines for improvement. The Student in fact had an incident with a teacher on the day of the fight itself.

Given this evidence of continued behavioral challenges after the October fight, the reduction in referrals does not suffice to show that the District's efforts improved his behavior.

6. Conclusion

I reject the LHO's finding that the District appropriately determined that this behavior was not a manifestation of the Student's disability. The District did not have the information it should have to determine whether it was a manifestation of the Student's disability. I further find that the District violated the IDEA when it did not complete a FBA of the Student.

The District must complete a FBA for the Student within 30 days of this decision. The team should then re-evaluate the manifestation question within 10 days of the completion of the FBA. This decision does not impact the Student's placement during that period.

7. 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. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.

s/ Avni Gupta-Kagan
Avni Gupta-Kagan

State Hearing Officer

March 31, 2023