

Before the
Administrative Hearing Commission
State of Missouri



, in the interest of)
)
)
Petitioner,)
)
vs.)
)
LIBERTY 53 SCHOOL DISTRICT,)
)
Respondent.)

Case No. 17-0211

DECISION

(Parent) filed a due process complaint on behalf of her son, (Student) against the Liberty 53 School District (District), alleging that the District: (1) improperly conducted a manifestation determination review (MDR) for Student and improperly decided that Student’s conduct was not a manifestation of his disability; (2) violated Parent’s or Student’s procedural due process rights accorded to them under the Individuals with Disabilities Education Act (IDEA) through the MDR process; and (3) failed to provide Student with a free and appropriate public education (FAPE) pursuant to IDEA, 20 U.S.C. §1400 et seq., when it modified Student's individualized education program (IEP) based on its manifestation determination.

We find that the MDR meeting was conducted in compliance with the IDEA, the determination as to Student’s conduct and disability was appropriate, and the District provided FAPE to Student.

Procedure

On February 23, 2017, Parent filed a due process complaint against the District on behalf of Student. On February 23, 2017, we sent the parties a notice of pre-hearing conference and notice of hearing, which we scheduled for March 15, 2017, and April 3-4, 2017, respectively. On March 6, 2017, the District filed its answer to the due process complaint.

On March 3, 2017, Parent filed her pre-hearing conference statement. On March 10, 2017, the District filed its pre-hearing conference statement. On March 15, 2017, we held a pre-hearing conference. Following the pre-hearing conference, we issued a notice to the parties scheduling a second pre-hearing conference for March 17, 2017. On March 17, 2017, we held a pre-hearing conference, and issued a pre-hearing conference order in which we identified two general disputed issues in the case. On March 17, 2017, the District filed a motion for involuntary dismissal of the second issue identified in the pre-hearing conference order. On March 24, 2017, Parent filed a response to the District's motion. On April 4, 2017, we issued an order revising the second issue identified in our pre-hearing conference order.

On April 6, 2017, Parent filed a motion for continuance. On April 7, 2017, we issued a notice to the parties scheduling a pre-hearing conference for April 10, 2017. On April 10, 2017, we held a pre-hearing conference, and issued an order continuing the hearing and decision deadline to May 15-16, 2017, and June 15, 2017, respectively. On May 15-16, 2017, we held a hearing in this matter. Parent appeared *pro se*. Shellie Guin, with Guin Mundorf, LLC, appeared on behalf of the District. On May 16, 2017, at the conclusion of the evidence, we left the record open for additional evidence to be taken via teleconference in order to allow each party to present additional evidence. On May 17, 2017, Parent filed a motion to conclude the due process hearing. By order dated May 18, 2017, we denied Parent's motion, and scheduled a conference call with the parties on May 22, 2017. On May 22, 2017, the District filed a motion to extend the decision deadline. On May 22, 2017, we held a conference call with the parties,

and issued orders scheduling the continuation of the hearing for May 30, 2017, and extending the decision deadline to June 29, 2017. On May 30, 2017, the parties presented additional evidence via teleconference.

We ordered the parties to file simultaneous proposed findings of fact, conclusions of law, and legal briefs no later than June 7, 2017, and to file simultaneous reply briefs no later than June 12, 2017. On June 7, 2017, the District filed its written argument. On June 8, 2017, Parent filed her written argument.¹ On June 12, 2017, the District filed a response to Parent's written argument. The District argues that Parent's written argument was filed late, and that it contains new information that is not supported by the record. We will consider Parent's written argument, but will not consider new information or arguments that are not supported by the record already made in this case.

Findings of Fact

1. At all relevant times, Student was enrolled in Liberty High School (LHS), which is in the District. At the time of the hearing, he was years old.

2. The District follows the Missouri Department of Elementary and Secondary Education's (DESE) model local compliance plan, compliance standards and indicators, and state plan for special education in its practices and procedures with respect to special education.

Student

3. Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and is eligible for special education under the categorical disability of Other Health Impaired (OHI). Student has an IEP.

4. The only medical diagnosis for Student that was provided to the District was ADHD. The District did not have a doctor's diagnosis of anxiety for Student.

¹ Parent filed her brief on June 7, 2017, at 5:02 p.m. We deemed it filed on June 8, 2017, because it was filed after the close of business hours. However, we deem it filed for the record as we recognize Parent was having difficulty faxing the document.

5. ADHD is a medical condition that manifests differently from person to person.

ADHD can have characteristics of a hyperactive type and an inattentive type. Some of the key characteristics of ADHD can include inattention, distractibility, lack of organization, problems with executive functioning, and impulsivity.

6. Not every individual with ADHD exhibits all of those characteristics. In some individuals, ADHD may exhibit strictly as inattentiveness while others may exhibit some hyperactivity. Individuals with ADHD may have poor organizational skills and a lack of focus. Some individuals may exhibit impulsive behaviors.

7. Student's ADHD causes him to exhibit avoidance and shutting down behaviors in the classroom. Student may become anxious and overwhelmed with academic tasks to the point that he does not know how to begin, which in turn affects his organizational skills and productivity. When this occurs, he may shut down and avoid tasks by listening to headphones, being distracted on the computer, or socializing with peers.

8. Student's ADHD characteristics exhibited at school occur when he is presented with work in the classroom. He has not exhibited them in his social interactions with students.

9. Student does not exhibit impulsivity, and his ADHD does not manifest in the form of aggressively lashing out toward others.

10. At times, Student used bad judgment unrelated to his ADHD that caused him to engage in inappropriate behavior at school with other students.

11. Student is bright, outgoing, sociable, and has many friends. He is extroverted and enjoys being around people. He smiles, talks with others, and tends to be the "life of the party." Tr. 321. He can be outspoken, which sometimes irritates people.

12. Student has struggled with inappropriate interactions with other students. More often than not, the interactions are mutually antagonistic, or Student is the instigator or aggressor in the situation. Even when Student is involved in neighborhood disputes, Student has been the one who brought the dispute into the school setting.

13. Student tends to be very open, honest, and up front with District staff. He typically admits to his misconduct.

14. Student and Parent have reported to the District that other students bully Student.

15. On each occasion, the school administration investigated the report, and did not substantiate any bullying of Student.

16. On at least one occasion, the administration utilized a second team unrelated to LHS to investigate a report of bullying registered by Student and Parent. Both investigative teams independently found that Student had been involved in a mutually antagonistic situation with another student, and was not the victim of bullying.

17. Student's approach to conflict occurring outside of school is to defend himself if another student "is doing him wrong." Tr. 349.

18. On December 8, 2016, Student was involved in a physical altercation with another student (Student 14) at school. Student's glasses were broken and his elbow was injured in the altercation. Student has had ongoing conflict with Student 14 outside of school for some time.²

19. Student initiated the December 8, 2016 physical altercation with Student 14. Student also initiated an exchange with Student 14 that occurred on January 4, 2017 – Student's first day back to school following a prior suspension. Following this, Student did not feel safe at school and did not attend on January 5 or 6, 2017.

20. The District developed a safety plan for Student so that he would feel safe returning to school. Parent did not sign the plan.

21. Pursuant to Student's IEP, prior to his current suspension, Student spent 7th period in the Learning Center with his case manager and special education teacher, Patrick Williams. During this time, Student triaged with Williams about his day and his concerns.³

Student's IEP

22. Student's IEP contains two goals and minimal services. Student has no behavioral goals or academic content goals in his IEP. Both of his goals pertain to him staying productive in the classroom, completing work, and turning in assignments.

23. On January 4, 2017, the District held an IEP meeting for Student. The District provided two notices to Parent. Parent was unable to attend because she was hospitalized on that date, and gave birth to a child on January 5, 2017.

24. Upon Parent's request, the District scheduled another meeting for January 20, 2017.

25. During the January 20, 2017 IEP meeting, Parent requested that any reference to behaviors, aggression, or impulsivity be removed from Student's IEP. Parent requested that the IEP focus on Student's anxiety and feelings of being overwhelmed with respect to his schoolwork.

26. The IEP team agreed with Parent's request because Student did not exhibit aggressive or impulsive ADHD characteristics.

27. Student's most recent IEP goals are:

Annual Goal # 1

When given support and strategies, [Student] will independently identify his level of anxiousness and the level to which he is overwhelmed, and take steps to maintain his productivity within the classroom on 4 out of 5 opportunities, as measured by observation and documentation.

² Student 14 is not the same student (Student 2) that Student threatened with a sock full of coins on February 8, 2017, the act that resulted in the long-term suspension and the MDR at issue in this case. This is described below in more detail.

³ Triage is an opportunity for Student to check in with a staff member to discuss any concerns with his day, to review any times he felt anxious or overwhelmed, and to help him get organized.

Annual Goal #2

When given an assigned task, [Student] will demonstrate increasing self-motivation by independently completing an assignment/task, and asking for assistance, if needed, with 75% accuracy in 5 out of 5 consecutive trials, as measured by teacher-charted observations.

Ex. B at LSD013.

Incident Resulting in Discipline

28. On February 7, 2017, Student reported to Williams during their triage session that he was upset or frustrated by actions of other students. Williams asked Student if he needed to report the situation to the school administration per the safety plan. The plan stated that Student should report when he was feeling threatened or bullied.⁴ Student said, “No, I’m good.” Tr. 282.

29. On February 8, 2017, Student brought a sock full of coins to school and used it to threaten other students. Student admitted that he planned to bring the sock to school to threaten another student who he believed wanted to fight him.

30. On February 8, 2017, Student's medications were being refilled.

31. The day before the incident, Student 2 warned Student that Student 12 wanted to fight him. In response, Student approached Student 1, and asked if he had an issue with him. Student 1 replied that he did not.

32. Student had previously called Student 1 a derogatory name and posted pictures of him on Snapchat.

33. The night before the February 8, 2017 incident, Student called other students about the situation. He specifically asked another student if he had any padlocks he could use, presumably to put in the sock.

⁴ Parent did not sign the safety plan, but the parties worked from the plan despite the lack of Parent’s signature.

34. The next morning, on February 8, 2017, Student went into the cafeteria at 7:55 a.m., and stopped at a table by the entrance where students come in from the bus. He pulled out a sock that was heavy on one end and tied off.

35. Student was not normally in the cafeteria at this time. However, because the sophomores in the school were taking the ACT test, the other students had free time and were in the cafeteria.

36. Student used the sock in a gesturing motion to swing it back behind him and forward into his palm as though he was getting ready to use it to fight. While doing this, he swiveled his hips in a fighting stance, "like he was going to throw a punch." Tr. 583.

37. At a different table about 30 feet away, Student 2 sat down with some friends. Student then got up and started yelling across the cafeteria at Student 2.

38. Student 2 kept his back to Student and ignored him. The other students at Student 2's table appeared nervous.

39. Student crossed the cafeteria with the sock in his hand and stood at the end of the table where Student 2 was sitting. Student asked Student 2 if he was the one talking about him. Student 2 did not respond. Student then told Student 2 that he had "three-and-a-half seconds to tell me what I want to know or someone is going to get hit." Tr. 586.

40. Student then said to the other students at the table, "If you don't want to get hit, then get out of the way." Tr. 587. All of the students on that side of the table got up and moved away.

41. One of the students sitting at the table is intellectually disabled and low functioning. Student warned this student to move if he did not want to be hit.

42. Student then proceeded to threaten Student 2 with the sock full of coins. Student 2 is also intellectually disabled.

43. Student 2 stood up from the table and said to Student, "[Y]ou aren't going to hit anybody with that sock," and then threw his trash away in a nearby trash can and walked away. Tr. 587.

44. Student indicated that he went to school with the intention of using the sock to confront Student 12. Student never approached or confronted Student 12.

45. Parent spoke with Student shortly after the incident occurred on February 8, 2017, and she testified that he did not seem anxious or overwhelmed.⁵ Student was not in distress and appeared to be fine. He was having a great day and was in great spirits.

46. Student admitted that he made the sock at home, and carried it with him to school since he returned for the second semester.

47. Following the incident, Parent mistakenly believed that Student threatened Student 14 with the sock full of coins, and not Student 2. Student 14 was not in the same vicinity as the students involved in the February 8, 2017 incident.

48. Student 2 has been a friend to Student and does not have any connection with Student 14. In the school setting, Student 2 tends to be the protector and informer. He does not want trouble, so he will warn people if someone is looking for trouble.

49. Parent now believes that Student 2 was not trying to instigate anything against Student; rather, he was trying to warn and protect Student.

50. Parent and Student never reported concerns to the District that Student 2 was harassing, threatening, or bullying Student. Student had no ongoing issues or conflict outside of school with Student 2.

⁵ Parent first testified that she spoke with her son at 8:39 a.m. on February 8, 2017, and Student was in distress and "was afraid of some situations or someone approaching him in regards to some things that were going to occur," and she tried to contact the school by e-mail. Tr. 474. Parent later testified that she spoke with her son at 8:39 a.m. and 9:10 a.m. on February 8, 2017, as he "wasn't under distress ... [h]e was fine ... [h]e didn't want me to pick him up ... [h]e was having a great day ... [h]e had not had any words with anyone." Tr. 547.

51. In investigating the February 8, 2017 incident, the school administration interviewed student witnesses, including Student, and reviewed the surveillance video, which confirmed that Student had used a sock filled with coins in a threatening manner toward other students.

52. On February 8, 2017, after concluding its investigation, the school administration suspended Student for ten days, and referred him for possible long-term suspension.

The Manifestation Determination Review

53. On February 13, 2017, the District held an MDR regarding Student's conduct on February 8, 2017. The MDR was conducted within ten days of Student's suspension for the incident.

54. The District provided Parent written notice of the MDR meeting.

55. Parent and her advocate attended and participated in the MDR meeting. Student did not attend the meeting. In addition to Parent and her advocate, a special education teacher, regular education teacher, principal, assistant principal, process coordinator, and director of special education attended the meeting.

56. The District follows the model MDR forms published by DESE in completing its MDRs.

57. Student's January 20, 2017 IEP served as the basis for his MDR, and the team reviewed it during the meeting.

58. During the MDR, the team also reviewed other information, including all relevant information in the student's file, teacher observations, and relevant information provided by Parent.

59. The team also reviewed Student's most recent evaluation, which identified Student's ADHD characteristics as being inattention, learning problems, and executive functioning, but not impulsivity.

60. The team specifically reviewed Student's support and safety plans that were in place at the time of the incident.

61. During the MDR, the participants discussed the details of the incident of misconduct and the administration's investigation.

62. In determining whether Student's behavior was a manifestation of his disability, the team discussed and considered the following information:

a. During his triage session on February 7, 2017, which was the day before the incident, Student did not report feeling threatened or unsafe. He reported that he believed other students were talking about him. Kids talk about each other all the time, and the school does not consider that to be harassing, intimidating or bullying behavior. Student repeatedly reassured his teacher that there were no concerns and nothing that he needed to go to the office to report.

b. According to his IEP, the characteristics of Student's ADHD are related to his becoming overwhelmed and anxious and shutting down in the classroom and not to engaging in aggressive behaviors toward others.

c. Student's behavior on February 8, 2017, appeared to be an isolated incident, and it did not appear to resemble the shutting down and avoidance behaviors associated with his ADHD.

d. Student's actions on February 8, 2017, are indicative of a well thought out plan and decision, not the result of impulsivity. Student had been carrying the weapon to school for several days. He had phone conversations the night before the incident with other students seeking out locks to put in the sock, he went through an organized thought process in creating the weapon and planning the confrontation, and there was a delay and a warning to others to move. It was not a quick, impulsive action.

63. The team determined that Student's conduct on February 8, 2017, did not have a direct and substantial relationship to his disability. The team also determined that Student's conduct was not a direct result of a failure to implement his IEP.

64. A written notice of action was subsequently provided to Parent via e-mail. Parent previously received copies of the Procedural Safeguards, but she did not receive a copy at this time.

65. Student's IEP team has no authority to determine how many days of long-term suspension a student receives if the behavior resulting in discipline is unrelated to a student's disability.

66. The District followed its standard operating procedures with respect to the long-term discipline imposed against Student.

67. Student was suspended for a total of 90 days, and his suspension will be complete on June 30, 2017.

Homebound Services

68. If a special education student is suspended long term for conduct that is unrelated to his or her disability, the IEP team must decide how educational services will be provided while the student is on suspension.

69. The most common placement option in the state of Missouri and in the District for serving special education students during long-term suspension is homebound.

70. Homebound services are not designed or intended to replicate the services that are provided in a school-based setting.

71. Although it is an individualized determination, the general guide established by DESE for a team to consider for homebound services is five hours per week. Typically, five hours per week of homebound instruction is deemed appropriate for a student who does not require much individualized instruction in academics.

72. In determining what services would be appropriate for Student during his suspension, the team considered what services would enable Student to:

- Continue to receive educational services to continue to participate in the general education curriculum, although in another setting.
- Progress toward meeting goals in the IEP
- Receive, as appropriate, a functional behavioral assessment (FBA) and behavior intervention services and modifications

designed to address the behavior violation so that it does not recur.

Ex. T at LSD147.

73. The team determined that a functional behavior assessment and behavior intervention services were not appropriate because there was no pattern of behavior to address, and an in-depth assessment was not necessary for this isolated incident.

74. The team determined that 300 minutes (5 hours) per week of homebound services was appropriate for Student to meet the above requirements. Student's IEP was amended to reflect this decision. The District provided Parent a written notice of action of this decision.

75. On February 9, 2017, the District suspended Student for ten days at the building level. His long-term suspension did not begin until February 23, 2017. Homebound services were required to start for Student by February 23, 2017.

76. On February 13, 2017, the District attempted to schedule homebound services for Student, which was prior to the time when the services were technically required to begin. One of Student's homebound teachers, Cheryl Pena, sent follow-up e-mails to Parent on February 14 and 15, 2017, trying to initiate services.

77. It is common for multiple teachers to provide homebound instruction. Student's homebound teachers included Cheryl Pena, Lori Failla, Beth Fuller, and Carissa Keedy. Homebound services are ordinarily provided by teachers who perform their normal teaching responsibilities during the day, and then schedule homebound instruction after the school day.

78. Typically, parents are provided with the time and location of when homebound services will be provided. It is usually scheduled as a block of time after school twice a week.

79. Due to the family's busy schedule, Student's homebound schedule ended up consisting of one-hour sessions through the week.

80. On February 15, 2017, Parent told the homebound instructor that she did not want to start the services that week and then have to switch to another instructor the next week.

81. On February 16, 2017, Student did not show up for homebound services. The instructor previously sent an e-mail reminder. The teacher e-mailed the required work to Parent.

82. On February 22, 2017, a different homebound teacher, Lori Failla, contacted Parent via e-mail attempting to schedule homebound services beginning on February 23, 2017. Parent declined this offer, and requested that the services not begin until February 27, 2017. Failla began providing homebound services on February 27, 2017.

83. Failla, an experienced process coordinator, provided most of Student's homebound services. Failla provided the services over her lunch hour.

84. Student was provided one-on-one homebound instruction at the library.

85. The District regularly provided homebound services to Student at least five hours per week on average. If Student did not receive the services, it was typically due to Parent or Student declining the services for a variety of reasons.

86. Beginning on April 17, 2017, Parent began refusing homebound services altogether. On May 8, 2017, Parent sent the homebound teacher an e-mail terminating the provision of any further homebound services.

87. During homebound instruction, the teacher focused on allowing Student to continue to receive educational services to participate in the general education curriculum and to continue to progress on his IEP goals.

88. The District provided Student with a laptop computer (MacBook), and Student had ongoing access to class materials, videos, and assignments during his suspension even when the teacher was not present. His homebound teachers worked directly with Student to help him

stay on task, be organized, and get his assignments completed. They helped him prioritize and provided any assistance he needed.

89. While receiving homebound services, Student had the opportunity to participate in all of his classes and earn credit, although sometimes he chose not to do so. Student often chose not to complete his work that he started with his homebound teacher. Student received good grades for the work he completed.

90. In working on Student's IEP goals, the homebound teachers helped Student prioritize, taught him how to retrieve things, and helped him complete assignments and get them turned in. The teachers reviewed assignments with Student, organized his work in folders, created a system to retrieve assignments, helped him construct e-mails to his teachers, and taught him how to do things independently.

91. Student made progress on his IEP goals while receiving homebound instruction. He was completing tasks and doing a better job of becoming more organized.

92. The District offered Student at least three service options during his suspension – homebound, in-school suspension, and the Learning Center.

93. By letter dated February 14, 2017, Student was offered the opportunity to serve his suspension through in-school suspension at LHS and receive his services in that setting.

94. In-school suspension is a full-day classroom that coincides with the regular school day. Tr. 166.

95. The District was also prepared to offer a long-term suspension credit recovery opportunity to Student, and it had drafted up the agreement. Student and Parent did not attend the long-term suspension meeting, at which time the opportunity would have been presented.

96. By a letter dated March 7, 2017, to both Parent and an attorney, Student was again encouraged to serve his suspension in the full-day, in-school suspension setting.

97. Student was also offered the opportunity to receive his services through full-day attendance at the Learning Center at LHS where he would have direct access to a special education teacher. Tr. 179-80. The Learning Center is different from the in-school suspension classroom.

98. Serving his suspension at the Learning Center would be as close to attending his regular high school program as Student could get while serving a long-term suspension.

99. In March 2017, Parent called LHS' Director of Student Services, Dr. Hammen. They discussed in more detail the opportunity for Student to attend the Learning Center at LHS during his suspension. Specifically, Hammen addressed Parent's concern that Student would be sitting in a study carrel in isolation. He assured her that would not be the case.

100. Most students serving a long-term suspension attend a long-term suspension classroom at a different location, but Student was offered the opportunity to attend at LHS during his suspension. If he had opted to attend, Student would have received both general and special education, and would have attended full days at LHS.

101. Parent rejected all of the options presented for Student to receive his services in a school setting during his suspension and elected to receive the homebound services that were offered.

Witnesses at the Hearing

102. Dr. Kris Martin is the Director of Special Education for Liberty Public Schools. She has a bachelor's degree in psychology, a master's degree in school psychology, an education specialist degree in educational leadership, and a doctorate in educational leadership. She has been in education since 1991 and has worked in both the clinical and educational setting as an education coordinator, school psychologist, and special education director. Martin holds Missouri certifications as a school psychologist and special education administrator. She has received training, education, and experience in mental health diagnoses of students, including

ADHD, and conducted research with respect to ADHD. As Director of Special Education, Martin oversees district-wide programming, budget, professional development, processes and transportation for IEP students. Martin also works closely with DESE on compliance and is an active participant in the Missouri Council of Administrators in Special Education and the Kansas City regional association for special education administrators.

103. Jennifer Henderson is a special education process coordinator for LHS. As process coordinator, she assists teachers and manages the IEP process for students at the high school. She also oversees evaluations, leads manifestation determination meetings, ensures staff is up to date about compliance and procedures, and assists case managers in development and implementation of IEPs. She has been in education for 14 years and started her career as a school psychologist. Henderson has a bachelor's degree in psychology and a master's degree in school psychology. She holds Missouri certification as a school psychologist and is certified by the National Association of School Psychologists. The evaluation of ADHD and the identification of how ADHD may affect a student educationally was a focus of her training program.

104. Patrick Williams is a special education teacher at LHS and is Student's case manager. He has been employed by the District for 11 years, and has been a special education teacher for five years. Williams has a bachelor's degree in political science and a master's degree in educational leadership. He is certified in special education, middle school math, and secondary social studies.

105. Scott Gillespie is a counselor at LHS. He has a bachelor's degree in psychology and a master's degree in school counseling. He has been in education for seven years, and has been a counselor at LHS for five years.

106. Dr. April Adams has been the principal of LHS since 2009. She has been in education for 20 years, holding the positions of special education teacher, assistant principal, and principal. She has a bachelor's degree in recreational therapy; a master's degree in

education with a focus in special education; an educational specialist degree in regular education, special education and administration; and an educational doctorate in urban leadership and urban policy development. Adams holds Missouri certifications as a behavior disorder teacher and administrator. Due to her experience with KU Medical Center and Marillac Center, she has training and experience in working with students with ADHD.

107. Brett Coffman is the assistant principal at LHS. He has been in education for 23 years and has been an assistant principal for five years. He taught at the elementary, middle, and high school levels. He has a bachelor's degree in history, a master's degree in curriculum and instruction, and a specialist degree in educational leadership. Coffman is certified as a teacher and a secondary principal. Student is assigned to Coffman's student roster at LHS.

108. Dr. Jim Hammen is Director of Student Services for Liberty Public Schools and oversees long-term student discipline. He has been in education for 30 years and spent 27 years of that time in administration. Hammen has handled the District's long-term disciplinary matters for 11 years.

109. Lori Failla has been a special education process coordinator for the school district for 19 years. She has been in education for 32 years. She began her career as a special education teacher and has taught students with learning disabilities, behavior disorders, other health impairments, and vision impairments. She has taught in the public school setting as well as day treatment programs. Failla has a bachelor's degree in special education and a master's degree in special education for emotional disturbance. She holds K-12 certification for teaching children with intellectual disabilities and behavior disorders.

110. Parent does not have formal education or experience in diagnosing children with ADHD, but she has direct, personal, and practical experience with Student's ADHD.

Conclusions of Law

This Commission has jurisdiction over this case. Section 162.961.⁶ The burden of proof is on the party seeking relief, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Parent must prove her case by a preponderance of the evidence. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 8 (Mo. App., E.D. 2000).

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App., W.D., 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

I. Objections Taken With the Case

Parent objected to Ex. U, arguing that she had not received the documents five days before the hearing as required by 34 C.F.R. §300.512(a)(3) (the 5-day rule). We stated that we would take the objection with the case, with our ruling dependent on further evidence. No further evidence was offered. We overrule the objection. Parent objected to Ex. L, arguing that she had requested the document and had not received it. We took the objection with the case, and, again, no further evidence was offered. We overrule the objection.

The District offered a continuing relevance objection on questions about past disciplinary incidents unrelated to the February 8 incident. We overrule the objection. The District offered a continuing objection to Parent's testimony about bullying. We overrule the objection. The District offered a continuing hearsay objection when Parent testified as to what Student told her. We overrule the objection. The District objected to Ex. 6 based on lack of foundation, relevance,

⁶ Statutory references, unless otherwise noted, are to the 2016 RSMo.

and the 5-day rule. We overrule the objection. The District objected to Ex. 7 based on lack of foundation, relevance, and the 5-day rule. We overrule the objection.

We admitted Ex. O for the purpose of what form the District uses on a regular basis. After Parent elicited further testimony about the document, the District offered Ex. O to be admitted without the condition. Parent objected to Ex. O, and we took the objection with the case. We sustain the objection. Parent objected to testimony about what Student said to a teacher. We overrule the objection.

II. FAPE in General

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri’s State Plan for Special Education (2016) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the Student’s IEP. State Plan, Regulation I, §, page 3.⁷

The primary vehicle for carrying out the IDEA’s goals is the IEP. 20 U.S.C. § 1414. An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities. 20 U.S.C. § 1414(d)(1)(A). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 207 (1982).

“To meet its substantive obligations under the IDEA” an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). This is

⁷Also see, 20 U.S.C. §1401(9).

not a bright-line rule and it “requires a prospective judgment by school officials” that is a “fact-intensive exercise” incorporating information from both school officials and the child’s parents. *Id.*, citing *Rowley*, 458 U.S. at 207.

The absence of the court providing a “bright-line rule” is not “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and such deference is “based on the application of expertise and the exercise of judgment by school authorities” and “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decision that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew*, 137 U.S. at 1001-1002, citing, in part, *Rowley*, 458 U.S., at 206. Nevertheless, this does not negate a hearing officer’s duty to weigh the credibility of the witnesses, and consider the impact of the testimony of expert witnesses. *Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D.Md. Mar. 6, 2006).

If a child's special education program or placement, as defined in the child’s IEP, is disputed by the child's parents, the IDEA provides for a review procedure. 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–.580. In this case, Parent attacks the MDR team’s finding that Student’s conduct was not a manifestation of his disability, and the resulting change of placement in the IEP to homebound education with services.

III. Manifestation Determination Review

An MDR is an evaluation of a student’s conduct to determine whether that conduct is a manifestation of the student’s disability. An MDR must be performed when a school district proposes disciplinary measures that will result in the change of placement for a child with a disability. 34 C.F.R. 300.530(e). A change of placement occurs when:

- (1) The removal is for more than 10 consecutive days; or

- (2) The child has been subjected to a series of removals that constitute a pattern —
 - (i) because the series of removals totals more than 10 school days in a school year;
 - (ii) because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
 - (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 C.F.R. 300.536(a).

A. MDR Meeting Procedures

Having determined that the proposed disciplinary measures would cause Student to experience a change of placement, the District properly conducted an MDR meeting on February 13, 2017. In her due process complaint, Parent makes no specific allegations of procedural irregularities with the meeting, and we see none. The only irregularity Parent testified about with regard to the MDR meeting was that she did not receive a copy of Procedural Safeguards notice. She admitted that she had received copies of this document in the past, and we do not find a denial of FAPE.

The members of the team included many professionals involved in Student’s education, including his classroom teacher and several educators with extensive experience. Parent appeared with a parent advocate. During the MDR meeting, the team reviewed all relevant information in Student’s file, including his IEP, other existing data, evaluations, and teacher observations in order to determine if the conduct was caused by, or had a direct and substantial relationship to, Student’s disability, or if the conduct was the direct result of the District’s failure to implement the IEP. 34 C.F.R. 300.530(e)(i) and (ii).

We find no significant procedural irregularities with the MDR meeting.

B. MDR Determination

During the MDR meeting on February 13, 2017, the team determined that Student's conduct on February 8, 2017, was not a manifestation of his disability. If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except services must be provided to ensure the child receives a FAPE, although it may be provided in an interim alternative educational setting. 34 C.F.R. § 300.530(c).

The key question for the manifestation determination is whether the child's conduct was caused by or had a direct and substantial relationship to the child's disability. 34 C.F.R. § 300.530(e)(1). A student's bad decision unrelated to his disability is not a manifestation of a disability. See *Fitzgerald v. Fairfax City Sch. Bd.*, 556 F. Supp.2d 543 (E.D. Va. 2008) (student's anxiety and ADHD issues were unrelated to his decision to conduct a weekend paintball raid on his high school).

The MDR team reviewed the conduct in question and all relevant information in Student's file. The characteristics of Student's ADHD include becoming anxious and overwhelmed in the classroom when presented with school work. Student does not exhibit impulsivity, and Parent specifically requested that references to impulsivity be removed from his IEP. When Student becomes anxious or overwhelmed in the classroom, he tends to shut down and avoid tasks by listening to his headphones, being distracted on the computer, and socializing with peers. He has not exhibited aggressive behaviors toward others associated with his ADHD.

Student's actions that resulted in discipline were planned, organized, and well thought out in advance of the incident. Student created the weapon himself, and carried it to school for

several days before the disciplinary incident. The day before the incident, he referenced frustration about other students with his teacher, but did not elaborate when asked and stated he did not need to report it to school administration. Later in the day, Student made phone calls to other students about the situation, and sought out additional supplies for his plan. There was no evidence that Student was feeling anxious or overwhelmed to the point that he was shutting down or otherwise affected by his ADHD.

On the day of the incident, Student tried to initiate a verbal confrontation with a table of students on the other side of the cafeteria. When the students did not respond, he carried his homemade weapon across the cafeteria to their table and proceeded to threaten an intellectually disabled student with it. While doing so, he warned others to move away from the table so they would not get hit.

These are not actions associated with Student's inability to control his behavior. Rather, we find that Student exercised bad judgment in making a calculated decision to create a weapon, bring it to school, and display it in a threatening manner. There was no evidence presented to suggest that Student's conduct resulted from him feeling anxious or overwhelmed due to his ADHD. Further, there was no evidence that Student's conduct was the result of him shutting down or engaging in avoidance behaviors that occur because of his ADHD.

Parent's evidence and argument centered on her claim that Student was bullied and acting in self-defense. The District offered testimony that the bullying reports were investigated, and, as we noted in our Findings of Fact, in many cases the altercations were mutually antagonistic or Student was the instigator. While bullying can be an issue in whether Student is receiving FAPE, that is not the case here. Parent also argues that the level and type of discipline (a 90-day suspension) was inappropriate. We have jurisdiction only over the MDR determination, not any school district's discipline policies or decisions.

We agree with the team's determination that Student's conduct was not caused by a direct and substantial relationship to his disability.

Parent argued, but provided no evidence, that Student's misconduct was a result of the District's failure to implement his IEP. As such, we further concur with the team's determination that Student's misconduct was not the direct result of the District's failure to implement his IEP.

Parent has failed to meet her burden of proof, and we find that Student's conduct was not a manifestation of his disability or a result of the District's failure to implement his IEP.

IV. Change in Placement in IEP

As a result of the MDR determination, LHS's disciplinary procedures were followed and Student was given a long-term, out-of-school suspension. Pursuant to 34 C.F.R. 300.530(d):

(1) A child who is removed from the current placement pursuant to paragraphs (c) or (g) of this section must --

(i) Continue to receive educational services, as provided in 34 CFR 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Witnesses testified that the District continued to provide educational services for which Student received high school credits. Despite some minor scheduling issues, there is no evidence that these services did not provide FAPE to Student. We find that the District offered FAPE to Student.

Summary

We find that the MDR meeting was conducted in compliance with the IDEA, the MDR determination was appropriate, and the District offered FAPE to Student.

SO ORDERED on June 27, 2017.

RENEE T. SLUSHER
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:
 - (a) Receive the records of the administrative proceedings;
 - (b) Hear additional evidence at the request of a party; and
 - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence.
- (2) Appeals may be taken from the judgment of the court as in other civil cases.
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision.
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same.
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. §300.516.