

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

In the Matter of:

A.P., on behalf of M.P.,
Petitioner,

V.

Florence County School District One,
Respondent.

This matter is before me pursuant to an appeal by A.P. (“Parent”), on behalf of M.P. (“Student”), of a decision by Vernell Scott, the Local Hearing Officer (“LHO”), finding the Individualized Education Program (“IEP”) team appropriately found the Student’s behavior on February 2, 2023, was not a manifestation of the Student’s disability, nor was it caused by the failure of Florence County School District One (“District”) to appropriately implement the Student’s IEP in accordance with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*, and the Student’s homebased placement was appropriate. The LHO also found the District erred in not providing additional services to the Student within 10 days of this alternative placement. The Parents do not appeal that finding.

1. Procedural Background

I incorporate the procedural history laid out by the LHO in her decision dated April 24, 2023. The Due Process hearing was held in person on March 29, 30, and 31, 2023. The Parent appealed the case on April 26, 2023. The Parent submitted a brief on April 29, 2023. The transcript and exhibits were made available on May 1, 2023. The District submitted a response on March 12, 2023. The Parent submitted a reply brief on May 19, 2023.

2. Factual Background

In August 2022, the Student enrolled in kindergarten at an Elementary School in Florence School District One. He started the year in a general education class and received Speech Language Therapy as a student with Speech Language Impairment. He has been diagnosed with a medical condition of X-ALD, a neuro-degenerative disease, and Addison's Disease as well.

The Student had behavioral challenges from the first day of school (District Exhibit 1) and in October, an incident occurred that lead to a Manifestation Determination Review ("MDR"). (Parent Exhibit 21). The IEP Team determined the behavior was a manifestation of the Student's disability and proceeded to conduct a Functional Behavioral Assessment ("FBA"). (Parent Exhibit 11; Parent Exhibit 34; Parent Exhibit 35). At this time, the team added additional services in the form of pull-out instruction and also developed a Behavior Intervention Plan ("BIP"). (Parent Exhibit 32, Parent Exhibit 33; Parent Exhibit 34). In addition, the team agreed to a re-evaluation review. The IEP was amended to create three behavioral goals as well. (Parent Exhibit 32).

Over the course of the school year, the Student continued to have behavioral challenges, with over 20 referrals. (District Exhibit 1). The classroom teacher said that she struggled with the Student because she would often ask for assistance and no one would be able to come quickly. She also said she taught 25 students and her aide was often used to help other classes. She expressed frustration that the Student continually returned to her classroom without additional support and that she stopped sending in referrals part way through the year because it was not helpful.

The Student had a few good stretches of behavior when promised big rewards (e.g. a hunting trip with his father). Several adults reported strong relationships with the Student. However, the general education teacher said after Thanksgiving the Student's behavior was out of control.

In December, 2022, the Student was evaluated by a psychologist at Medical University of South Carolina who diagnosed the Student with Attention Deficit Hyperactivity Disorder (ADHD), Inattentive type. This psychologist recommended an occupational therapy evaluation, additional supports to help with attention in class, including frequent breaks and rewards. On January 12, 2023, the IEP team reviewed the re-evaluation and determined that the Student was eligible for services under the category of Other Health Impairment ("OHI") due to his medical diagnoses of X-ALD and Addison's Disease. They did not include the ADHD diagnosis in the OHI category but did review the report from the psychologist. (Parent Exhibit 4a; Parent Exhibit 4B). On January 25, 2023, the team met again to consider information provided by the Parents from a private evaluation conducted. (Parent Exhibit 7, Parent Exhibit 8). The team decided to add a service of one-on-one support throughout the day.

The District was unable to find a one-on-one full-time aide right away but did assign staff members to work with the Student in the afternoon. On February 2, 2023, the Student straightened out a paperclip. The paraprofessional tried to take it from him and the Student proceeded to throw chairs and pencils at the teacher and assistant principal. (Parent Exhibit 16). The District conducted an MDR on February 7, 2023, and the team determined that the behavior was not a manifestation of the Student's disability and that the conduct was not a direct result of the District's failure to implement the IEP. (Parent Exhibit 16; Parent Exhibit 6).

The IEP team placed the Student in a homebased program for thirty days during which time the District provided some instruction virtually and some in person. (Parent Exhibit 25; Parent exhibit 20). The Parent and District were unable to agree on times for some of these sessions and the Student received only some of the hours of services required at the end.

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).

3. Hearing Officer's Findings

The LHO found that the District did not deny the Student a free appropriate public education (FAPE) by finding that the Student's behavior on February 2, 2023, was not a manifestation of his disability and therefore the IEP team was justified in placing the Student in a homebased setting under 34 CFR § 300.530(c)(1).¹ However, the LHO found a violation of a FAPE in that the District was required to put more safeguards in place to ensure that the Student

¹ Of note, the LHO said that the District can seek a change in placement and hold a MDR if it believes the current placement is substantially likely to result in injury to the child, citing 34 C.F.R. § 300.530(e). But that is not the law, and not what the cited regulation provides. The cited regulation (34 C.F.R. § 300.530(e) states that a MDR is required whenever a child with a disability faces discipline that results in a change in placement for more than 10 days. This is what happened in this case - the MDR was held, the school concluded the behavior was not a manifestation, and the parents appealed. The LHO cited a standard relevant to a different procedural posture - when the MDR determines that the behavior *was* a manifestation; in such case, a district may appeal if there is a substantial likelihood the child remaining in the present education setting will result in injury to the child or another. 20 U.S.C. § 1415(k)(3)(A). Because the MDR team did not determine that this behavior was a manifestation of the student's disability, this provision was not at issue. Accordingly, the district does not raise arguments under the "substantially likely" standard in its brief.

is not deprived of educational benefit when removed for more than 10 days of school, and that simply revising the FBA on February 8 did not provide enough protection as the Student remained on homebased instruction during the pendency of this matter.

The LHO found the meeting was appropriately and thoroughly conducted. She found that the team was properly constituted, all team members had input and the team reviewed relevant information. She did not find it problematic that the District did not add ADHD to the Student's disability category because the behavior displayed by the Student was not impulsive but that testimony showed the behavior was intentional.

The LHO ordered that a new IEP be created with an emphasis on extended school year services, and that the Parent should cooperate with the District to participate in any programs developed. She did not find a prevailing party.

4. Discussion

The Parents raised a number of issues in their appeal, some of which are properly before me and others of which are not. I will focus my review on the following questions:

- 1) Did the IEP team properly determine that the Student's behavior was not a manifestation of his disability?
- 2) Did the District violate the FAPE requirement by not putting more safeguards in place to ensure the Student was not deprived of educational benefit after 10 days out of school?

The Manifestation Determination Review

Was the behavior at question a manifestation of the Student's disability?

The Student was classified as having a disability due to a Speech Language Impairment and an Other Health Impairment due to his X-ALD disease. While much attention was paid to whether or not the Student also should have been classified as Other Health Impaired due to ADHD, I do not focus on this question here as the disability classification is not the core issue of the case. Instead, I focus on what the team had previously determined as behaviors that stem from the Student's disability.

The goals in an IEP should be designed to “meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child’s other educational needs that result from the child’s disability.” 20 U.S.C. §1414(d)(1)(A)(1)(II)(bb).

The Student’s IEP described the impact of the Student’s disability as “[Student’s] disability causes weaknesses in the areas of behavioral skills. This affects his involvement in the general curriculum and age appropriate activities. [Student] requires a heavy schedule of reinforcement ensuring all learning opportunities are captured. Behaviors demonstrated are a disruption to his learning and the learning of the other students in his environment.” (Parent Exhibit 6A).

The IDEA also requires an IEP to include goals that will help address the child’s needs that “result from the child’s disability.” 20 U.S.C. § 1415(d)(1)(A)(1)(II)(bb); 34 C.F.R. § 300.320(a)(2)(i)(B). As with other parts of the IEP, the Student’s goals reflect that his disability “result[s]” in significant behavioral problems. The IEP listed 6 goals, the first three of which are listed here:

- Goal 1: By the end of the IEP, when given a one-step direction verbally, [Student] will follow directions on the first request within 10 seconds intervals, increasing 20% to 80%, as measured by teacher made behavior logs.
- Goal 2: By the end of the IEP when feeling frustrated, [Student] will verbalize his emotions appropriately and will not display verbal aggression (shouting at others; calling others names; inappropriate language for example: shut up, liar, idiot, stupid; arguing with peers/adults) and physical aggression (getting in others' person space; hitting; kicking; throwing items; pinching; choking) for 70% of the time increasing from 20% on (sic) the time as measured by a teacher made behavior log.
- Goal 3: By the end of the IEP, during a moment of frustration, when directed to use a specific pre-taught calming strategy (e.g. "Let's use ____ to calm down."), [Student] will use the calming strategy within 1 minute, with no more than 2 verbal or non-verbal prompts (e.g. "Remember to use...", pointing to calming box), for 4 out of 5 moments of frustration increasing from 1 out of 5 moments of frustration as measured by a teacher made behavior log.

(Parent Exhibit 6A).

These goals reflect the IEP team's consensus in the determination that the behaviors described result from his disability; that is why they were in the IEP.

The purpose of a FBA is to understand the root causes of the behaviors that the student is exhibiting. The FBA completed in the fall of 2022 described the Student as one "who is currently struggling with both verbal and physical aggression towards peers and staff. He shouts at others, calling them names. He throws materials across the room and at others. He has hit, kicked, pinched, and even choked a student." (Parent Exhibit 11). The target behavior identified in the FBA is verbal and physical aggression, with an antecedent of "when he is told no, or is told to do something he does not want to do." (Parent Exhibit 11). Of note, the October 24 FBA – completed as a next step from an MDR on October 20, 2022 - lists a series of sources from which the team gathered data, but does not list the strategies tried or evidence gathered from those data sources. It is unclear how they determined the antecedent behavior. The only strategies listed were a token board for rewards for positive behavior, short breaks to calm down,

and a daily visual behavior log with a mid-day and afternoon check in. The BIP dated October 25, 2022, indicated the baseline data was 18 times daily on average for verbal and physical aggression. (Parent Exhibit 33).

The incident leading to the MDR was that the Student sharpened a paperclip, threw a chair, threw pencils and threw items at the assistant principal. These are the exact behaviors his IEP is meant to address, and which the IEP team recognized as resulting from his disability. Despite the IEP, FBA and BIP all describing these behaviors as resulting from his disability, the team determined that the behaviors on February 2 were not a manifestation of his disability, claiming that the Student was able to control his behaviors sometimes and that these behaviors were learned rather than caused by his disability.² In essence, the IEP defined the disability as the exact behaviors he is exhibiting. The IEP also clearly stated that the Student, when frustrated, exhibited these behaviors most of the time (the goal was to increase positive behaviors from 20% of the time to 80% of the time).

² Testimony from school team members all argued the same general point, quoted here to demonstrate consistency:

- a) “he’s able to verbalize why he did it or why he has . . . these meltdowns and act this way. He can tell you that he wants you to get out of his face or doesn’t want to do something. If you don’t get out of his face, he’s going to do this.” (Testimony p. 189).
- b) “I felt like that [the Student] knew what he was doing. He even told them what he was going to do. And then, so to me, if we’re talking about a behavior that is not – either is not or is uncontrolled – then it would be difficult to say that that’s the case because I determined he knew what he was doing.” (Testimony p. 255-6).
- c) “if you can be so good to get recess and then afterwards start to misbehave then you can control it.” (Testimony p. 402).
- d) “I felt the students’ conduct was not related to the disability as he was able to control it in certain situations and not display the same behaviors towards different people. . . I don’t think he wanted a particular reward. I think he just wanted to do what he wanted to do at that moment. And so if he didn’t want to do it, he just wasn’t going to do it. If he wanted to do it, he would do it.” (Testimony of p. 507-8).
- e) “From my experience with the student up until this point, from what I’ve seen, I see him as a very intelligent little boy that is very strong-willed and self-determined, which are great qualities. But if it’s something that he does not want to do or something that doesn’t motivate him, he will act out to get his point across. So I didn’t feel like it was a manifestation of his disability.” (Testimony of p. 540).
- f) “He also was able to almost – I don’t want to say maybe bargain for – things. If you don’t give me this, I’m going to do this. He was able to verbalize what he was going to do or why he did things. . . some days he had great, great days, and so I felt like it wasn’t related to his disability.” (Testimony of p. 575-6).

During the hearing, team members stated the Student could control his behaviors when he wanted to and that he behaved poorly only when he did not get something he wanted. The FBA clearly states that the antecedent action to his behavior (caused by his disability) was not getting what he wanted. The LHO seemed convinced by the school staff member's arguments that they had seen the Student control the behaviors some of the time and that the behavior was learned, but nothing in the record suggests that those facts make it any less of a behavior stemming from his disability. 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. That conclusion is particularly strong in the present case, when the IEP team recognized a fairly low baseline – exhibiting the desired behaviors only 20% of the time.

The Prior Written Notice (“PWN”) from the MDR stated the team believed the Student's behaviors had escalated over the last 2 weeks, that it is limited to the general education classroom and not across environments, that the Student has learned to bargain to complete tasks, and that he had 8 “perfect” behavior days when facing a positive reward. None of these facts make the behavior less likely to be from the disability. The strategies the team set up for the Student involved rewards for good behavior, so the fact that bargaining to complete tasks or good behavior when faced with a positive reward worked, means that perhaps the team had identified the right strategy for changing his behavior. The general education classroom is a

larger environment where constant reward is more difficult, so it also is logical that he struggles more there.

The District argued that the Parent had not met the burden of proof to demonstrate that the behavior was caused by the disability. I find that the facts in the evidence meet that burden, and that the testimony of the school district officials only further strengthen the argument (as stated above). The behaviors demonstrated on February 2, 2023 are the behaviors targeted by the Student's IEP and therefore, I find that the behaviors were a manifestation of his disability as defined by the IEP team.

Was the behavior caused by the school's failure to follow the child's IEP?

The key question raised by the Parents regarding whether the District followed the Student's IEP is the lack of a full-time one-on-one paraprofessional. The IEP team amended the IEP to require a full-time paraprofessional on January 25. This incident took place on February 2 and the District had not yet hired a full-time paraprofessional but had assigned an aide, known to the Student, to be with him for parts of the day. At the time of the behavior in question, the aide was with him. The District claims this means that the behavior could not be caused by failure to follow the IEP.

The presence of an aide at the time of the incident does not demonstrate that a full-time aide would not have affected the behavior. A full-time aide may have been more attuned to mood or behavioral changes throughout the day and may have been able to intervene sooner. However, the District's failure to find a full-time aide within a week does not constitute a violation of the Student's IEP.

I do want to note that I am concerned that the IEP itself was not properly designed to meet the needs of this Student, given the number of incidents that had taken place. Much of the burden of implementing the plan was placed on the classroom teacher, and per her testimony, she had over 25 students with an aide often out of the room. While I appreciate the District's desire to keep the Student in the mainstream classroom, it is evident that greater support was necessary earlier in the school year in order to appropriately allow for the teacher to serve this Student. That is not the question for this hearing, however, so I will not make a ruling.

Did the Parents have the opportunity to participate in the hearing?

The Parents were properly notified and included in each hearing. Their input was taken into consideration. I do not dispute the LHO's findings in this regard.

Did the District violate the FAPE requirement by not putting more safeguards in place to ensure the Student was not deprived of educational benefit after 10 days out of school?

I note at the outset that evaluating this issue is not necessary based on my finding that the challenged behavior was a manifestation of the child's disability. I further note that the District did not file an appeal challenging this finding. Accordingly, even though the District challenged this finding in its brief, I would not be required to consider those arguments.

The LHO found the District was in violation of a FAPE for leaving the child on home-based status "without doing more for more than 10 school days during the pendency of this action.". In fact, the IDEA makes clear that, even if a student is removed for behaviors that are not a manifestation of his disability, after 10 days of removal, "educational services provided must enable the child to appropriately progress in the general curriculum irrespective of the relationship between disability and misconduct." The LHO explained the District attempted to

provide services, but was unable to. However, the LHO still found that the District should have done more to ensure that the Student was receiving the necessary services.

It is clear that, while the Student was at home, he was not making progress towards the general curriculum both due to a lack of time with teachers and due to the fact that he was unable to practice his behavioral goals while in a home setting. Therefore, I agree with the LHO that the District was in violation for not providing sufficient services in the home setting.

Further, I find that the 10 school day count should not start at the start of the MDR, but instead, needs to include the other days the Student was suspended during the school year. According to the record, the Student was suspended for 4 other school days with no services provided (August 11, September 14 for two days, September 27) prior to this incident. Therefore, by 6 days after the incident, the Student should receive services that are designed to meet the Student's individual and unique needs and provide the Student a FAPE.

The District's appeal brief suggests that the LHO said that the IEP team should have reviewed the placement prior to the end of the 10 days and argued that such review was not required. This is not in fact the LHO's finding. The LHO opinion turned not on whether a meeting happened but on whether services were provided.

5. Conclusion

I reverse in part and affirm in part the LHO's finding. I reverse the LHO's finding that the District appropriately determined that this behavior was not a manifestation of the Student's disability. The IEP, the FBA and the BIP clearly described the Student's disability as leading to the behaviors that led to the MDR. Therefore, I affirm the LHO's finding that the District had a responsibility to provide more services after the Student had been in the homebased placement,

but alter the timeline for the provision of increased services from 10 days after the incident in question to after 10 days of removal from school throughout the year.

The District must provide compensatory services for the Student to replace the days of lost instruction during homebased services. The District should include all days of homebased services after the 10th day of removal for the school year in the calculation of compensatory services. The IEP team should determine if the Student also qualifies for ESY services.

6. 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.

A handwritten signature in black ink, reading "Avni Gupta-Kagan", is positioned above a horizontal line.

Avni Gupta-Kagan

State Hearing Officer

May 26, 2023