

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit



PETITIONER

VS.

NO. EH-24-33

FORT SMITH SCHOOL DISTRICT

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

Issue Presented:

Whether the Forth Smith School District erred at the manifestation determination conference held on February 1, 2024, in concluding that Student’s conduct exhibited on January 25, 2024, was not related to Student’s disability.

Procedural History:

On February 1, 2024, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate an expedited due process hearing from [REDACTED] [REDACTED] (hereinafter referred to as "Parents" or "Petitioners"), as parent of [REDACTED] [REDACTED] (hereinafter referred to as "Student") against the Fort Smith School (hereinafter referred to as "District" or "Respondent")

In response to the Parents’ request for an Expedited Due Process hearing, the Department assigned the case to this impartial hearing officer. Thereafter, the Prehearing conference was scheduled for February 26, 2024, and the Expedited Due Process Hearing set for February 28-29, 2024.¹

The Prehearing conference was conducted via zoom on February 26, 2024.² Counsel for both the District and the Parent participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.³

Thereafter testimony was heard in this case on February 28, 2024.⁴ Present for the Hearing were Theresa Caldwell, attorney for the parent, [REDACTED] parent, [REDACTED] parent, Audie Alumbaugh, advocate, Marshall Ney, attorney for the District, Katherine

¹ See Hearing Officer file, Scheduling order.

² Transcript, prehearing conference.

³ Id.

⁴ Hearing Transcripts Vols. I-II.

Campbell, attorney for the District, Domonique Alexander, Special education director for the District.

The following witnesses testified in this matter: Domonique Alexander, Joni Donoho, and [REDACTED]⁵

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended and Arkansas Code Annotated §6-41-202 through §6-41-223, Dana McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, neither party chose to submit briefs.

Findings of Fact

1. Student is an eleven-year-old boy identified as a child with a disability as defined by the IDEA, 20 U.S.C. 1401(23).⁶
2. Student has been diagnosed with Disruptive Mood dysregulation Disorder (DMDD), severe ADHD, Sleep problems, Tourette Disorder, Autism, and specific Learning Disorder, with impairment in written expression.⁷
3. Student is in the fifth grade at Beard Elementary School in the Fort Smith School District.⁸
4. On January 25, 2024, Student was involved in an incident at school during which he threw chairs, staples, and other metal objects at staff, and hit and kicked staff when

⁵ Id.

⁶ Parents' Exhibits, pg. 3.

⁷ District's exhibits, pgs. 244-246, 293, 303.

⁸ Parents' Exhibits, pg. 4.

they attempted to stop him from harming himself. Student was suspended for two days due to this incident.⁹

5. Student's suspension on January 25, 2024, brought his total number of days suspended for the 2023-2024 school year to eleven days.¹⁰
6. On February 1, 2024, a manifestation determination review (MDR) was held.¹¹
7. At the MRD, the IEP team determined that Student's behavior on January 25, 2024, was not a manifestation of his disability.¹²
8. Parents and Dr. Sheila Barnes who attended the MDR, disagreed with the decision that Student's behavior on January 25, 2024, was not a manifestation of his disability.
9. On February 1, 2024, the same day as the MDR decision, Parents filed a request for a due process hearing and specifically requested that the "school staff would agree that the action was indeed a result of [Student's] disability."¹³

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Before consideration of the Parents' claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*,

⁹ Parents' exhibits, pgs. 313-314.

¹⁰ Id., at 315-316.

¹¹ District's exhibits, pgs. 130-134.

¹² Id., at 134.

¹³ Parents' exhibits, pgs. 1-2.

546 U.S. 49, 62 (2005). Accordingly, the burden of persuasion, in this case, must rest with the Parents.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Albright ex rel. Doe v. Mountain Home Sch. Dist.* 926 F.3d 943 (8th Cir. 2019), *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive.

The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision.

MANIFESTATION DETERMINATION REVIEW

20 U.S.C. 1415(d)(1)(E) states:

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's

file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

Here the Parents specifically challenge the decision by the IEP team that Student's behavior on January 25, 2024, was not a manifestation of his disability. During the hearing, both Domonique Alexander, special education director for the district and Joni Donoho, Student's principal at Beard Elementary School, testified that further review of Student's records after the manifestation determination review held on February 1, 2024, the District determined that a mistake had been made and that Student's behavior on January 25, 2024, was a manifestation of Student's disability. Specifically, they pointed to the November 1, 2021, letter from Dr. Virden, the December 2, 2021 letter from Dr. Virden, and the December 2023 UAMS Psychological Evaluation for changing the District's decision. Additionally, attorney for the District stated numerous times on the record during the hearing that the District was prepared to change its decision at the manifestation determination review and find that Student's behavior on January 25, 2024, was a manifestation of his disability. Ms. Alexander testified that when she read Dr. Virden's letter she saw the following:

"██████████ is currently diagnosed with Unspecified Disruptive, Impulsive Control, and Conduct Disorder, Disruptive Mood Dysregulation Disorder. He is also diagnosed with severe ADHD, sleep problems, and Tourette's Disorder. ██████████ parents have been keeping me updated about his recent difficulties at school. Based on his diagnoses, his symptoms can include extreme temper tantrums of verbal and/or physical aggression that are beyond what would be expected for the situation/provocation or for someone his age. These can occur in multiple settings and can occur multiple

times per week."

Ms. Alexander further testified that in particular the Disruptive Mood Dysregulation Disorder was not discussed at the MDR and that was significant because symptoms mentioned by Dr. Virden were the exact behaviors Student exhibited on January 25, 2024. When being questioned by Mr. Ney, the District's attorney, the following exchange occurred:

Q And is it the district's position that the decision was wrong?

A Yes, sir.

Q And is it the district's position that the conduct listed on page 285 was, in fact, a manifestation of the child's disability?

A Yes, sir.

Q And is the district, on that basis, fully prepared for the Hearing Officer to enter an Order on those facts that a mistake was made and to order a reversal of that decision?

A Yes, sir.

Q And is the district fully prepared to implement the remedies that are so ordered by this Hearing Officer?

A Yes, sir.

MR. NEY: Nothing further.¹⁴

Order

The results of the testimony and evidence warrant a finding for the Parents. Specifically, the Parents presented sufficient evidence in the record to establish by preponderance of the evidence that the District's decision, that Student's conduct on January 25, 2024, was not a

¹⁴ Hearing transcript Vol. 1, pgs. 63-64.

manifestation of his disability as determined at the February 1, 2024, manifestation determination review was incorrect. District is hereby ordered to take the following actions regarding student:

1. Within 15 days from the date of this decision the District shall convene an IEP team meeting and change the manifestation determination review made on February 1, 2024, to reflect that Student's behavior on January 25, 2024 was a manifestation of his disability.
2. Within 30 days from the date of this decision the District shall provide that Dr. Sheila Barnes conduct a functional behavior assessment on Student. This functional behavior assessment shall be at no cost to the parents.
3. Within 15 days of the completion of Dr. Barnes' functional behavior assessment of Student the IEP team shall convene to discuss the functional behavior assessment and develop a behavior intervention plan for Student. Dr. Barnes shall be invited to attend this IEP meeting to explain the functional behavior assessment she completed, and participate in the development of Student's behavior intervention plan.

Finality of Order and Right to Appeal:

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

Dana McClain
HEARING OFFICER

3/13/2024
DATE