

**Individuals with Disabilities in Education Improvement Act
Before the Local Hearing Officer**

BG (“Petitioner”) on behalf of	)	
JR (“Student”)	)	
	)	
Parent/Petitioner,	)	
	)	
vs.	)	Final Order
	)	
Florence County School District	)	
One,	)	
	)	
District/Respondent.	)	

I. Procedural History

The Petitioner/Parent emailed her due process complaint to the District on November 11, 2021. The District submitted a Response on November 21st. After the Undersigned was appointed, he conducted a pre-hearing scheduling call on November 23, 2021, in which the Petitioner, Student’s father, Student’s advocate, and counsel for the District participated.

The Parent chose a public hearing. The hearing started on December 9, 2021.¹ The hearing continued the morning of December 10, 2021, when the proceedings were suspended because of a medical emergency. After the Parent notified the Undersigned that she could proceed, the parties participated in a scheduling call on January 11, 2022. The hearing resumed on February 7, 2022, and it concluded on February 8, 2022.

The parties were provided until noon on February 10, 2022, to submit post-hearing written argument. Both parties timely submitted post-hearing arguments.

¹ See 34 C.F.R. § 300.532(c)(2) (requiring that hearing commence within 20 school days).

II. Factual Background²

A. Background

The Student is a ninth-grade student at South Florence High School. She has been identified as eligible for special education services based on her identification of specific learning disability (SLD). She also has been diagnosed since childhood with attention deficit hyperactivity disorder (“ADHD”). A 2018 document from the District shows not only a diagnosis of ADHD, but also that therapy services were necessary “to help promote stability in the academic setting.”

B. Prior school years and IEPs

During the 2018-19 school year, the Student was a sixth grader. In the 2018 Reevaluation Review, the IEP team noted:

[The Student] is easily distracted by the behavior of others and has difficulty controlling her temper when bothered. [The Student] loses her temper when she is upset by other students, does not want to complete the assigned task, or thinks she is being treated unfairly. She will yell and scream at others, use profanity, threaten physical contact, or throw classroom materials. While these incidents do not occur frequently, they should be addressed immediately or redirect [the Student] and control the situation.

[Resp. Exh. 1 at 0513]. Therapy records from the District also note both the ADHD diagnosis and issues, including “defiance and . . . getting along with peer[s].” The Student made “substantial

² Citations to the transcript are in the following format: For example, Tr. 7:5-14 means page seven, lines five through fourteen. Citations to videos are in the following format: [minute]:[seconds] or [hour]:[minute]:[seconds]. For example, 1:08:07-14 means the matter found at the one hour, eight-minute mark between seven and fourteen seconds. “Pet Exh.” is a reference to a Parent exhibit, while “Resp. Exh.” Refers to a District exhibit. When possible, Bates numbers are used to refer to exhibit pages.

progress,” with therapy and, though she “encountered some stressors when it comes to peer interactions,” she was “maintaining without great deal of difficulty or discipline.”

In February 2019, the Student reportedly “attack[ed]” another student who accidentally bumped into her twice. The Student’s last therapist in elementary school, testified that the Student’s reaction is an example of impulsive behavior related to her ADHD. There were continued sessions about the Student’s ability to get along with others, including the Student’s assertions that others were picking on and laughing at her. The Student progressed to the point that her school therapist discussed ending services towards the end of the year.

The Student continued to receive behavioral therapy during her seventh-grade year (2019-20). Counseling records show a placement in an alternative program and one argument with another student. The Student did not receive any services in the fourth quarter of the year, and she did not attend in person because of the COVID shutdown.

The Student attended virtually for the 2020-21 school year (8th grade). She apparently received no behavioral therapy during this year.

C. Student’s ninth grade year: 2021-22

1. The September 16, 2021, IEP reevaluation

The Student entered high school as a ninth grader at the beginning of the 2021-22 school year. The District conducted a Reevaluation Review and annual review of the Student’s IEP on September 16, 2021. The Reevaluation Review

notes the Student has both asthma and ADHD for which she is taking medication. This time, there were no noted issues of temper management. The IEP team again identified the Student as a child with SLD.

One of the school's assistant principals testified that the IEP team noted other behaviors that attend ADHD, such as difficulty with focus, taking initiative and taking responsibility for completion of tasks. Under the Social/Emotional/Behavioral section of the review, however, there are no observations about “losing her temper,” or “threaten[ing] physical contact” as there was three years earlier. There was no mention of any such issues in the 2021 IEP itself, which discusses behavioral issues in the context of difficulty with listening and following directions, and that the Student is easily distracted.

The IEP team described the Student as “friendly and kind to her peers” and that she “enjoys socially interacting with her peers.” The Student’s resource teacher described her as “sweet.” The assistant principal also described her interactions with the Student as typical.

2. Student’s troubles with other students and in adjusting to high school

The Student’s transition to high school has not been without serious issues. This school year proceeded with notable incidents involving the Student and District staff, as well as with other students. On October 6, 2021, for example, the Student came to school dressed in a manner that violated the school dress code. The Student became argumentative and accusatory towards the when confronted. The principal took the Student to the classroom of the Parent/Petitioner, who teaches at the school. The principal gave the Student and the Petitioner the option of the Student changing

clothes and returning that day or of returning the next day. The Student did not return that day.

Before October 15, 2021, the school principal learned about conflict between the Student and other female students. On October 15, 2021, the principal observed the Student sitting close to these students after school while they were waiting in the cafeteria for their bus rides home. The Student is not a bus rider, and she should not have been in the cafeteria. The principal sensed that the situation was tense, and she approached to intervene when the situation escalated into what the principal described as a “shouting match.” The Student tried to push past the principal. The Student and another female were separated and put in different offices. The principal called the Petitioner and inquired into why the Student was still at the school unsupervised, a violation of the school’s policy. The Parent told the principal that the Student stayed at the school because there was a varsity football game that evening. The principal told the Parent that the Student could not be left unattended after school. The Student contended that she was being bullied during the incident. The principal responded that the Student approached the others.³

The Student discussed conflict she was having with other students with the principal. The Student shared social media communications of some kind to the principal, who advised the Student to “block” the other students.

³ One week later, on October 22, 2021, the principal noted the Student was again at the school unsupervised. There also was another occasion on which the Student and some friends stayed in the school after hours on a Thursday before a junior varsity football game.

3. Another incident prompts the Parent's request for a functional behavioral assessment ("FBA")

On Monday October 25, 2021, there was an incident at the school when the Student was involved in a confrontation near a vending machine. The Student's parents both became involved and discussed the issue with administrators at the school.

The school's administrators, including two assistant principals, met with parents and the students identified in text messages or social media messages. According to the school principal there were accusations going both ways as to who was bullying whom. The Student did not attend the meeting, although the Parent did.

Both of the Student's parents met with school personnel later that day. They requested that the District conduct a FBA and that a behavioral intervention plan ("BIP") be implemented.

On October 27, 2021, the Student's special education teacher, provided the form to Parent.

4. The fight

The next day, October 28, 2021, the Student was involved in the fight at the heart of this matter. The fight was intense on both ends. It took several adults, including a school resource officer ("SRO"), to separate the participants, who both resisted and sought to evade the adults to continue the fight.

The only video evidence that suggests what happened at the outset of the fight is the four-frame security camera video.⁴ Focusing on the bottom right frame, the Student

⁴ The same file was produced in another format. [Pet. Exh. 1, file 1230421.webm].

emerges at :19 from the bottom right of the frame with another (unrelated) student, and they head down the hall towards the cafeteria (Student is the taller of two in the dark sweatshirt). At :29, the two enter the cafeteria, the Student becomes visible in the top right frame by the stairway. At the same time, the other fight participant emerges (gray sweatshirt, long hair) from the top right of the same frame. The other student walks directly up to the Student. The Student does not appear to take any steps to get to the other participant. The two square up. In short order, the school SRO and assistant principal Carter try to intervene. There is no evidence of who said what to whom, or even who made first physical contact. All that is clear from the video is that the other student physically approached the Student rather quickly and from a distance.⁵

Even after the Student was separated and isolated in an office, she was uncontrollable for about twenty minutes. She tried to escape, resisted restraints, was profane and loud, was not listening to instructions, and she generally defied all authority.

5. District schedules a manifestation determination review ("MDR")

On November 4, 2021, the District issued notices of a MDR to both parents and to the Student. The District held the MDR in two sessions.

a. The November 9, 2021, virtual MDR session

The first session was held virtually on November 9, 2021, which ran for almost one and one-half hours. It consisted mainly of a back-and-forth on how the

⁵ It is not clear whether either the Student pushed the other before Carter and the SRO tried to move the other student away.

manifestation determination question was framed. From the outset of the meeting, the Parent (and others advocating for the Student) argued that the issue should be whether the behavior is a manifestation of the Student's ADHD, which the Parent contended was what she believed was the basis for the special education services. District representatives, on the other hand, continued to steer the issue to whether the behavior is a manifestation of the SLD identification.

At several points during the meeting, the District representatives agreed that the assertion of a possible eligibility as other health impairment (OHI) needed to be looked at, but they asserted that the issue of manifestation determination must be completed first, and that it had to focus on the "primary disability" and the "only disability" identified in the IEP (*i.e.*, SLD).⁶

One of Student's advocates suggested an emergency IEP meeting to look at the Parent's information about ADHD. At first, the principal agreed and inquired into what needed to be done to schedule the meeting, which led to an extensive discussion about what the records reflected at that time, which then led back the discussion among District personnel to focus solely on the SLD.

Sonya Herbert, the assistant director for exceptional children, called for the meeting to be reconvened the next day in person because she wanted to consider further

⁶ District representatives acknowledged the Student's ADHD had been discussed and documented, but they stated that it was in the context of attentiveness to work, and there had been no record of any attendant explosive behavior.

the issues of OHI and ADHD. Herbert contended that it was hard to see how there would be a manifest determination based on SLD, that she wanted to review more information, and that, no matter what they decided, the District would have to “start over again” with an FBA.

After the Parent inquired again about addressing the issue of the Student’s disability (ADHD), Herbert advised that the agenda for the meeting going forward was on the IEP classification as written because “there has to be consequences.” Herbert and the principal again opined that they did not see how the behavior at issue could relate to SLD.

b. The November 10, 2021, MDR session

The IEP team reconvened the next day (November 10) in person. The meeting began with the Student recounting her problems with various students, the fight itself, and her perception during the fight and during the time that she was restrained. One of the assistant principals shared accounts from others of the fight, as well as perceptions of the parents of the other participant based on things those parents heard from others. The assistant principal also shared her first-hand account on the inability of the adults to calm the Student after she was separated from the other participant.

Herbert asked the Parent for more information about what the Parent had shared previously about the Student’s ADHD and medication issues. After discussion on the matter, however, Herbert said that the District “must address the ADHD,” but she added that, first, “we must finish the manifestation determination,” which she then framed as whether the specific learning disability manifested itself in the behavior. Predictably, the Parent quickly chimed in that the disability under consideration should be the ADHD. The Parent again asserted that it was her understanding the

Student's disability has always been ADHD and that she was unaware that it was ever designated as something else.

Hicks instructed the IEP team on the questions they were to answer as part of the MDR. Consistent with the District representative's position that the MDR turn solely on the content of the IEP, Hicks qualified the question posed to the IEP Team. Hicks twice read the first question⁷ and, both times, added that the disability at issue was specific learning disability for reading and math. Hicks also again stated that the determination could only turn on a classification in the IEP, that disabilities such as ADHD could be addressed by accommodations, but that they could not consider OHI if it was not evaluated and made part of the existing IEP.

The IEP team did not reach a consensus on whether the conduct was a manifestation of the Student's disability. The IEP team also did not reach a consensus as to the conduct resulted from a failure by the District to implement the IEP. As the LEA representative, the assistant principal Greene, made the final determination that the Student's behavior was "not a manifestation of Students specific learning disability."

After the meeting, the District representatives, except for the assistant principal and the school principal, left the room. The assistant principal, principal, Student, and Student's parents then watched what the principal identified as the four-frame security camera footage.

⁷ *I.e.*, whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability." 20 USCS § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1).

On November 11, 2021, the assistant principal Greene issued a written determination that the behavior was not a manifestation of the Student's disability.⁸ She also issued a PWN.

III. Analysis

"The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination . . . may request a hearing." 20 U.S.C. § 1415(k)(3)(A). The hearing officer appointed to resolve such an appeal may "order a change in placement of a child with a disability," and may "return a child with a disability to the placement from which the child was removed," or order placement in an "interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."

The Parent's due process complaint appears to raise three primary issues: (1) falsification of a 2018 PWN; (2) whether the District failed to recognize the Student's disability of ADHD (which would put her in the OHI category); and (3) whether the District's LEA representative should have determined the Student's behavior on October 28, 2021, was a manifestation of the Student's disability.⁹

The Parent contends that documents were falsified because there are two versions to a 2018 PWN. Under "Actions that the school district/ agency proposes

⁸ There was not a specific discussion by the the assistant principal as the LEA as the LEA representative as to the second question about whether the conduct was caused by a failure of the District to implement the IEP.

⁹ The Parent's post-hearing submission greatly transcends the issues raised in the Complaint. As noted in the Scheduling Order, both the hearing and this Order are limited to the issues raised in the Complaint.

or refuses to take,” one version states the Student will continue in the program “with an Other Health Impairment.” The second version states the Student will continue in the program “with a Specific Learning Disability.” There appears to be no dispute that both documents reside in the District’s files and were discussed before this hearing. The Parent contends that the former is what was provided to her.

The existence of the two forms is puzzling. The evidence does not suggest, however, that there was any falsification of a document. The apparent inference the Parent wishes to draw is that the Student was identified as a student with an OHI and that, after issues arose, someone at the District changed the form to say SLD. That would only make sense, however, if other documents, such as the Student’s 2018 IEP, ever identified OHI as Student’s classification of disability. That is not the case. The Student’s prior records are consistent in their SLD identification. (2018 Placement form specifying SLD support); *id.* at 507 (IEP section detailing reasons for SLD classification decision); *see also* Pet. Exh. 4 (2013); Pet. Exh. 5 at 583 (2012-13 document identifying primary disability as SLD); Pet. Exh. 12)]. The OHI reference in one version of the 2018 PWN is an aberration.

There is no evidence that documents were falsified.

B. Claimed failure to identify as OHI

Since the Parent has learned about how the classification works, and the impact the District has claimed that it has on the MDR, the Parent has contended that the classification should be changed to fit her understanding that the Student’s disability is ADHD, which the Parent now seemingly understands falls within OHI. The Parent raised the fact that the Student was diagnosed as ADHD in IEP meetings, after confrontations involving the Student, through the MDR process, and throughout this proceeding. The Parent repeatedly argued during the manifestation determination

manifestation review that she was unaware that ADHD was not considered to be Student's disability. To be fair, the documentation has been ambiguous. The Student's prior therapist also assumed that the Student was identified as OHI for IEP purposes when the Student was in elementary school. It is understandable that the Parent believed the "disability" is ADHD because that is what the Parent likely has focused on, and everyone acknowledges it has always been discussed.¹⁰

The Parent's belief, however, is relevant only if it shows why she was not arguing against SLD as the classification for which the Student was identified. That is not the issue.¹¹ The issue here is whether the Student should have been identified under the disability category of OHI.

¹⁰ For this reason, I accord little weight to the fact that a layperson signs off on a document as complex and lengthy as an IEP. Even if the Parent "agreed" with something, that is not preclusive of whether a violation occurred. The issue here is the Student's rights under the IDEA, and not how well the Parent understood the complexities of the law.

¹¹ The District makes several arguments against a finding of manifestation based on statements attributed to the Parent and the Student's father before the altercation at issue and during the MDR. Although the District is correct that the Parent has not relied on consistent arguments throughout, that is of no consequence. The issue here is not what the Parent believes, or how well versed she is in the IDEA. The principles of estoppel would not apply here because the focus of this proceeding is on the rights of the Student, and not on the opinions of her parents. This case is no different than most IDEA cases. It has many valid and invalid arguments, misperceptions, and parties offering both relevant and irrelevant evidence in support of their various arguments. Like many IDEA hearings, the proceedings get sidetracked as disputes (sometimes bickering) between adults are aired out. But that is not what matters. It is about the Student. The only issue here is whether there is competent, relevant evidence of noncompliance with the IDEA.

Likewise, the fact that the Parent did not object to the classification of SLD in September is not determinative. First, it appears clear that the Parent was unaware of the scope of the classifications, and the fact that ADHD is mentioned in the IEP could well explain why she still believes that is the Student's recognized disability. Second, whether Student's category is SLD or OHI is not the issue here. It would only matter if that identification precluded consideration of other impairments. And that is not the law.

The IDEA does not define “disability.” The statute references the term in the definition of “child with a disability.” 20 U.S.C. § 1401(3)(A). That term uses “disability” in the circular sense, along with the term “impairments.”

The term “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, **other health impairments, or specific learning disabilities**

Id. § 1401(3)(A)(i) (emphasis added); see also 34 C.F.R. § 300.8(c)(1). Specific learning disability is defined in both the statute and the regulations. 20 U.S.C. § 1401(30); 34 C.F.R. § 300.8(c)(10). Unlike specific learning disability, the term “other health impairment” is not defined in the statute. The Regulations provide:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

(i) is due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder . . . ; and

(ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9).

In defining “child with a disability,” Congress used plural terms (“disabilities” and “impairments”), which recognizes that a child may have more than one disability or impairment. Disabilities, of course, are not mutually exclusive, as students often deal with multiple impairments. Even impairments that do not, by themselves, adversely affect educational performance may, along with other impairments, qualify for identification in one of the twelve categories.

Multiple disabilities means concomitant impairments (such as intellectual disability-blindness or intellectual disability-orthopedic impairment), the combination of which causes such severe needs that they cannot be accommodated in special education solely for one of the impairments. . . .

34 C.F.R. § 300.8(c)(7). This provision not only reaffirms the distinction between disability/impairment and category, but it also recognizes the existence of comorbidities, as does the District's own form.

During the manifestation review, District representatives, at times, framed the issue as one of Student's "primary disability." Although disabilities may be noted as "primary," "secondary," or "tertiary," neither the IDEA, nor its Regulations, support the idea of primacy of one category over another in terms of conducting a manifestation review. As discussed below in Section III(C)(1)(b), nothing in the IDEA states that the manifestation review is limited to or should be focused solely on a "primary disability."

In September 2021, the team members were not provided information that, as a ninth grader, the Student might engage in explosive behavior because of her ADHD. The team did, however, have information that the Student's ADHD, "[a]dversely affect[ed her] educational performance." 34 C.F.R. § 300.8(c)(9)(i). That by itself would not be a red flag necessarily as to explosive behavior but the issue isn't whether the IEP team was on notice of potentially explosive behavior.¹² The issue of identification is whether the IEP was aware of Student's ADHD that

¹² In both MDR sessions, there is reference to a March 2020 FBA. Neither party introduced this document into evidence. I will not consider the characterizations of any purported 2020 FBA made during the MDR.

adversely affects her educational performance.

During the manifestation review, the District representatives relied almost exclusively on the lack of an identification as the basis for finding the absence of a manifestation. They did so with full recognition of the diagnosis of ADHD, but they stressed that it was the lack of information about potential explosive activity that was important. District representatives agreed that the IEP itself may need to be changed and a BIP may be necessary based on information that had surfaced and assertions the Parent was making. During the first session, for example, Herbert remarked that, if the IEP team knew in September 2021 what it was being informed of in November, the MDR might not be an issue.

There is a serious question about why the Student also was not identified as OHI in September 2021, at least as a “secondary classification.” The District is correct that it addressed ADHD and that it provided accommodations based on what it knew at the time. However, if the District insists that identification of disability classification is the touchstone to an MDR, rather than any underlying disability, it cannot also argue that there is “no harm/no foul” in not identifying OHI because it provided accommodations.

On balance, the Parent has met her burden of proving the District’s process in September for evaluation and identification was flawed. The question

then becomes whether this procedural violation led to any substantive harm. That is an issue best addressed in the context of the manifestation review itself.¹³

C. Manifestation determination

Under the IDEA, the IEP Team, must review all relevant information in the student's file, including any relevant information provided by the parents to determine: (i) if the conduct was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct was the direct result of the LEA's failure to implement the IEP. 20 USCS § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1). Here, the LEA answered both questions in the negative.

1. Was the conduct caused by, or directly or substantially related to the child's disability?

Although the Parent bears the burden of proof, the issues may be best understood in the context of the District's contentions, which will be addressed first. The District contends that the behavior at issue is not a manifestation of Student's disability for three reasons. First, District witnesses claim that the fight was a planned response to an escalating feud, rather than the result of any impulsive behavior. Second, the District informed the IEP team that the focus in the MDR was on the Student's SLD, rather than her ADHD. Third, the District claims that the behavior was not a manifestation because is unrelated to any classroom or curricular activity.

¹³ This is not a dispute in which a student engaged in rule violations only to claim afterward that he or she was afflicted by an impairment. The Parent's assertion that ADHD affects the Student is not an eleventh-hour ploy. The records show that she has raised ADHD at all stages of Student's education, including in September. She also brought up her daughter's response to conflict and, on October 25, 2021, she requested a BIP and an FBA.

a. The girl drama argument

There are two problems with the District's argument that the behavior was a planned reaction to an ongoing feud. First, the Student was not disciplined for the back-and-forth or, as it was referred to in documents and at the hearing, "girl drama." Rather, the Student was disciplined for her participation in the October 28, 2021 fight. The focus of the inquiry should have been on Student's actions on October 28, 2021.

i. Whether the Student's conduct was premeditated and planned

District personnel simply got it wrong in assuming that Student's response on October 28, 2021, was a planned or premediated act by Student. There was no evidence introduced that the Student knew of the other girl's existence before the fight, and there was no evidence that the two had ever conversed, texted, or otherwise communicated. The other girl in the fight was not one of the girls whom the District identified as involved in the back-and-forth, nor was she one of the girls with whom the District met on October 25, 2021. The Student stated during the November 9 and 10, 2021, MDR sessions that she did not know the girl that approached her, a point Parent also made during the first session of the MDR. (Student's account from November 10, 2021 session, stating that the other participant accused the Student of jumping her sister, and the Student did not know who her sister was) (Student's disciplinary hearing testimony).

The, who made the ultimate decision, testified that she did not view the Student's conduct as a manifestation because this issue had been brewing for some time. The other District witnesses also testified that the Student's conduct was

not a manifestation of ADHD because it was premeditated on the Student's part.

(Herbert characterizing the fight as "premeditated" and "planned out"); assistant principal, Ms. Bown, for example, testified:

I believe that to be a not impulsive act because there have been situations other than this and this situation that this was -- this was a planned. This was thought out. This wasn't an impulsive scrap on the playground. This was no remorse after the incident. This was pre -- This was a well-planned, well-played intentional act. This was not impulsivity.

[Tr. 514:24 – 515:6]. On cross, Bown doubled down and cited the October 25, 2021, meeting as evidence that the Student planned the fight:

Considering that [the Parent was] a part of the meeting where everything was laid out specifically with no bullying, threatening, eye rolls, any of that, and that it needed to be nipped on that day and two days later there was an altercation due to the same, I would call that planning.

[/d. 523:11-18]. Ultimately, Bown conceded that she didn't know Student's intentions or whether she planned to fight.

Because nobody refutes the Student's claim that she did not even know of the other participant in the fight beforehand, the District's conclusion that this was all "planned" is without foundation. The District did not identify the other participant as someone engaged in the "girl drama." If it had, one would assume that the girl would have been summoned to the October 25, 2021, meeting, nor is this a situation of transferred intent as there is no evidence that, as of October 28, 2021, the Student planned to fight anyone.

The significance of the "premeditated" and "planned out" rationale for rejecting the manifestation consideration is highlighted by the puzzling testimony from Herbert, the assistant principal who served as the LEA representative, Hicks, and Murphy, who testified in lockstep that, even if they considered the ADHD as a disability, they would still find that there was no causal effect because the fight was planned. This argument

is completely self-defeating.

Essentially, there are two elements to be considered in making the manifestation decision (*i.e.*, conduct and disability). Here, the decision-makers are arguing that one of the two elements (disability) is essentially immaterial. By its own admission, the District focused only on one element, the behavior and its conclusion about behavior (*i.e.*, that it was “premeditated” and “planned”) simply cannot be squared with the facts. Thus, even if consideration of only one element could be defensible, and it is not, it is impossible to understand how a decision can stand when the conclusion about behavior is so clearly wrong.

In reaching their opinion about the planned nature of the fight, the District personnel never even considered the security camera footage, the only video that shows what happened before, and at the start of, the fight.¹⁴ During the video conference on November 9, 2021, participants only viewed what the parties have referred to as a cell phone video that apparently was posted by another student on social media. That video only shows a portion of the fight after it had begun. No conclusion about the cause of the Student’s behavior, such as what precipitated the fight, can be drawn from the cell phone video.

ii. Credibility determinations

In assessing the credibility of the District’s assertions, I find it remarkable that the same assertions, phrased in the same manner, are made by several witnesses. For

¹⁴ The assistant principal viewed the security camera footage after the MDR meeting solely in the presence of the Student, her father, Parent, and the principal.

for it is particularly surprising that four individuals independently concluded that they would reach the same result in terms of manifestation even if the ADHD had been considered. Not one of the four individuals even hinted that, if different facts existed, they would want to consider all the information as required by the statute. Rather, each of them testified that they would not need to consider such information.

Likewise, the credibility of Hicks's testimony is called into doubt by her response to questions about whether her opinion that the fight was planned would change if the two participants did not know each other. Ultimately, Hicks acknowledged that she did not think it would make a difference. How can a person plan a fight with someone whose existence is unknown? And how can that not matter?

Hicks' testimony was not the only one that seemed slanted to fit a narrative. After District's witnesses took a unified position with their premediated and planned theory, Bown, for example, was evasive and resisted acknowledging the truth:

Q Was the student that assaulted [Student] in the meeting on October 25th?

A I don't know that anyone assaulted anyone else.

Q Were the other person involved in the incident on October 28th, was she involved in the meeting on October 25th?

A I believe a family member was. I don't know if it was her specifically.

Q You stated that you have a relationship with this student?

A Yes. She's a student on my caseload.

Q So was she in the meeting?

A Her parent was.

Q Was she in the meeting?

A No, ma'am. She's the sibling of a student that was in the meeting.
Older sibling.

[Tr. 524:2-18].

All of this paints a picture of witnesses advocating for a particular result. That is a significant concern given the IEP team members' responsibility to ensure: (1) that all information is objectively considered; and (2) that decisions are made based on the data available, and not to reach a particular result.

The homogeneity of responses to key questions, especially questionable answers to hypotheticals, gives rise to serious concerns that IEP team members are advocating for certain results, rather than examining the facts. That is significant here as the IDEA requires a higher level of objectivity.

b. The focus on SLD related to reading and math

The LEA's conclusion about manifestation is also clouded by the instructions given by Hicks on November 10, 2021. By focusing the IEP team on the identification category, rather than the Student's underlying condition, Hicks misstated the scope of the inquiry.

District personnel maintained at the review meeting that the IEP team must first determine manifestation based on the facts documented in September, and that the other information should be considered by the IEP team after it made the manifestation determination. By refusing to consider the other information available at the time of the review, District personnel violated the clear language of statute and the regulations:

[T]he IEP Team . . . **shall review all relevant information** in the student's file, including the child's IEP, any teacher observations, **and any relevant information provided by the parents to determine** . . . if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability.

20 U.S.C. § 1415(k)(1)(E)(i)(I) (emphasis added); 34 C.F.R. § 300.530(e)(1) (substituting “must” for “shall”); see *also* Office of Special Education Services, Special Education Process Guide for South Carolina, at 125 (Ch. 8(D)(1)) (2013).¹⁵

The statute’s requirement that information besides the IEP be used “to determine” manifestation defeats District’s position that it could address the ADHD *after* determining manifestation. Had Congress intended that the IEP team limit its consideration to the text of an IEP, or to only a classification previously identified, it never would have required that the IEP team “shall review all relevant information” including “any relevant information provided by parents” as part of the decision-making process itself.¹⁶ It would have been easy for Congress to have said that the MDR is limited to the disability category identified in the IEP. But it didn’t say that.

Legislative history and the regulations also belie District’s position. The IDEA conferees stressed that manifestation determinations are not based on static facts from any particular time (*e.g.*, as of the date of an IEP):

The Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented. Additionally, it is the intention of the Conferees that when a student has violated a code of conduct school personnel may consider **any unique circumstances on a case-by-case basis** to determine to whether a change of placement for discipline purposes is appropriate. The Conferees intend that if a change in placement is proposed, the manifestation determination will analyze the

¹⁵ See *also* 20 U.S.C. § 1415(k)(1)(A) (“School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement . . . is appropriate for a child with a disability who violates a code of student conduct.”); 34 C.F.R. § 300.530(a) (same).

¹⁶ In other words, while Hicks was correct during the November 10, 2021, MDR that medical information and an evaluation is necessary to classify a child as OHI, it does not follow that a prior identification of OHI is a requirement for ADHD related information to be considered in a manifestation determination. Congress specifically intended otherwise.

child's behavior as demonstrated **across settings and across time** when determining whether the conduct in question is a direct result of the disability.

Conference Report, Individuals with Disabilities Education Improvement Act of 2004, H.R. Rep. No. 108-779, at 224-25 (Nov. 17, 2004) (emphasis added).

In publishing the Regulations, the Department of Education ("DOE") responded to a concern that the draft regulation did "not account for the spectrum of inter-related and individual challenges associated with many disabilities." Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities; Final Rule, 71 Fed. Reg. 46540, 46720 (Aug. 14, 2006).

The DOE stressed that the interrelatedness of medical conditions must be considered, which forecloses the notion that, for example, only a "primary disability" be considered as the District contends. The DOE also adopted the principle that the behavior be evaluated over time and in different settings, foreclosing District's argument that what the IEP team knew in September is determinative:

We believe the criteria in § 300.530(e)(1) that the LEA, parent, and relevant members of the IEP Team must determine whether a child's conduct is a manifestation of the child's disability is broad and flexible, and would include **such factors as the inter-related and individual challenges associated with many disabilities**. The revised manifestation provisions in section 615 of the Act provide a simplified, common sense manifestation determination process that could be used by school personnel. The basis for this change is provided in note 237–245 of the Conf. Rpt., pp. 224–225, which states, "the Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented." The Conferees further intended that "if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated **across settings and across time** when determining whether the conduct in question is a direct result of the disability." No further clarification is necessary.

Id. (emphasis added).

The District contends in its post-hearing submission that the IEP team permitted the Parent to provide input before it made the decision. Yes, the Parent and her advocates spoke, and they made their points, but the notion that those points were considered is impossible to reconcile with the statements of District representatives in the MDR videos. District representatives repeatedly remarked that the information was not germane to the manifestation determination. The principal not only characterized the Parent's points as "off topic," she also remarked that a discussion of the issues the Parent was raising was "putting the cart before the horse" and that the IEP team needed to, instead, focus solely on whether the behavior was a manifestation of the "primary disability" of SLD.

Discussion of the Student's medical issues was not "off topic." To use own metaphor, the statutory cart here is manifestation determination, and the statutory horse is "any relevant information provided by the parents." By insisting that the IEP team resolve the manifestation determination issues before considering "relevant information," it was the District that put the cart before the horse.

Likewise, it is hard to understand how the District contends that its representatives considered the Parent's information about ADHD when, at the hearing, they testified that consideration of the ADHD would not have changed their opinion on causation.

The LEA determined that the Student's behavior during the fight was not a manifestation of the Student's disability without considering: (1) the best evidence of what happened before and during the fight; (2) the information parent sought to have considered about Student's disability; or (3) the fact that the Student did not know the other participant in the fight, which was the entire

premise of the rationale that the Student's conduct was planned. Put simply, when trying to determine whether a causal effect existed between the Student's medical impairment and the behavior at issue, the LEA ignored information about both.

Because the IEP team's error was in not considering information about ADHD and Student's circumstances during the MDR, any error in the identification in September was not the direct result of LEA representative's final decision. As noted above, District representatives maintain that they would have reached the same result regardless of the disability. Accordingly, even if the District could show that the classification in September was unassailable, District's own admission that the distinction would not matter is problematic. Put another way, if the IEP team did not err in classifying the Student solely as SLD, it still violated the IDEA by not considering the information required by the statute "in determining" whether the Student's disability manifested itself in the behavior at issue.

Ultimately, the Parent bears the burden of proving a substantive violation. It is not enough to just find fault with the District's approach. The errors must matter in the end. The Parent offered credible and corroborated testimony that physical confrontation could cause an impulsive response by the Student given her ADHD. The Parent introduced evidence that impulsivity and low frustration tolerance attend ADHD, and that may lead to fighting behaviors. Most of the behavioral issues noted in the record are a few years. The Student's previous therapist and another therapist testified, however, that ADHD is not curable, but it is controllable.

The Student responded well to therapy in elementary school. The Student's previous therapist explained, however, that such progress can be negated by a triggering event. The other therapist who worked with the Student also added that impulsivity can be triggered by any situation that is affronting to a person, which she opined could include someone approaching in an aggressive manner. She also acknowledged that students without ADHD also might react without thinking, but explained that an individual's ability to assess and exercise impulse control varies, while an impulsive student just reacts.

While the District makes a fair argument that the Student's response to any aggression may constitute a natural adolescent reaction, the District ignores that the fight is not the only conduct that should be considered. Both parties introduced evidence that, even after the participants were separated, the Student remained in an unmanageable state of rage for almost twenty minutes, resisting restraints, seeking escape, and screaming expletives, even after the immediate threat was eliminated. . While punching back in the heat of confrontation could be considered a natural response,¹⁷ Student's behavior after the fight itself warrants examination.

The evidence presents a dramatic dichotomy in the Student's behavior, depending on whether she feels affronted. For example, when authority figures, such as the principal have appropriately confronted her for issues such as her clothing, or being on school grounds unattended, the Student responds in a highly inappropriate manner. Contrast that with the description of the Student as "sweet" and generally compliant when not confronted.

¹⁷ Calling it a possible "natural response," however does not negate the fact that the best course would be to evaluate the situation further to determine whether the behavior is disability related.

Student spoke during both MDR sessions. When prompted for input, the Student was soft spoken, polite, and responsive – a stark contrast to her behavior when she apparently feels affronted.

The pattern of the Student's inappropriate responses juxtaposed with the Student being receptive and cooperative in other settings recalls her documented behavior in 2018. By all accounts, the Student responded well to therapy for those issues. When the Parent tried to investigate the possibility of therapy after the October 28, 2021, fight, the school's counselor reportedly offered to help and was told by the principal to "stay out of it and only get involved if [his] assistance is requested."¹⁸ It is likely time to make that request.

The District offers no competent evidence against which one could weigh the evidence produced by the Parent about the ADHD's causal effect on Student's behavior. So, the only possible outcome here is that Parent has met her burden of proof in showing that the manifestation determination made by the LEA is erroneous.

c. The nexus between behavior and setting

Hicks further led the IEP team astray in stating that Student's conduct was unrelated to the disability because it did not occur in the context of instruction. Hicks told the group that this was unlike a situation in which the Student engaged in misconduct after being asked to do a math problem or to read aloud, and she stated that it was unrelated because it occurred in the cafeteria rather than the classroom.

¹⁸ The use of feminine pronouns in this document is confusing as two women are referenced in the counselor's notes. Lesane, however, confirmed that she was not the individual who told the counselor to stay out of it.

Hicks repeated this opinion at the hearing, stating that the behavior “was related to the cafeteria, not academic time.”

This instruction influenced others. At the hearing, for example, Bown testified:

If she had been sitting in class and got frustrated because she couldn't read the passage and stood up and pushed her chair out or shouted, that would be one thing. This is not that. This has nothing to do with the disability in a core curricular subject.

[Tr. 515:22 – 516:2].

This approach is unfounded and contrary to the statute. The issue is not whether the behavior at issue is “caused by, or had a direct and substantial relationship to,” a curricular subject. The issue is whether the behavior is “caused by” or has a “direct and substantial relationship to the child’s disability.” 20 USCS § 1415(k)(1)(E)(i)(I); 34 C.F.R. § 300.530(e)(1).

In short, the entire process here went off the rails with the improper instructions and unwarranted assumptions.

2. Was the conduct the direct result of the LEA's failure to implement the IEP?

The Petitioner contended that this question should be answered “yes” because ADHD was not added to Student’s IEP. [Pet. Exh. 3 at 0010]. The issue, however, is not whether the IEP was wrong. The issue with this prong is whether the IEP was implemented.

There is no evidence that the District failed to implement the IEP as written. Even if there were evidence of a failure to implement the IEP, there is no evidence that any such failure was the cause of the behavior at issue, or that any procedural failures to implement the IEP as written led to a denial of FAPE.

IV. Conclusion

For these reasons, the District's determination that the Student's conduct was not a manifestation of her disability is reversed.

V. Remedy

The IDEA provides:

Authority of hearing officer.

(i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

20 U.S.C.S. § 1415(k)(3).

Under this provision, I order that the Student be returned to the placement in effect before the removal.

The District also is ordered to promptly conduct a functional behavioral assessment and the IEP team must promptly meet to create a BIP and determine what other intervention services and modifications are necessary to address the Student's behavior violation so that it does not recur. 20 U.S.C.S. §§ 1415 (k)(1)(D)(2), (F). If consents are required from the Parent to conduct any assessment or evaluation, she must promptly execute them.

Finally, the District must promptly conduct an independent educational evaluation (IEE) to obtain information for the IEP team's consideration on whether modifications to the IEP are necessary, including any modifications to the Student's identification(s), and whether additional services are appropriate.

I have reviewed the other requests for relief requested by the Parent. Many do not follow from the violations here or relate to issues that are not properly before me given the scope of the Complaint.

VI. NOTICE OF APPEAL RIGHTS

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
Columbia, SC 29201

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



Brian P. Murphy
Local Due Process Hearing Officer

February 14, 2022

Greenville, South Carolina