

STATE OF SOUTH CAROLINA	)	
	)	
FLORENCE COUNTY	)	LOCAL DUE PROCESS HEARING
	)	HEARING OFFICER BRUCE J. SMITH
In the Matter of:	)	
	)	
K. T., on behalf of J. U.	)	
	)	
Petitioner,	)	
	)	FINAL ORDER
v.	)	
	)	
South Carolina Public Charter School	)	
District and High Point Academy	)	
<u>Respondent.</u>	)	

PROCEDURAL HISTORY

This Due Process Hearing is before me pursuant to a request, initially received via email on March 4, 2024, that I serve as the Local Due Process Hearing Officer (“LHO”). As a result of the parties’ failure to fully resolve this dispute during the resolution period, a pre-hearing conference call was conducted on March 11, 2024. Both parties participated in the conference call at the request of the hearing officer to verify the exchange of documentation and logistics for the hearing. The time and date for the hearing was set for March 19, 2024, at 9:00 a.m. at a High Point Academy meeting room located at 6655 Pottery Road, Spartanburg, SC.

SUMMARY

The Petitioner/Parent filed this action on the basis that the District violated the Individuals with Disabilities Education Act (“IDEA”) when it failed to appropriately implement “Child Find”; failed to find the student eligible as a student with a disability under the IDEA and provide the student a free appropriate public education (“FAPE”); failed to maintain accurate discipline records; failed to find the discipline referral was a manifestation of the child’s disability; and failed to implement appropriate accommodations.

However, after efforts during the allotted resolution period the Petitioner offered, without objection from the Respondent, that, *“The parties stipulate the child is protected under Section 300.534 of the IDEA Regs as the school had knowledge of the child’s disability, although he is*

*not served with an IEP. This is now, effectively, an appeal of the Manifestation Determination Review held February 21, 2024 per Section 300.532, with an important caveat: the only issue is whether the incident discussed in the February 21, 2024 MDR was a manifestation of the child's ADHD and/or ODD, which were the two documented disabilities at the time of the incident. ”*¹

PROCESS

This hearing was conducted according to a preset format that was presented to both parties and reviewed at the outset of the hearing. The hearing began at approximately 9:00 a.m. and proceeded until approximately 1:00 p.m. on March 19, 2024.

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

Afterwards, each party offered and presented the hearing officer with a written closing statement/argument.

ISSUES

1. Did the District fail to make the proper determination at a February 21, 2024 Manifestation Determination Review (MDR) that J.U.'s behavior of accessing inappropriate materials were not related to his disability.

FINDINGS

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

1. The student (J.U.) is a 12 year, 3-month-old male student who is eligible as a student with a disability and has an Accommodations Plan under Section 504 of the

¹ For the purposes of this hearing, the parties stipulated that J.U. is a student protected under § 300.534 of the IDEA as the School had knowledge of the student's disability, although he is not served with an Individualized Education Program ("IEP"). (Respondents' Closing Argument)

- Rehabilitation Act of 1973 (“Section 504”) based on his Attention Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD).
2. J. U. is a 6th grader at High Point Academy (HPA), a charter school authorized by the South Carolina Public Charter School District (“District”).
 3. J.U.’s academic scores outperform his cognitive profile.
 4. October 17, 2023, J.U.’s first Section 504 Plan was developed at HPA after a September 28, 2023, incident involving the viewing of inappropriate materials. The Student was determined eligible as a student with a disability under Section 504 due to his ADHD and placed on modified schedule.
 5. October 18, 2023, there was a referral for lying, and throwing and killing a frog. The Student was suspended for 4 days and recommended for expulsion due to breaking his (*behavior support plan*) contract.
 6. October 25, 2023, second 504 meeting.
 7. October 26, 2023, MDR tabled to allow for IDEA Evaluation. No prior written notice (“PWN”) issued.
 8. November 8, 2023, there was a referral for telling a girl she would be next “rape” victim. The Student was given 5 days of in-school suspension (ISS) but refused on first day and was given 10 days of out-of-school (OSS).
 9. November 13, 2023, there was a disciplinary referral for refusing to attend ISS and participate in the psychoeducational evaluation.
 10. December 8, 2023, evaluation completed.
 11. December 11, 2023, eligibility meeting. The conclusion, “J.U. is not eligible as a student with a disability.”
 12. December 12, 2023, there were 2 disciplinary referrals for rude/racist comments, (something is missing) to listen, defiance.
 13. January 3, 2024, MDR related to the December 12, 2023, behavior was conducted. Found manifestation of disability (ADHD, although not clearly stated as such)
 14. January 8, 2024, 504 Meeting conducted and the Student’s ODD diagnosis was added to the Student’s Section 504 Accommodations Plan.
 15. January 23, 2024, there was a disciplinary referral for not wearing an ID and refusing to serve lunch detention.

16. February 7, 2024, J.U. was involved in an incident when he again accessed an inappropriate image during science class that he saved on his Google Drive.
17. February 21, 2024, MDR was conducted relative to the above incident. During the MDR, the team determined that J.U.'s behavior was not a manifestation of his disability and he was suspended and recommended for expulsion for the remainder of the 2023-2024 school year.
18. February 23, 2024, the Petitioner's expedited due process hearing request was initiated to challenge J.U.'s MDR team's decision that his violation of District's code of conduct was not a manifestation of his disability.
19. The Due Process Hearing was conducted on March 19, 2024.

STANDARD OF REVIEW

Under the IDEA statute at 20 U.S.C. § 1415(k)(5)(B) and the federal IDEA regulations at 34 C.F.R. § 300.534(b), a school is deemed to have knowledge that a student has a disability when (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (ii) the parent of the child requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or (iii) the teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of such agency or to other supervisory personnel of the agency.

In accordance with these provisions of law, if a student engages in behavior that violates a code of student conduct prior to a determination of his or her eligibility for special education and related services and the public agency is deemed to have knowledge of the student's disability, the student may assert the disciplinary protections under the IDEA, including the manifestation determination review (MDR) provisions under 20 U.S.C. § 1415(k)(1)(E) and 34 C.F.R. § 300.530(e) even if the child has not been found eligible for special education and related services. These provisions require that within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the

local educational agency (LEA), the parent, and relevant members of the child's team (as determined by the parent and the LEA) must conduct an MDR.

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

By definition a disability-based behavior is a “behavior caused by or directly and substantially related to a student’s disability.” That definition is reiterated in the 504 MDR (S-29 Exhibit) questions that the team had to answer, that is was:

1. the conduct in question caused by or had a direct and substantial relationship to the child's disability; or was
2. the conduct the direct result of the district's failure to provide accommodations and development of a behavior intervention plan contributed to the incident.

The burden of proof in this case lies with the Parent for her claim, as the respective party seeking relief.

DISCUSSION

The LHO led off the hearing with a request for the Petitioner to reiterate the specific issue to be addressed at this expedited due process hearing. As stated in an email, from the Petitioner, for clarification of the purpose prior to the hearing, the following was read into the record; “***an appeal of the Manifestation Determination Review (MDR) held February 21, 2024 per Section 300.532, with an important caveat: the only issue is whether the incident discussed in the February 21, 2024 MDR was a manifestation of the child’s ADHD and/or ODD, which were the two documented disabilities at the time of the incident.***”²

The “incident” that caused the MDR is described in a February 21, 2024 Manifestation Determination Review (Exhibit S-31) as follows: “***J.U.’s Science teacher was using technology***

²In the matter before the LHO, the Petitioner is not challenging the eligibility determination relative to whether the student qualifies as a student with a disability under the IDEA.

in her classroom, with access to Hapara. She noticed that J.U. was looking at an image that was not part of the assignment. As she approached J.U. he quickly closed the image and she asked, “No sir, what were you looking at?” J.U. voluntarily accessed the image and showed her. It was an image of a naked man with a distorted face. J.U. has also saved inappropriate images from another computer in his Google Drive that is managed by High Point Academy, after school hours.”

During the one-day due process hearing, the LHO heard testimony from eight witnesses. The Petitioner presented her case first with direct examination of District staff and educators for the purpose of establishing that the HPA MDR committee incorrectly determined that J.U.’s behavior was not a manifestation of the student’s disability.

In testimony the primary assertion by the Petitioner was that J.U.’s behavior was not “premeditated and deliberate” as determined by the MDR committee, but was “impulsivity”, which was a manifestation of his ADHD, ODD disabilities.

The “incident” that led to the MDR and expulsion for the rest of the school year was described by J. W., the Student’s Science Teacher. She began her testimony explaining that J.U. was instructed to do some vocabulary skills on his computer. During that session [Science Teacher] noticed on her Hapara (a site where you can see what sites the students are on) she saw he was looking at an image. When asked if she saw the image, she replied, “It was a naked obese man. ... I thought it was inappropriate for the class room.” (Draft Transcript 9:23). The Science Teacher then stated that she reported the incident and turned his computer over to administration, T. G, Assistant Principal and 504 Coordinator.

When asked if the subject incident was related to his disability, the Science Teacher testified “No.” Q. “And why not?” “Because with ODD or ADHD, a lot of time the students are impulsive—I have had students like that before in my 23 years of teaching – and this situation was premeditated, and he had to take multiple steps to find that image....Also with ODD, most students are defiant and he has always been compliant and was compliant the day that I asked him to open his computer and show me the image.” (Draft Transcript 9:27:50 -9:28)

S. B., the School Psychologist, testified primarily relative to school exhibit S-17, a December 8, 2023, Evaluation Report. Page 18 of that report showed that two teachers and mom did rating scores. When asked by the Petitioner “And looking at the results, the graph here, showing the T scores, 50 is average or acceptable and then 60 to 70 is at risk; is that true? The

response was “Yes.” Q. ‘And then looking down at your summary as well as the actual first line of the composites there, the externalizing problems composite which includes hyperactivity, aggression and conduct problems, Ms. [] rated him at a 103 and Ms. [] rated him at a 90 which are both well over 70 in the clinically significant range, is that true? The response was “Yes sir.” Q. “Does that include to you that J.U.’s teachers are seeing hyperactivity, aggression and conduct problems at school a significant amount of time? The response was “yes sir.” (Draft Transcript 9:35:30 -9:36:43)³

The School Psychologist was later asked to read into the record a definition: “Impulsivity refers to hasty actions that occur in the moment without fore thought and that have a high potential for harm to the individual; for example, darting into the street without looking. Impulsivity may reflect a desire for immediate rewards or an inability to delay gratification. Impulsive behavior may manifest as a social intrusive; for example interrupting others excessively and/or as making important decision without consideration of long term-term consequences; for example, taking a job without adequate information.” (Draft Transcript 9:38:25 – 9:39).

On cross examination, the School Psychologist, was asked, “In your professional opinion, was the behavior that occurred in the classroom of looking at inappropriate images of February 8th a manifestation of the student’s ADHD”. A. “I would say no”. Q. “Why is that?” A. “I have worked with many students with ADHD. ADHD can bring with it impulsivity. But from my reading of that incident, it seems to have been more planned than an impulsive decision. Students with ADHD typically have difficulty with those planning stages. And in my professional opinion, I would have said no, that that was not related.” (Draft Transcript 9:41 – 9:41:45)

The Assistant Principal and 504 Coordinator responded to the question “Could you explain to me how you understand that J.U.s viewing of that image was premeditated and deliberate?” “Because there -- it included steps. J.U. had to consciously click another tab. J.U. had to search through Google. He had to consciously click on the image and knew enough to know that when the teacher saw it, he was to close his computer so she couldn't view it.

³ Note: This testimony is in conflict with the testimony of the teachers and staff at this hearing. The teachers noted in this December Evaluation Report were not present at this hearing and were not involved in subject incident or MDR.

However, he was not malicious in his attempt because when he was asked, he showed her.”
(Draft Transcript 10:02 -10:02:37)

The Petitioner (Student’s Mother) testified relative to J.U.’s most recent 504 (S-26 page 2) where it says, “paper assignments when appropriate.” Q. “Can you tell us a little bit about why this is included in his 504?” A. “Because I requested that he receive paper assignments to keep him off of access to technology.... Because he has the tendency to view inappropriate things on websites.” Q. “Does J.U. often act without thinking about his actions at home?” A. “Yes, ma’am.” Q. “Does he understand the consequences of his actions.” A. “Not all the time.” (Draft Transcript 10:28:45-10:29:23)

Because of the reference of J.U. be given “paper assignment when appropriate” versus using the school’s computer, The Assistant Principal and 504 Coordinator was asked, “Was computer misuse a pattern of behavior for J.U.?” A. “In my opinion, I would have to say no, J.U. was very capable of completing assignments on the computer that were required. J.U. also took map testing and stayed focused and on track with all of the things he needed to do to be successful....” (Draft Transcript 12:34:28 -12:34:46)

J. S., HPA’s Technology Director, in testimony described how HPAs’ computer fire wall works and the steps that must be taken to override it and explained that it was not possible for students to inadvertently stumble upon inappropriate images. When asked “Is it possible for students at High Point Academy to inadvertently stumble upon inappropriate images?” HPA’s technology director responded “Inadvertently, no, ma’am.” Q. “How would one bypass the firewall?” A. “So you would have to intentionally seek ways to circumvent the system we have in place, the multitier system, and basically a search for key words and things how do I bypass how do I get around this filter. How do I bypass security filtering, how do I unblock my school Chrome book, you know, search things like that. And then what you could also do as a student is if you have a personal device, you could be searching those things on your personal device and with your personal device, we have no visibility into any of that. So you search that on your personal device, figure out if it works on not and then attempt to use it on a school device to see if it works.” (Draft Transcript 10:41 – 10:44:24).

D. E., J.U.'s ELA Teacher from mid-October 2023 to give J.U. a restart, in testimony described J.U.'s in her classroom as "J.U. is very well behaved. Very kind considerate. Has great leadership qualities. His peers love him. He's like a magnet for students, for his peers. He's very charismatic, and in the classroom was very well behaved, very polite." Q. "Have you ever had a behavior problem with J.U. in your classroom?" A. "No, I've never experienced any behavior issues with . . . at all. The first day that he was in my class, he wanted to try to make fun of a student of mine who is kind of heavy set and wasn't acceptable, he was. Yes, ma'am and he was fine." (Draft Transcript 10:58:50 - 10:59:24)

When asked if she agreed with the conclusion of the latest MDR meeting that resulted in J.U.'s expulsion, the ELA Teacher replied, "I did... Because the behavior was when he pulled up inappropriate images during computer use is when I believe he was on his vocabulary. And my rule on that was I did not agree that it was due to his disability because he took several steps to get to the point of where he was in order to pull the image to the computer and to me it did not show an impulsiveness in his behavior." (Transcript 11:04 - 11:05). When asked if [ELA teacher] had any experience or knowledge with ADHD students... she responded, I do. I not only as a teacher but as a parent. I have a child who deals with ADHD and impulsivity, so she has extreme impulsive behaviors, and I don't -- I've never seen those behaviors in . . . at all. I've never seen impulsive behaviors in" Q. "Is there anything you would like to add?" A. "I would really like to see . . . get some help. I'm sorry. He's a great kid and he deserves -- he deserves to have a great education..." (Draft Transcript 11:05 – 11:05:50)

Also, as to character, the Science Teacher testified that "J.U. is well liked. He works well with others. When in class he completes his assignments. Very likable, very obedient and very friendly... He was never a behavior issue." (Draft Transcript 9:26:30).

H.H., the Principal, when asked about the rationale behind the MDR committee's decision he replied, "With that picture and the previous pictures that . . . were downloaded at different times. It was not impulsive. It was not anything like that. Also when [Science Teacher] asked . . . to open up his computer – because he had closed it so she didn't (couldn't) see it. . . . He immediately just opened it right up, did exactly.... what he was supposed to do, what she asked him to do. He didn't have any defiance or anything like that. He just did exactly what the teacher asked him and showed her the picture." Q. "As you sit here today, do you believe the

MDR committee was correct in its findings?” A. “Yes, ma'am I do.” Q. “Is there anything else you would like to add?” A. “Just the fact of I know on that day that he was very willing to do anything that anybody asked him to do. I explained to him the situation that was going on after I explained to him and we called mom because I realized we needed to and he said I was recommending him for expulsion because of his behavior that day, he just walked off and just gave a thumbs up.” (Draft Transcript 11:20:34 -11:21:34)

For a comparison when asked a similar question about J.U.s' behavior at the earlier (January 3, 2024) MDR, the Assistant Principal and 504 Coordinator testified, “J.U. was very argumentative and would not do what administration had asked him to do. He was very vocal in conveying it. I will say at no point did J.U. become belligerent or out of control. He was very precise with the things he was saying and our result of this was that we determined that it was a manifestation of his disability.” (Draft Transcript 12:35:29 - 12:35:50) An ODD diagnosis was added to the Student's (January 8, 2024) Section 504 Accommodations Plan.

The assistant principal and 504 Coordinator testified that J.U.'s behavior improved with the implementation of the 504 accommodations plans and there was no significant escalation behavior to trigger a reassessment. There were three 504 accommodation plans (October 17 & 25, 2023 and January 9, 2024) with the first one triggered after a referral (September 23, 2024) for view improper material. For insight into the behavior intervention she was asked, “Will you describe some of the behavior accommodations outlined in the October 25th accommodations plan?” A. “. . . so this plan was written in tandem with Petitioner's (Student's Mother) recommendations as well that J.U. would start his day with positive affirmations with his mentor that we were going to provide in our building. That mentor was [] J.U.'s Social Studies Teacher. (He) Will provide him with clear expectations, with short concise directions, and establish a routine that stays the same. These were opportunities that we reiterated to J.U. on a regular basis. To provide supervision during transitions, disruptions and field trips. This meant school staff pretty much had their eyes around J.U. for most of the day. Obviously that did not mean we went to the bathroom, with him but that meant that in any unsupervised time during lunch J.U. was going to move to the front of the line and had a designated area to sit. This was still with his peers. We were not removing him from any setting to be able to socialize. And then we put a built-in reward program in. If he were to follow the rewards for 30 days, he would be able to sit

in the cafeteria and then we gave clear expectations as to what the positive behavior would look like.” (Draft Transcript 12:22:34 -12:30:45)

CONCLUSION

As a reminder and for clarification, the scope of this hearing was narrowly focused. The Petitioner offered, without objection from the Respondent, that: ***“The parties stipulate the child is protected under Section 300.534 of the IDEA Regs as the school had knowledge of the child’s disability, although he is not served with an IEP. This is now, effectively, an appeal of the Manifestation Determination Review held February 21, 2024 per Section 300.532, with an important caveat: the only issue is whether the incident discussed in the February 21, 2024 MDR was a manifestation of the child’s ADHD and/or ODD, which were the two documented disabilities at the time of the incident.”***

During the hearing there was substantial information that was presented or available that was reviewed, but did not influence my decision because of the narrowness of the issue as stated by both parties. This was also considered so as to maintain consistency with the intent that in developing an MDR “All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision” Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 559 (E.D. Va. 2008).

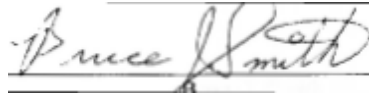
During the hearing, the Petitioner failed to present any evidence through testimony or documentation that the students’ behavior during the February 8, 2024 incident was a manifestation of his disabilities (ADHD or ODD), which is necessary to justify overturning the determination that the Student’s behavior was not related to his disability. Testimony from District personnel established the fact that the Student’s behavior was planned and intentional. Testimony also differentiated the Student’s oppositional response related to previous conduct and the Student’s compliance when his behavior related to the incident in question during this hearing was discovered.

THEREFORE, IT IS ORDERED, that the Petitioner’s contention that the February 21, 2024 MDR committee erred in determining the Students’ behavior was not a manifestation of his disability are not substantiated through the testimony and evidence presented by the Petitioner.

APPEAL PROCEDURE

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

The South Carolina Department of Education,
Office of General Counsel
1429 Senate Street
Rutledge Building Room 1015
Columbia, SC 29201

A handwritten signature in dark ink, appearing to read "Bruce J. Smith", is written over a horizontal line.

March 28, 2024

Bruce J. Smith,
Local Due Process Hearing Officer

Note: I will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to me by the SRO or the District Court. No email, letter or other written communication will be construed or considered as either a Motion or Reconsider or as a Motion to Alter or amend this Order. Further, no such communications may toll or extend the time limit above for filing an appeal.

