

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Re: Child, by and through his parent(s), Parent v. County Public Schools
Case No. 23-046a**

**Child & Parent(s)/Guardian:
child
parent(s)**

Administrative Hearing Officer:

**Child's Attorney/Advocate(s):
Advocate**

**County Public Schools' Attorney
Attorney for LEA**

**Superintendent of County Public Schools:
Dr. Superintendent**

DECISION

I. PROCEDURAL HISTORY¹

On November 9, 2022, the parents, filed a due process complaint (DPC/complaint). (AR 2). The Hearing Officer held an initial telephonic prehearing conference (PHC) on November 22, 2022, to address matters pertaining to the DPC.

The Hearing Officer then issued a scheduling order on November 22, 2022. This order provided a summary of discussions that occurred during the PHC, related directives from the Hearing Officer, and the scheduling of upcoming proceedings. (AR 6). As the Hearing Officer determined that the parents pled expedited and non-expedited issues in their complaint, the Hearing Officer bifurcated the matter scheduling an expedited hearing for December 8, 2022, on the expedited issue, and a non-expedited hearing for January 4, 2023, on the non-expedited issue. These dates were noted in the scheduling order and agreed to by the parties.

¹ Throughout the decision, the Hearing Officer will use the following abbreviations:

| | | |
|----------------------------------|---|-----|
| Transcript | - | Tr. |
| Parents' Exhibit | | P |
| Local Educational Agency Exhibit | - | S |
| Administrative Record | - | AR |

In addition to the PHC held on November 22, 2022, the Hearing Officer held another PHC on December 6, 2022, to address, among other matters, objections to proposed witnesses, exhibits, and requests for subpoenas for the expedited hearing. Parents had requested the issuance of six (6) witness subpoenas and two (2) subpoenas for the production of documents. The LEA objected to several of the parents' proposed exhibits and witnesses, and the requests for the issuance of subpoenas. After considering any arguments for or against the proposals and requests mentioned here, by orders issued on December 6, 2022, the Hearing Officer overruled the LEA's objections to Parents' proposed exhibits. In addition, the Hearing Officer granted the parents' request for the issuance of an order(s) directing the production of documents. Moreover, the Hearing Officer issued five of the witness subpoenas requested by the parents and granted the LEA's motion to quash one witness subpoena. (ARs 22 and 24).

Before testimonial evidence was taken during the hearing, the Hearing Officer admitted exhibits of the parties: Parents' Exhibits 1 through 16 and LEA Exhibits 1 through 29.

In addition, the Hearing Officer has determined that each party has had an opportunity to review the administrative record (AR) and had no objections to it. Accordingly, AR items 1 through 27 have been made a part of the record.²

During the due process hearing, each party was allowed time to present an opening statement, conduct direct examination of their witnesses, and cross examine the opposing party's witnesses. Neither party desired to present rebuttal testimony. The parties jointly requested leave to present their closing arguments in writing. The Hearing Officer granted the joint motion. The parties' closing argument was due by December 15, 2022. Both submitted their closing arguments on December 15, 2022. (AR 27).

II. EXPEDITED ISSUE

Did the LEA wrongly decide the child's behavior was not a manifestation of his disability?

III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA's actions.

IV. STATEMENT OF FACTS

1. Child is a ninth grader and has been determined eligible for special education and related services under the disability category other health impaired (OHI) due to child being diagnosed with ADHD. (S 2 and 3; Tr. 135-137).

² Following the hearing, LEA counsel requested the Hearing Officer add to the record the November 14, 2022, letter from the LEA confirming the Hearing Officer's appointment letter. That letter was also accompanied by a copy of a letter dated November 14, 2022, from the LEA to the parents which also confirmed the Hearing Officer's appointment. The Hearing Officer has designated these two letters AR 26. Moreover, on December 15, 2022, the parties filed their closing arguments/statements. The Hearing Officer has made those arguments AR 27.

2. On September 1, 2022, the IEP team met to amend the child's IEP as child was returning from an alternative school placement. The child had been placed in the alternative setting for the period February 15, 2022, to June 16, 2022, due to his possessing marijuana at school. The IEP resulting from this IEP meeting is the IEP dated September 1, 2022 (September 1, 2022 IEP). This IEP is Child's current IEP for the 2022-23 school year.

The September 1, 2022 IEP notes that Child has been deemed a child with a disability and eligible for special education and related services under the Other Health Impaired (OHI) category due to deficits in attention and focus. Although the September 1, 2022 IEP references a Sensory Processing Disorder (SPD) in the present level of performance section of the IEP. The IEP team added this language in February 2022, because the parents reported the child had an SPD. Specifically, the parents stated the child would be uncomfortable wearing a uniform at Child's new placement at an alternative school. School staff had not observed Child displaying an SPD.

The September 1, 2022 IEP does not note Child has been diagnosed with autism.

The IEP does note the child is performing below grade level, but the IEP does not indicate the child has been diagnosed with an intellectual disability. The Hearing Officer finds below grade level performance and intellectual disability are not identical.

Regarding Child's behavior, the September 1, 2022 IEP noted that the child is easily distracted and can lose focus during instruction. Child was characterized as "well-behaved in class and follows classroom rules and procedures." The IEP also noted that Mother is impressed with how Child is improving academically. (P 9; S 6; Tr. 34-35, 42-47, 75-76, 183).

The Hearing Officer finds the evidence insufficient to find Child has a Sensory Processing Disorder and diagnoses of autism and intellectual disability. (P8; S1; Tr. 140).

Incident, Investigation, and Police Interview

3. On the morning of September 27, 2022, a substitute teacher at High School (HS) reported to Assistant Principal concerns regarding Child. (Tr. 55; S8). Particularly, the substitute teacher informed Assistant Principal of concerns that had been reported to Substitute teacher by students. The concern reported noted that Child had indicated he had guns and planned to bring a gun to school and shoot up the school.

4. Then, Assistant Principal conducted an investigation on September 27, 2022. (Tr. 48). Assistant Principal interviewed students who reported that Child had stated he would shoot up the school. In addition, students reported that Child had shown students videos of guns in Child's home and Child had informed students that Child planned to bring a gun to school. (Tr. 56). Also, students reported that a few weeks before, Child showed a video of someone being shot in the head five (5) times. (Tr. 57) During the course of Assistant Principal's investigation, Child admitted to Assistant Principal, he had shown this video of a person being shot in the head 5 times. (Tr. 58; S 12).

5. Moreover, Assistant Principal's investigation revealed that there was a video of Child stating Child is going to shoot up the school. Assistant Principal viewed the video and even though faces of in the video could not readily be determined, when Assistant Principal interviewed the child, Child admitted that he was in the video and that he was the person in the video that stated he would shoot up the school. (Tr. 57). In addition, when Assistant Principal's interviewed Child, he also stated that he made the statement about bringing a gun to school to scare others.

6. Investigation by Assistant Principal also revealed that Child advised one student that he should not attend school the next day because Child would be bringing a gun to school. (Tr. 58).

7. During the investigation of the September 2022 incident, the child reported that a factor in his behavior was he felt bullied. Child stated that other students had made homophobic comments and racial slurs. He noted in his statement that those comments or slurs had not been directed at him. Moreover, Child stated that he was not homosexual. Parents also reported bullying and had provided the LEA with some names of students who purportedly were bullying Child. Assistant Principal interviewed the students. The investigation of the bullying revealed that Child had been showing students videos and pictures of guns. Further, he had showed a video of a person being shot 5 times in the head to a student. The investigation revealed that as a reaction to Child's showing these videos and pictures, when Child was going into his backpack, students would comment "Child has a gun." Or students might pretend to run out of the classroom. The evidence shows that the investigation revealed that students' actions may have been unkind. However, they acted in this way as they were concerned due to Child showing pictures of guns. The LEA determined the reaction of the students was not bullying. In making this determination, the LEA had knowledge of an incident on the bus on September 11, 2022, where Child had been poked in the leg several times with a knife. The LEA determined this one-time incident did not constitute bullying, as bullying reoccurs. (Tr. 49-51; 80-81).

8. Police officer also interviewed Child on September 27, 2022. The police officer conducted the interview with the child. Child's father accompanied Child to the interview and remained present, at Child's side, while the police officer interviewed Child. (S 29). During that interview, Child affirmed that he made the statements about the gun and they were made to scare others. Further, during Child's interview with the police officer, Child was given the meaning of the word "aggression." Child then acknowledged understanding the word's definition. Child then stated his behavior was an act of aggression and that he made the statement to scare others. Child provided a written statement to the police officer affirming same. (Tr. 59, 68; S15 and S29).

9. Child stated during his interview that he had threatened to shoot up the school several times. (Tr. 176-77). The Hearing Officer finds the child made multiple threats to shoot up the school.

10. During the investigation written statements were not only obtained from Child, but from other students as well. Those statement confirmed what was told to Assistant Principal and or the police officer. (S10; S11).

Risk Assessment

11. After Assistant Principal conducted the investigation and formed a preliminary assessment,

the LEA formed a risk assessment team. The purpose of the risk assessment team was to determine (i) if there was a threat of violence to the school, students, the child and or staff and (ii) if so, when any violence was likely to occur. The risk assessment team consisted of the child's general education teacher, the school's social worker, Special Education Teacher and Case Manager, High School's resource officer (SRO), Assistant Principal, school counselor, and the school's psychologist. All members of the team were familiar with the child. The team conducted the risk assessment on September 28, 2022, considering several factors. Those factors included, among others, the following:

- Child had access to a gun at home and engaged in target practice
- Child had the means to carry out violence with a gun
- Child's motive in making the statements to other students at school about the gun(s) was to intimidate
- Child engaged in an attack planning
- Child showed inappropriate interest in weapons

After the team's assessment, the team determined the child's threat was high risk and imminent.

(Tr. 61-62; S14/)

Discipline and Proposed Alternative Placement

12. School administration disciplined Child. This discipline was due to school staff determining that on or about September 26, 2022, Child made statements to other students threatening to "shoot up the school," Child showed students picture of a gun on September 26, 2022, informing them that the gun was real, Child promised that someone would die because Child perceived that a student had taken his jacket. In addition, prior to September 26, 2022, Child had been showing other students a violent video of someone being shot in the head 5 times. (S7 and S12).

13. Particularly, the administration suspended the child from school for 10 consecutive school days. The 10-day suspension commenced on September 27, 2022, and concluded on October 11, 2022. In addition, the LEA recommended an alternative placement for the child for the remainder of the 2022-23 school year. This alternative placement constituted a change in the child's current educational placement at a public day high school. Accordingly, the school administration took action to schedule and hold a manifestation determination review (MDR) meeting within the 10 school days of the child's 10-day out of school suspension (OSS). (S12, S13, S6 at 23, S19; P1, P7).

Scheduling the MDR team meeting

14. The LEA exchanged correspondence with the parents to facilitate scheduling the MDR meeting. The meeting was initially proposed to be held on September 29, 2022, at 9:15 a.m. Mother sent an email on September 29, 2022, at 1:12 p.m. stating that Parents would not be attending and informing Assistant Principal that Child was in jail. Mother also stated the child had

diagnoses of intellectual disability, SPD, and ADHD. Further, Mother's email indicated that Child was suspected of being autistic. On September 30, 2022, Assistant Principal sent correspondence to the parents providing additional available dates and times for the MDR meeting. Those dates and times were October 4, 2022, at 8:00 a.m. or 10:30 a.m. and October 5, 2022, at 11:00 a.m. In her correspondence, Assistant Principal expressed the school's desire that the parents attend the MDR meeting. Assistant Principal also informed the parents that if Assistant Principal received no response from the parents, the meeting would proceed on October 5, 2022, at 11:00 a.m. Father emailed Assistant Principal on September 30, 2022, at 2:49 p.m. stating he would attend the meeting. Assistant Principal's correspondence to the parents offered them several means to participate in the meeting; that is, in -person, by telephone, or virtually. (P2, P3, P4, P5, S17; Tr. 70).

15. Notwithstanding, on October 5, 2022, at 7:02 a.m., Mother transmitted an email to Assistant Principal requesting a delay in the meeting to allot time for a competency to stand trial evaluation to be completed and psychological/psychiatric assessments. Parents had requested several delays during the time the school sought to schedule the MDR meeting. Principal on October 5, 2022, prior to the scheduled time for the meeting responded to the mother's delay request. Principal stated in her response that the meeting "must be held within the first 10 days of a student suspension." Principal affirmed the meeting would proceed as scheduled at 11:00 a.m. on October 5, 2022. (P4; S18, S19; Tr. 36-40, 71, 171).

16. The 10th day of the child's OSS was October 11, 2022. In asking for the delay on October 5, 2022, Parents did not suggest another date for the meeting between October 5 and 11, 2022. Neither did parents indicate how long it would take to receive the evaluations. (Tr. 71, 73).

Manifestation Determination Review Meeting

17. The Manifestation Review Team (MRT) met on October 5, 2022, to determine if the child's behavior was a manifestation of his disability. (S20).

18. Those attending the MRT meeting included Special Education Teacher, School Psychologist, School Social Worker, General Education Teacher, and Principal. Accordingly, although notified of the meeting in advance, Parents failed to attend the meeting. (S20/4; Tr. 146-147, 183).

19. Child's cumulative file was available at the MDR meeting for review by the MDR team members. (Tr. 94, 189, 190-191). Among other items, the cumulative record contained a psychological evaluation by School Psychologist II dated February 2, 2015, and a Supplemental OT evaluation dated March 5, 2015. (P11, P12; S1).

20. The MDR team reviewed School Psychologist II's evaluation. (Tr. 173-174).

Regarding the evaluation, School Psychologist II report indicates that Child has average range verbal reasoning. School Psychologist also noted that testing showed Child demonstrated at risk attentional concerns. Further, School Psychologist II's evaluation mentioned that the evaluation may be an underestimate of Child's ability due to the child's difficulty with focus and

attention. (Tr. 115-116, 142-144).

One testing instrument, among others, School Psychologist used to complete his psychological assessment was the Behavior Assessment System for Children (BASC-II). Specifically, the BASC-II was used to monitor the child's social and emotional functioning. Results from this segment of the evaluation showed no concerns with Child showing aggression as he rated in the normal range. In addition, test ratings from the BASC-II showed that in the school setting the Child demonstrated appropriate adaptability and social skills.³ (Tr. 115-116, 142-144; S1; P 11).

The evaluation addressed executive function. School Psychologist I qualified as an expert in school psychology. (Tr. 100). She defined executive function as an individual's ability to monitor his/her behavior. School Psychologist II's evaluation addressed executive function. In his report, the psychologist noted that Child has difficulties with executive function which may be related to Child's ADHD, inattentive type and exposure to substances in utero. As referenced above, the MDR team considered the psychological evaluation. The consideration of this report was one of several ways the MDR team considered Child's executive function as well as his difficulties with focus, attention, and organization. (Tr. 103-104 and 172-174; S20).

School Psychologist I, as an expert, opined that executive function and/or inhibition, a core function of executive function, does not cause a person to threaten to shoot up a school. (Tr. 138-140)

In addition, the MDR team determined that there was no specific evidence regarding Child's exposure to substances in utero and this exposure impacting the child. (Tr. 173-174).

School Psychologist II noted that Child's ability to persevere and maintain consistent attention on cognitive tasks may have negatively impacted his performance on the DAS-II (cognitive functioning test). (P11 at 3).

21. The child's cumulative file also contained Occupational Therapy Supplement to Evaluation (OT Supplemental Evaluation) which was dated March 5, 2022. (P12).

The report shows that the evaluator conducting the OT Supplemental Evaluation utilized the "School Companion Sensory Profile 2" (Profile 2) to assess Child's sensory processing patterns. The results of this testing showed the following:

- Child seeks sensory input at a higher rate than his peers, but also misses sensory input more than others
- Child having difficulty with sound, visual, and touch processing and therefore not consistently responding with an adaptive response
- Child being distracted by movement in the classroom
- Child needing, more than others, external supports, awareness and attention, and tolerance

³ Of note, parents' adaptability responses on the BASC-II scored child in the at-risk range in the home setting. (S1; P11; Tr. 144).

(P12).

22. The OT Supp Evaluation does not conclude that Child has/had an SPD. (Tr. 205; P12).

23. The MDR team considered the results mentioned in the OT Supplemental Evaluation. (Tr. 189).

24. The MDR team also considered that Child previously received OT services. Receiving such services may suggest an individual has an SPD. That said, as of January, 2021, the IEP team discontinued those services and they were removed from the child's IEP. (Tr. 207).

25. The IEP team also considered parents' report of child having an SPD. To this point and as referenced above, as of February 15, 2022, Child was placed at an alternative school through the remainder of the 2021-22 school year. The LEA changed the placement from a public day middle school to the alternative placement due to the child possessing marijuana at the middle school. Generally, a student attending the alternative dressed in a uniform. Mother reported Child had an SPD and asked that Child be allowed to wear athletic clothing as he would be uncomfortable in a uniform. That accommodation was approved by the child's IEP team. The duration of this accommodation was from February 15, 2022, to June 2022. Parent agreed with the amendment to the IEP and the duration of the accommodation. (S4, S5 at 4 -5 and 13; S6 at 17; Tr. 184).

26. School staff did not observe Child displaying an SPD. The accommodation regarding any SPD was made based on a report from Mother. Further, the accommodation was for a defined period which expired on June 16, 2022. (Tr. 187; S6 at 17).

27. As referenced above, the Hearing Officer finds, the MDR team considered the SPD reported by the mother. (Tr. 110, 150-160, 166-167).

The Hearing Officer finds the evidence is insufficient to show Child was diagnosed with SPD.

28. Child's reevaluation and most recent eligibility determination were completed on May 19, 2020. The reevaluation, related documentation, and recent eligibility determination were a part of Child's cumulative file and reviewed by the MDR team. (Tr. 95, 144-145; S2).

29. In addition to the items in the cumulative file mentioned in the preceding statements of facts, the MDR team considered child's disciplinary history, the discipline information associated with Child's behavior on or about September 26, 2022. Moreover, to the extent possible, the team considered information provided regarding what preceded the child's behavior that gave rise to the MDR meeting. The team considered Child's statement that he felt threatened and claims of Child being bullied. Also, the team considered the impact on Child of not being able to find his hoodie and how that affected him. Further, the team reviewed two videos related to the behavior: one video where the child stated in the video that he would "shoot up the school," and a second video where the child was walking around and appeared upset.

The fact that the Child made several threats and had a plan was considered. Additionally, consideration was given to the fact that the behavior involved more than a single situation and the

behavior was more than a reaction by the child. (Tr. 106, 131-132, 172, 192, 199).

30. Furthermore, during the MDR meeting, the child's teachers discussed their observations of the child in the classroom setting. This included what they observed regarding his behavior. Child's special education and general education teachers shared their observations with the MDR team for consideration. (Tr. 147, 163-164).

The teachers noted during the MDR meeting that the child was generally well-behaved. There were no incidents of threatening behavior observed in the classroom. Special Education Teacher reported Child was respectful to his teachers. Child got along with his peers, he had friends, and Child's teachers noted during the MDR meeting that they were surprised at the threats made by child and his showing of the video of an individual being shot 5 times in the head. Neither teacher had observed the child displaying aggression. Child's behavior during the incident on or about September 26, 2022, was described as atypical.

Both observed effects of ADHD in the classroom. They included lack of focus, needing redirection, needing preferential seating to assure completion of work. Child special education teacher observed Child being frustrated before. But Child remained respectful to the teacher and did not threaten to shoot up the school.

(Tr 148-150, 183-184, 200-211).

31. The MDR team also discussed Child's disability and how it impacted the child. As referenced above, Child's teacher and School Psychologist I noted that the ADHD impacts Child's attention, focus, and organization. (Tr. 149-150).

32. What is more, the MDR team considered the Threat Assessment that had been conducted on September 28, 2022. In reviewing the Threat Assessment, the MDR team considered the statements made by students regarding threats Child had made and Child's statements regarding the incident. (Tr. 164; S14).

33. The MDR team also considered input from the parents that had been received prior to the MDR team meeting as parents declined to attend the MDR team meeting. (S20). Among other information provided by the parents, the team considered the email dated October 5, 2022, from the parents indicating that a judge had ordered a competency evaluation of the child and the child's attorney had requested psychological and psychiatric evaluations of the child. (Tr. 165).

34. Parents have not provided any psychiatric or psychological reports to the school since requesting the meeting be delayed so they could be obtained.⁴ (Tr. 165-166).

⁴Regarding the competency evaluation, on the day of the expedited hearing, the parents did report that they had just obtained a copy of the competency evaluation. Parents' advocate offered to share the evaluation with counsel for the LEA and the Hearing Officer. On information and belief, competency evaluations prepared for a defendant in a Juvenile and Domestic Relations Court in the Commonwealth of Virginia are generally ordered to be confidential and kept under seal. Because it could not be determined if the parents were permitted to disclose the evaluation, neither counsel for the LEA or the Hearing Officer reviewed the evaluation.

35. The Hearing Officer finds any input provided by the parents were considered during the October 5, 2022 MDR team meeting.

36. The MRT team also considered the child's current IEP, the September 1, 2022 IEP, to include his services and goals. Goals were both academic and behavior. The behavior goal focused on Child's difficulties with focus, attention, and organization. His academic goals focused on deficits in reading, writing, and math. The September 1, 2022 IEP was Child's most recent IEP and included the December 16, 2021 IEP, as well as any amendments to the IEP made following the December 16, 2021 IEP. Particularly, the IEP team had amended the child's IEP in February 2022, as a result of Child's placement changing to an alternative school until June 2022. The September 1, 2022 IEP amended the IEP because the child was returning to a regular public day school. The MDR team considered goals and services (S 4; S6; Tr. 151-153).

37. The MDR team determined the LEA had implemented the child's IEP. (Tr. 170).

38. After undertaking the consideration noted here, MDR team went through a series of questions. Specifically, the team asked "Was the C's conduct caused by his disability?" (Tr. 167).

39. The team also asked "Did the C's behavior have a direct and substantial relationship to the disability"? To these questions the team considered the C's disability was OHI due to ADHD diagnosis. Further, the MDR team considered the disability's impact on the child's ability to focus, be attentive, and organize. The team determined the behavior on or about September 26, 2022, did not have a direct and substantial relationship to the disability. Accordingly, the team answered both questions with "no." (Tr. 167; S20/4).

40. Lastly, the team asked " Was the C's conduct the result of the LEA's failure to implement the C's IEP"? Tr. 167; S20 at 4). The team determined that the IEP was being implemented and answered the question with "No." (Tr. 167,170; S20).

41. The team answered each of the three questions with "No." The team then determined that the child's conduct was not a manifestation of C's disability. (Tr. 167; S20).

42. By their respective testimony, Special Education Teacher and School Psychologist I stated the manifestation determination was correctly decided by the MDR team. (Tr. 170, 211).

Other Factual Findings

43. The Hearing Officer observed the demeanor of Assistant Principal who testified during the hearing. Her testimony was consistent with other evidence of record. The Hearing Officer finds Assistant Principal's testimony credible.

44. The Hearing Officer observed the demeanor of School Psychologist I. Testimony of the witness was consistent with other evidence of record. Moreover, School Psychologist I qualified as an expert in school psychology. She also was a member of the MDR team and was familiar with the child. The Hearing Officer finds School Psychologist I's testimony credible.

45. The Hearing Officer observed the demeanor of Special Education Teacher. Special Education Teacher had direct involvement with Child as his special education teacher. She participated in the MDR team meeting and had direct knowledge of what was considered during the meeting. Her testimony was consistent with other evidence of record. The Hearing Officer finds Special Education Teacher's testimony credible.

46. The evidence is not sufficient to vacate the school's manifestation determination decision.

47. The Prior Written Notice (PWN) regarding the MDR meeting provides a summary of documents, items, or topics discussed during the MDR team meeting. (Tr. 189).

48. The Hearing Officer has considered all the exhibits admitted by each party whether specifically mentioned or not. By way of example, the Hearing Officer has considered Exhibits 13 through 16 of the parents providing information on the Manifestation Determination Process, ADHD, Intellectual Disabilities, and autism spectrum disorder.

V. LEGAL ANALYSIS

Congress passed the Individuals with Disabilities Education Improvement Act (IDEA/Act) to guarantee that children with disabilities have available to them a Free Appropriated Public Education (FAPE). 20 U.S.C. § 1400 *et seq.* For this purpose, the federal government provides funds to states in exchange for the states' compliance with a set of regulations aimed at providing "special education and related services designed to meet" disabled children's "unique needs and prepare them for further education, employment, and independent living." *Id.* The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., § 22.1-214-215. IDEA anticipates cooperation between the schools and parents to best identify and serve the needs of disabled children. *See id.* §1400(d)(1B), (d)(3); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). (Identifying that the "core of the statute" as "the cooperative process that it establishes between parents and schools").

The individualized education program (IEP) is the mechanism established in the statute to be employed to deliver the child a FAPE. *Honig v. Doe*, 484 U.S. 305,311 (1988). As defined by the IDEA, an IEP is "a written statement for each child with a disability that is developed, reviewed, and revised" according to specific procedures and that includes a roadmap for the child's academic growth and development. 20 U.S.C. §1414(d)(1)(A)(i). It is expected that the parents and educators will collaborate as "the IEP team" to draft, revise, and update a child's IEP. In addition to the provisions of the IDEA addressing the IEP, the statute requires the school to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017). Further, in addition to this substantive obligation of the schools, the IEP affords parents of disabled children certain procedural safeguards.

The IDEA imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S.

176 (1982). This includes, certain obligations of the LEA when a child with a disability is or a child who is suspected of a disability is recommended for a long-term suspension or a change in placement due to a violation of a code of student conduct. 20 U.S.C. § 1415(k). In this case, the LEA recommended Child for an alternative placement for 150 days due to his making threats to shoot up the school and showing a violent video. Therefore, the LEA was required to hold a Manifestation Determination Review meeting to decide if the conduct in question was a manifestation of Child's disability.

Parents contend that the LEA failed to meet its obligations during the MDR meeting. Thus, the Hearing Officer examines the evidence here to determine if the MDR determination is flawed.

In determining whether Child's conduct was a manifestation of the disability, IDEA directs the team to determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or whether the conduct was the direct result of the failure of the LEA to implement Child's IEP. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e).

The MDR Committee is also required to review all relevant information in Child's file, including the child's IEP, any teacher observations, and relevant information provided by the parents. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e). Further, the IDEA requires the MDR team to consist of relevant members of the IEP team as determined by the parent and LEA. 34 C.F.R. § 300.530(e).

Relevant members of the IEP team:

First the Hearing Officer decides if the relevant members of the IEP team attended the Manifestation Determination Review team meeting (MDR meeting). The evidence shows that the LEA held the MDR meeting on October 5, 2022. The evidence demonstrates that those attending the meeting were the school's psychologist, the principal, the child's special education teacher, the school's social worker, and the child's general education teacher. The evidence also shows that the parents had been invited to the MDR team meeting. In fact, the child's father had emailed the school on Friday, September 30, 2022, stating "I will be there oct 5 at 11:00 a.m." However, on the morning of October 5, 2022, at 7:02 a.m., the child's mother emailed Principal requesting a delay of the MDR meeting so that competency, psychological, and psychiatric evaluations could be obtained. Parents offered no alternate time or date for the MDR meeting. On October 5, 2022, Principal did respond to the parents' request. In that response Principal informed the parents that due to the requirement to hold the meeting within 10 school days of the school's decision to change the child's placement because of a violation of a code of conduct, the meeting would not be postponed.

The Hearing Officer notes that October 11, 2022, was the 10th school day following the school's proposal to change the child's placement. However, parents' request for a delay was indefinite and failed to indicate that there was a delay requested for only a few hours or days. Further, it is reasonable to infer that it would take weeks or months for the evaluations to be completed and available for review by the MDR team. Parents knew in advance about the meeting and initially agreed to attend. The evidence establishes no reason why the parents could not have

attended the meeting, especially considering the school offered the parents several ways to attend: by telephone, in-person, or virtually. Postponing the meeting for a protracted period as suggested by the parents was not feasible. Parents chose not to attend. The Hearing Officer therefore finds, the LEA did not violate the MDR process by holding the meeting on October 5, 2022, without the parents being present.

Review of All Relevant Information

Next, the Hearing Officer considers whether the MDR team considered all relevant information.

1. Reviewing of Cumulative File

The evidence shows the child's cumulative file was present during the MDR meeting. Further, the team reviewed relevant information.

This file contained, among other items, the psychological evaluation prepared by School Psychologist II, the OT Supplemental Evaluation, the re-evaluation and most recent eligibility determination, the child's IEP, the child's disciplinary history, and the threat assessment.

Among other psychological testing results, the psychological evaluation noted the child's level of aggression was not abnormal. Further, testing indicated that Child demonstrated appropriate adaptive and social skills in a school setting. In addressing executive function, the School Psychologist II noted that the child may have difficulties with executive function which the evaluator stated may be related to Child's ADHD, inattentive type and exposure to substances in utero.

Parents presented two witnesses who attended the MDR team meeting. Both testified credibly that the team considered the psychological evaluation. Parents in effect argue or suggest that the child's has difficulty regulating his behavior and that the MDR team did not properly consider child's deficits in executive function. The behavior which was the subject of the MDR meeting involved making threats to shoot up the school. Parents' own witness who qualified as an expert opined that executive function and/or inhibition, a core function of executive function, does not cause a person to threaten to shoot up a school.

The Hearing Officer finds that the evidence clearly shows the MDR team considered the psychological evaluation to include, but not limited to, the child's executive functioning.

Similarly, the evidence demonstrates that MDR team considered the OT Supplemental Evaluation and any SPD of the child. Special Education Teacher testified credibly that the MDR team reviewed the supplemental report and the results of the testing tool used, the School Companion Sensory Profile 2. The evidence shows that at the MDR meeting, the team reviewed (i) Mother's report that was made on or about February 2022, of the child having an SPD, (ii) the accommodation provided as a result of that report, and (iii) removal of the accommodation on September 1, 2022, once Child returned to the regular public high school. The team also considered Child received OT services in the past, but noted the IEP team discontinued them

January, 2021.

What is more, the evidence shows that a student's sensory processing can change.

Moreover, the team considered that the child has not displayed an SPD by school staff.

The Hearing Officer finds that the evidence shows the MDR team considered the OT Supplemental Evaluation as well as any reports of an SPD. The Hearing Officer finds that the evidence is not sufficient to demonstrate that the child has an SPD. Further, the Hearing Officer finds the MDR team considered the parental report of an SPD.

Witnesses for the parents also testified credibly that the MDR team considered the child's most recent eligibility and re-evaluation. Moreover, the Hearing Officer admitted the minutes of the MDR meeting as an exhibit. This documentary evidence also reflects and corroborates that the team considered the Child's most recent eligibility determination and re-evaluation. The evidence shows that discussions took place regarding the nature of Child's disability, OHI due to ADHD diagnosis, and how his disability impacts him.

The evidence demonstrates that the MDR team considered the child's IEP. Reviewed were his goals - both academic and behavior. Behavior goals focused on Child's difficulties with focus, attention, and organization as the IEP team in developing the IEP had determined these were the child's areas of need. In addition, the MDR team considered services offered in the child's IEP.

School Psychologist I testified that the MDR team discussed the Child's eligibility and how his disability impacted him. She stated that the Child is eligible for special education and related services under the category OHI based on his ADHD diagnoses. Further, the ADHD impacted his attention, focus, and organizational skills. School Psychologist I's testimony is substantiated by other testimony and documentary evidence. Moreover, the Hearing Officer observed her demeanor and determined her testimony was credible. Accordingly, the Hearing Officer finds the MDR team considered the child's eligibility determination and related re-evaluation documentation.

2. Teacher Observations

As referenced above, those attending the MDR meeting included, among others, the child's special education teacher and the child's general education teacher. Child's teachers shared their observations of Child during the MDR meeting. For example, Special Education Teacher testified credibly that from her observations, child was respectful to his teachers. Even when frustrated, Child remained respectful to his teachers. In her classroom she observed that the child got along with his classmates, he had friends, and his social interactions were appropriate. In the school setting, she observed the child displaying deficits in focusing, attention, and organizational skills.

The evidence shows that during the MDR meeting, Child's other teacher, General Education Teacher, expressed similar observations of child at school, noting Child was generally well behaved. This teacher also noted concerns about the child's attention and focus.

The teachers had not observed threatening behavior by the student in the classroom or school setting prior to the incident occurring on or about September 26, 2022, which is the subject of this due process matter. The evidence shows that both of child's teachers were surprised by the behavior displayed by the child during the incident that occurred on or about September 26, 2022.

The observations mentioned here were shared by Child's teachers and considered. Moreover, the teachers' observations of Child's behavior and adaptability are consistent with reports in documented evidence of record such as the child's IEP.

3. Behavior History and Incident and Threat Assessment

In addition to considering the above-mentioned information, the evidence shows that the MDR team also considered the child's behavior history. Child's behavior history included his possession of marijuana on school property and consequential change in placement from February 2022, to June 2022, due to the behavior.

Moreover, the team considered the incident which occurred on or about September 26, 2022. Their consideration included, among other things, Child not being able to locate his hoodie and how the loss affected him. After thorough consideration, the MDR team determined the incident was not a single event. Instead, Child made multiple threats during different times. In addition, he showed a video with someone being shot in the head 5 times. Further, considered was the child had a plan and that his behavior during the incident was not typical of him as he had never threatened to shoot up the school, nor was he known to show videos of someone being shot.

The evidence also shows that in considering the incident, the MDR team also took note of (i) the written statements of Child and other students regarding the incident, (ii) Child's statement that he felt threatened, and (iii) the threat assessment made by the school after an investigation occurred. They also considered the threat had been assessed as "high and imminent." This was the case because the Child had the means to carry out a shooting at school as there were guns in the home, and Child had been target practicing at home.

4. Bullying

The evidence also shows, the MDR team considered reports of bullying.

During the investigation of the September 2022 incident, the child reported that a factor in his behavior was he felt bullied. Child stated that other students had made homophobic comments and racial slurs. He noted in his statement that those comments or slurs had not been directed at him. Moreover, Child stated that he was not homosexual. Parents also reported bullying and had provided the LEA with some names of students. The investigation of the bullying revealed that Child had been showing students videos and pictures of guns. Further, he had showed a video of a person being shot five times in the head. The investigation revealed that as a reaction to Child showing these videos and pictures of guns, when Child was going into his backpack, students would comment "Child has a gun." Or students might pretend to run out of the classroom. The evidence shows that the investigation revealed that students' actions may have been unkind. However, they acted in this way as they were concerned due to the child's showing of violent

videos and pictures of guns. The LEA determined the reaction of the students was not bullying. In making this determination, the LEA had knowledge of an incident occurring on the bus on September 11, 2022. The incident involved Child being poked in the leg several times with a knife. The LEA determined this onetime incident did not constitute bullying, as it occurred on one occasion only.

5. Parental Input

The evidence demonstrates that the parents had the opportunity to attend the MDR meeting and elected to not attend. That said, during the MDR meeting, the team did consider child's IEP and the email sent by the parents requesting a delay of the MDR team meeting so that competency to stand trial, psychological, and psychiatric evaluations could be conducted. As referenced earlier, due to the protracted delay this would cause, the LEA notified the parents the LEA would hold the meeting and did so. The Hearing Officer finds the LEA's decision to proceed with the MDR meeting was responsible and reasonable.

6. Other

The evidence also shows that the MDR team considered Child being exposed to substances in utero. The evidence also shows that the school had received no specific reports that the substance use had an impact on the child.

The parents argue that the MDR team failed to give proper consideration to relevant information. They point to the PWN and MDR minutes regarding the MDR meeting to show deficient consideration. After carefully considering the evidence, the Hearing Officer finds the testimony of the school's witnesses may provide more specificity, but the PWN and the minutes of the MDR meeting consistently show what the team considered.

Implementation of the IEP

If the LEA fails to implement the child's IEP and the conduct is a direct result of this failure, the MDR team must find the behavior was a manifestation of the child's disability. 34 C.F.R. §300.530(e)(1). The parents presented no evidence to substantiate a failure by the LEA to implement the child's IEP. Accordingly, the Hearing Officer cannot find the LEA was required to find behavior caused by the failure to implement the IEP

VI. CONCLUSION

The Hearing Officer has considered all arguments and all evidence. Parents have failed to meet their burden and show the MDR meeting was flawed.

What is more, Parents were afforded an opportunity to participate in the MDR meeting, but elected to not attend. In addition, the evidence fails to show that the child's behavior was impulsive. To the contrary, the evidence demonstrates that the child's behavior was planned and with a purpose, to intimidate. Moreover, there is no indication that the team members approached the MDR with a closed mind. For these reasons the Hearing Officer finds she must sustain the

school's MDR decision. *See, generally, Fitzgerald v. Fairfax County School Board*, 556 F. Supp. 2d 543 (E.D. 2008).

Moreover, the Hearing Officer recognizes precedent in this federal judicial circuit, requiring that due deference be given to the opinion of the professional educators. *See, e.g., County School Bd. Of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 1399 f.3d 298, 313 (4th Cir. 2005). Having no reason to set aside the school's decision, the Hearing Officer upholds the decision made by the MDT team.

VII. DECISION AND ORDER

For reasons stated above, the Hearing Officer finds the manifestation determination review was conducted properly and upholds the Manifestation Determination Review team's decision.

VIII. PREVAILING PARTY

I have the authority to determine the prevailing party on the issues and find the prevailing party is the LEA.

IX. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a federal district court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.

ENTERED THIS 6th day of January, 2023.

Ternon Galloway Lee, Hearing Officer

Cc: Parents
Advocate for Parents
Counsel for LEA
Dir. of Special Education for LEA
VDOE Coordinator
Hearing Officer Monitor of the Proceedings