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RE: V.R., THE STUDENT AND T.S., THE STUDENT'S PARENT V. SHELBY COUNTY SCHOOLS, APD Case No. 07.03-200758J

Enclosed is a *Final Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF
SPECIAL EDUCATION**

IN THE MATTER OF:

**T.S. THE PARENT,
V.R. THE STUDENT,
*Petitioner,***

v.

**SHELBY COUNTY SCHOOLS,
*Respondent.***

APD Case No. 07.03-200758J

FINAL ORDER

This contested case under the Individuals with Disabilities Education Act was heard by Administrative Judge Michael Begley on October 20-21, 2020, and December 1-2, 2020. The Petitioners, student V.R., and his parent, T.S., are represented by attorneys Brice Timmons and Holly Renken. Respondent, Shelby County Schools (SCS), is represented by attorney Laura Bailey. This matter became ready for consideration upon the filing of proposed findings of fact and conclusions of law by Petitioners (February 5, 2021) and Respondent (February 6, 2021).

The issues to be determined in this case are whether SCS failed to provide V.R. with a Free and Appropriate Public Education (“FAPE”) primarily by failing to properly apply V.R.’s BIP or administer progressive discipline and whether V.R. was subject to a change in placement without receiving a manifestation determination.

After review of the testimony, exhibits, arguments of the parties, and the record in this matter, it is determined that the Petitioners have failed to meet their burden of proving by a preponderance of the evidence that V.R. was denied FAPE or that V.R. was subject to a change in placement based on conduct that was a manifestation of his disability that should have triggered a manifestation determination. The determination is based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. During the events identified in this appeal, V.R. was a student within the local education agency (“LEA”) of Shelby County Schools (“SCS”).
2. T.S. is V.R.’s mother.
3. V.R.’s Individual Education Plan (“IEP”) lists his primary disability as autism with a secondary disability of emotional disturbance (“ED”). The ED diagnosis relates to anxiety and depression. V.R. has also been diagnosed with ADHD.
4. V.R. is entitled to the protections of the Individuals with Disabilities Education Act (IDEA).
5. In August 2019, V.R. started his eighth-grade year as a part of the SCS Optional Program at Snowden Middle School with an up-to-date IEP and BIP in place.
6. On November 4, 2019, the IEP Team convened and concluded that V.R.’s primary IDEA disability was autism, his secondary disability was ED, and his ADHD will continue to be noted under medical concerns. The conclusions were based on prior psychological evaluations of V.R. from both a private psychologist and a school psychologist.
7. On November 18, 2019, the IEP Team convened to discuss V.R.’s IEP and behavior intervention plan (“BIP”). T.S. consented to V.R.’s evaluation for a functional behavioral assessment (“FBA”), which was utilized at the meeting.
8. T.S. provided input on a draft IEP by way of email observations prior to the November 18, 2019, meeting. She was also present at the meeting.
9. In advance of the November 18, 2019 meeting, T.S. reviewed previous teacher data logs regarding V.R.
10. During the November 18, 2019 meeting, T.S. provided input about what positive enforcements would be useful. SCS also included T.S.’ statement of parental concerns in the IEP document.

11. Some of T.S.' listed parental concerns included the following:

- consideration of V.R.'s medical educational diagnoses when undesired behaviors are observed;
- consistent provision of assignment lists and weekly conduct grades;
- positive reinforcement behaviors and use of conduct logs to record only positive behaviors as well as detailed antecedent behaviors and training on how teachers should complete conduct logs;
- continued documentation of progress in all academic areas, and
- daily SPED support for executive functioning and behavioral support.

12. V.R. was also invited to the November 18, 2019, meeting. While the testimony was conflicting regarding the length and reason for his attendance, he was invited and was present at some point. T.S. also spoke with V.R. about the draft BIP in advance of the November 18, 2019 IEP meeting.

13. During the November 18, 2019 IEP meeting, the IEP Team considered T.S.' concerns, specifically, communication between school and home, uniform completion of the behavior logs, clear cut criteria for conduct, and positive feedback. The IEP Team also reviewed the draft BIP and revised it, including adding a referral to the Special Project Coordinator, discussion of crisis plan, and adding Greenie Bucks to the positive behavioral interventions.

14. A SCS behavioral consultant observed V.R. in multiple classes and consulted with V.R. to develop recommendations.

15. The IEP Team also discussed the possibility of school-wide autism training, subject to the approval of the principal, training with teachers on how to complete the weekly conduct logs, and training for teachers on how to implement V.R.'s BIP. The IEP team reviewed how success would be measured, including using the weekly checklist to check replacement behaviors on the BIP.

16. T.S. signed a document that gave permission for V.R. to participate in an Early Intervention Group through Shelby County Schools Mental Health Center.

17. The Early Intervention Group through Shelby County Schools Mental Health Center was not a part of the November 18, 2019 IEP. In addition, social work services were not a part of the November 18, 2019 IEP.

18. At the conclusion of the IEP meeting, T.S. accepted the draft BIP, with revisions.

19. The November 18, 2019 BIP described V.R.'s problem behavior and the function of this behavior as follows:

- 1) Calling out: [V.R.] will yell out to his peers during class, sometimes using cursing or inappropriate language
- 2) Throwing objects: [V.R.] will throw paper, rocks, or pencils at other students in order to get their attention.
- 3) Not following procedure: Vincent will display non-compliance with teachers instructions, such as completing his tasks and assignments and remaining seated.

[V.R.'s] behaviors sometimes warrant an adult response, so adult attention is a secondary function of his behavior.

20. Section 2, of the BIP, "Positive Behavior(s) to be taught which will serve the same function, how they will be taught, and who will teach them" states the following:

- 1) Given a group setting with peers, [V.R.] will engage in positive verbal and nonverbal peer interactions, with no more than 2 gestural reminders, in 7 out of 10 opportunities as measured by informal teacher observation and/or review of records by the end of the annual IEP.
- 2) Given a verbal request, [V.R.] will comply with request from adults (e.g., teachers, principals, substitutes, and support staff) such as being attentive to instruction, being prepared for classroom instruction in 7 out of 10 opportunities as measured by informal teacher observation and review of records by the end of this annual IEP.

21. SCS general and special education staff were responsible for teaching the positive behavior functions, and SCS understood that the measures would be reported through informal teacher observation in the form of the conduct sheets completed by teachers and office referral paperwork. The progress toward these goals was to be measured by the end of the annual IEP on November 17, 2020.

22. Section 3 of the November 18, 2019 BIP addressed “Positive reinforcement that will occur when the new behavior is exhibited or when the problem behavior is avoided” and it identified six positive reinforcements:

- 1) [V.R.] will receive positive praise and a higher daily conduct grade when he raises his hand, interacts positively with peers, and complies with teacher instructions.
- 2) When [V.R.] positively interacts with a peer, her will receive more opportunities to practice positively interacting with a peer by asking a peer (or two) of choice to come and eat lunch in a teacher’s classroom with him.
- 3) [V.R.] will be given the opportunity to talk with preferred peers or teachers, when he shows appropriate behavior, interacts positively with peers, and completes his assignments.
- 4) Free time on the computer when his work is complete.
- 5) Vincent will receive rewards provided by home such as time on video games, snacks or drinks.
- 6) Greenie Bucks.

23. Items 1-6 of Section 3 of the BIP were options to use to give V.R. positive reinforcement when he showed appropriate behaviors. There were blank spaces on the positive reinforcements of the draft BIP so that additional positive reinforcements could be added if desired. For example, the IEP team hand-wrote Greenie Bucks in as a positive behavior as a positive reinforcement behavior during the IEP meeting.

24. The items listed for positive reinforcement were not the exclusive means of positive reinforcement teachers could use.

25. Greenie Bucks were used as a form of currency rewarded to students that they could use for various benefits at school.

26. V.R. received positive reinforcement for engaging in desired behavior. Types of positive reinforcement were as follows:

- Higher daily conduct grade;
- offer to each lunch with a peer in the classroom;
- Permission to work in a preferred peer group;
- Free time to work on the computer;
- Greenie Bucks; and
- Documentation of positive behaviors on a weekly conduct log.

27. Section 4 of the November 18, 2019 BIP addressed the environmental/curricular strategies/modifications to be used by SCS teachers and staff and states as follows:

- 1) V.R. will receive a daily check in with special educational teacher that will include an organizational component and a social skills component.
- 2) V.R. will receive a daily check out with a school counselor who will help in to reflect on his day and make any goals for the next day.
- 3) V.R. will receive preferred seating in the classroom to assist with monitoring behaviors and academic activities.
- 4) Speak to V.R. in a calm, direct tone.
- 5) Give V.R. verbal reminders to write down important information in his agenda book.
- 6) Redirect V.R. to the instructional task when appropriate.
- 7) V.R. will receive a weekly checklist that includes a list of the positive behaviors he is working towards. This checklist will be shared with V.R. and his mother on Fridays.
- 8) When V.R. receives 3 positive peer interaction check marks, he will receive an opportunity to invite another student to lunch in a teacher's classroom.
- 9) A list of classroom rules and procedures will be placed on the inside of V.R.'s classroom notebooks/binders for the classes where he exhibits the most problem behaviors-Math and STEM. This will serve as a reminder for the expectations he must follow when in those classrooms.
- 10) Use First/Then language with Vincent- if he complies with a direction FIRST (such as completing an assignment), THEN he can get 5 minutes to spend with a friend at the end of class.
- 11) Vincent will have the opportunity to improve and earn back his conduct grade throughout the quarter.

28. V.R. met with Tessa Silvestri, special education teacher at Snowden Middle at the time, for a daily check-in for his organizational skills. They would discuss the prior day and any social or organizational goals and strategies for the current day. This included discussion of dealing with negative peer interaction.

29. V.R. also met with the school counselor for a daily check-out, where he would reflect on his day and provide goals for the next day as well as convey his position regarding any pending discipline.

30. Eventually, V.R. stopped going to his daily check-outs with the school counselor.

31. V.R. also received preferential seating in the classroom. He was observed in preferential seating in some classes, and there is insufficient evidence that he was denied such seating in other classes.
32. Ms. Silvestri spoke with V.R. in a calm and direct tone. She also gave him daily verbal reminders to write down important information, and she redirected him to instructional tasks as appropriate when he was in her classroom for supervised study. There is insufficient evidence in the record to suggest that other teachers were not instructing V.R. in a similar way.
33. Ms. Silvestri collected the weekly checklists from V.R.'s teachers, complied them, and sent them to T.S. One purpose of the checklists was to document V.R.'s positive behavior when exhibited.
34. T.S. testified that she did not get the weekly checklists every week, and that she could not identify what V.R.'s positive behaviors were because they either weren't listed or because SCS teachers and staff did not uniformly and consistently fill out the checklist.
35. Section 5 of the November 18, 2019, BIP states the following:

5. Negative consequences that will occur when the problem behavior is exhibited: SCS school policy on discipline will be followed in conjunction with the SCS student code of Conduct at all times. In the classroom specifically, the following progressive measures of discipline will be put into place by teachers and/or other SCS Staff.

1. Private conference between teacher and Vincent
2. Vincent will be verbally redirected by teacher
3. Behaviors will be documented on a Minor Infraction Report, with a copy given to the special education teacher and notification given to the parent
4. Vincent will be moved to new seat in the classroom
5. Phone call home
6. Referral to school counselor [interlineated] referral to meet with Special Project Coordinator
7. Referral to LEA [interlineated]/Administrator
8. ISS: In school suspension
9. OSS: Out of School suspension

10. Review of the IEP and/or Behavioral Intervention Plan

36. The “problem behavior” mentioned in the BIP refers to the problem behaviors identified in Section 1 on the BIP which are (1) Calling out: V.R. will yell out to his peers during class, sometimes using cursing or inappropriate language; (2) Throwing objects: V.R. will throw paper, rocks, or pencils at other students in order to get their attention; (3) Not following procedure: V.R. will display non-compliance with teacher’s instructions, such as completing his task and assignments and remaining seated.
37. If V.R. exhibited a behavior other than an identified problem behavior, Section 5 did not apply because it only dealt with problem behaviors.
38. If one behavior started occurring frequently that was not listed on the BIP, SCS would seek permission to re-assess the student to determine if SCS should add the new behavior to the BIP.
39. V.R. was disciplined for several different incidents during the school year. Of those incidents, the following were first-time behaviors for V.R.: biting another student, cutting another student’s hair, and threatening to kill another student.
40. V.R. was also disciplined for incidents involving sexually explicit behaviors, such as catcalling other students, writing a sexually explicit letter, simulating sex, and writing a sexually explicit rap. Sexually explicit behaviors were not specifically identified as problem behaviors in the BIP.
41. Both parties elicited a great deal of testimony on the meaning of “progressive discipline” within the context of V.R.’s actions and resulting discipline. The testimony also varied on what each individual witness understood the term to mean. There is no affirmative guidance in the documentary evidence to suggest the term should be understood as applying either sequentially or as proportional to the conduct in question.

42. Section 7 of the November 18, 2019 BIP addressed how and when V.R.'s success would be measured as demonstrated by an increase in appropriate behavior or decrease in problem behavior. The measures were as follows:

- 1) Data will be reported through [V.R.'s] IEP goals and objectives every 9 weeks. The IEP team will meet as needed to discuss process/propose changes to the current data collection methods. The case manager will consult with teachers/administration to monitor strategies and interventions and their effectiveness.
- 2) The team will report data through the weekly checklist.
- 3) Report Card every 9 weeks
- 4) Progress Reports
- 5) Grade Reports
- 6) Number of referrals to administration/counselors

43. SCS, via Ms. Silvestri, recorded and reported V.R.'s IEP goals and objectives every nine weeks. In preparing progress reports, Ms. Silvestri referenced her daily check-ins with V.R., reports obtained from teachers regarding assignments, observation of V.R.'s agenda book, notes from her meetings with V.R., and on the information that was collected on the weekly checklists. Ms. Silvestri provided progress reports to homeroom teachers who distributed them with the report cards.

44. Ms. Silvestri used the weekly checklists to consult with teachers and administrators to monitor for strategies and interventions if needed.

45. The parties discussed an IEP team meeting to be held in February 2020 to discuss progress and proposed changes to V.R.'s BIP. T.S. was unavailable for the February 2020 IEP meeting and for an early March 2020 meeting time.

46. V.R.'s 2019-2020 Report Card showed improved conduct for the second quarter of Fall 2019 from the first quarter, approximately one month from the date of implementation of the BIP. V.R.'s grades were generally similar from the First Quarter to the Second Quarter, and he completed the Fall 2019 Semester with an "A" average.

47. Grade reports were available to T.S. via Power School, which was also where T.S. had access to view and print V.R.'s grades, attendance, and disciplinary record. Office referrals and counselor referrals were communicated to T.S. via Snowden administration.
48. V.R.'s discipline log did not show any discipline between November 19, 2019 to January 30, 2020.
49. The IEP team developed the weekly checklist specifically for V.R. Its purpose was to capture positive behaviors, as well as the weekly conduct grade for that class. Teachers were to record the conduct grade regardless of the conduct grade earned.
50. Ms. Silvestri trained V.R.'s teachers on the weekly checklist and monitored how the checklist was being filled out.
51. Ms. Silvestri added instructions to the weekly conduct checklists. Teachers were supposed to put a check-mark next to any positive behavior V.R. demonstrated during a teacher's class period. If V.R.'s behavior warranted a minor incident report, teachers were to fill it out and send it to Ms. Silvestri the same date of the incident. Teachers were to include a weekly conduct grade in the space provided, and Ms. Silvestri would collect the weekly conduct checklists.
52. T.S. understood the weekly checklists on be for the purposes of recording positive behavior only.
53. The IEP team created the weekly checklist to document the measures outlined in the BIP. More specifically, the team created it to determine V.R.'s progress as it relates to the BIP and to consider any changes that may need to be made in the future.
54. Dr. Tanika Johnson testified that the data collection in the weekly checklists was not sufficient to comply with the BIP and IEP. Her reasoning primarily concerned when the form

was filled out or what type of information was on the form rather than the purported completion of the form.

55. The weekly checklist forms were not always filled out to the letter of the instructions on the form itself. Different marks were used by different teachers at times. However, SCS teachers and staff did populate the form and did attempt to provide feedback on the form.
56. The weekly checklist form contained instructions to teachers SCS staff on how to fill out the form. SCS conducted additional training of teachers and staff if the forms were not being correctly populated. In instances where teachers did not follow instructions on the forms, Ms. Silvestri wrote emails to the teachers restating the instructions.
57. V.R. engaged in the following behaviors from the date of implementation of his second BIP on November 18, 2019 to the filing of this Due Process Hearing Request:
 - 1) November 18, 2019: Used the “N-word” in what another student believed was directed towards V.R.
 - 2) January 30-31, 2020: Called students the “N-word” on multiple occasions
 - 3) February 3, 2020: Bit another student on the arm, leaving a mark
 - 4) February 5-6, 2020: Cut a section of another student’s hair; acted as though he was going to cut another student with the knife
 - 5) February 12, 2020: Wrote a sexually explicit note referencing wanting to kill another student
58. With regard to the January 30-31 Incident, V.R. referred to other children of color as “monkeys,” and as he was leaving the building V.R. called one boy the “N-word,” which incited the student, caused him to chase V.R., and resulted in the student punching V.R. was issued two days of OSS for this incident.
59. Snowden principal at the time, Jamie Stallsmith, testified that she considered V.R.’s IEP, BIP, and current support system in her decision about the appropriate negative consequences.
60. The other student involved was also issued OSS.

61. For the school year 2019/2020, V.R. was not issued more than 10 collective days of OSS, ISS, or Supervised Study.
62. V.R. received FAPE during the days he was issued ISS or supervised study because he received IEP/BIP services and with both general education and special education students in the ISS classroom or while he was in Ms. Silvestri's classroom.
63. V.R. was admitted to East T-Steam Academy, a SCS Optional School.
64. T.S. did not notify SCS more than 10 days in advance that she intended to seek private school reimbursement for V.R.'s education.

CONCLUSIONS OF LAW

Petitioners bear the burden of proof in this case. The U.S. Supreme Court held in *Schaffer v. West*, 546 U.S. 49 (2005) that the burden of proof in a due process hearing, brought pursuant to the IDEA, is on the party “seeking relief.” Thus, when a parent files a due process complaint, the parent bears the burden of proof, or burden of persuasion, in the due process hearing. Specifically, “the party challenging the IEP . . . bears] the burden of proving by a preponderance of the evidence that the IEP devised by the school is inappropriate.” *L.H. v. Hamilton Cty. Dep’t of Educ.*, 900 F.3d 779, 790 (6th Cir. 2018).

Under the IDEA, schools that receive federal funds for education must provide every disabled student with a “free appropriate education” (FAPE). *Somberg v. Utica Community Schools*, 908 F.3d 162, 170 (6th Cir. 2018); 20 U.S.C. § 1412(a)(1)(A). In developing educational programs and determining appropriate services for those students through an IEP, school districts must comply with the substantive and procedural requirements of the IDEA and state Special Education law. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 102 S. Ct. 3034 (1982). Procedural

violations generally concern “the preparation of an IEP.” *Somberg*, at 171 (citing *Rowley*, at 3051). “Substantive violations concern the substance of the IEP; namely, whether the school has provided ‘an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.’” *Id.* (quoting *Endrew F. ex. Rel. Joseph F. v. Douglas Cty. Sch. Dist.* 137 S. Ct. 988, 1001 (2017)). Parents are not entitled to relief for minor procedural violations, alone. Technical procedural violations do not render an IEP invalid. *Dong v. Board of Educ. of Rochester Community Schs.*, 197 F.3d 793, 800 (6th Cir. 1999).

A determination of whether a student received FAPE must be based on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i). When a procedural violation is alleged, an administrative law judge can only find a FAPE violation if a procedural violation “(I) impeded the child’s right to FAPE; (II) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or (III) caused a deprivation of educational benefit.” 20 U.S.C. § 1415(f)(3)(E)(ii)(I) – (III). Only procedural violations that result in substantive harm constitute a denial of FAPE and justify relief. *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001) (procedural violations must cause substantive harm and constitute denial of FAPE to be actionable); see also *Bd. of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

The “IDEA does not require that a school either maximize a student’s potential or provide the best possible education at public expense. The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education.” *Nack ex rel. Nack v. Orange Cty. Sch. Dist.*, 454 F.3d 604, 613 (2006) (quoting *Fort Zumalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (citing *Rowley*, 102 S. Ct. at 3049; *A.W. By and Through N.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158, 163-164 (8th Cir. 1987)). The IEP must only be “reasonably calculated to enable a child to make progress appropriate in light of the

child’s circumstances.” *Endrew F.*, at 999. Furthermore, the IDEA “guarantees access to education – not that a child will achieve a particular outcome.” *Barney v. Akron Bd. of Educ.*, 763 Fed.Appx. 528, 533 (6th Cir. 2019).

IEP and BIP Implementation

V.R. is an IDEA eligible student, and he is entitled to the protections of Individuals with Disabilities in Education Act (IDEA). SCS provided V.R. with an up-to-date IEP and BIP in place at the start of the 2019/2020 school year. SCS properly obtained T.S.’s consent to evaluate V.R. for autism and to conduct an FBA. SCS timely completed the autism evaluation.

V.R.’s November 18, 2019 IEP/BIP complies with the IDEA and State procedural requirements. The IDEA contains procedural and substantive requirements that relate to the delivery of services through an IEP, including personalized instruction and support services reasonably calculated to enable the child to make progress appropriate under the circumstances. *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 137 S.Ct. 988, 1001. T.S. fully participated in the November 18, 2019 IEP meeting during which the draft November 18, 2019 IEP was accepted and revised. V.R. was also in attendance at the meeting for an undetermined length of time.

The IEP Team properly and appropriately considered the stated parental concerns in the development of the November 18, 2019 IEP and BIP as demonstrated in the behavioral interventions and supports included in the November 18, 2019 IEP and BIP. Although the IEP Team is required to take into account parental concerns, “the IDEA does not require school districts simply to accede to parents’ demands...” *Blackmond v. Springfield R-XII School District*, 198 F.3d 648, 658 [8th Cir. 1999](citing *Board of Edu. v. Rowley*, 458 U.S. 176, 206 (1982)). T.S. understood that as a parent participant of V.R.’s IEP team, she could change or edit

any part of any draft IEP or BIP related to V.R, including the draft IEP and draft BIP that she possessed prior to the meeting.

V.R.'s November 18, 2019 IEP and BIP provided FAPE because it was reasonably calculated to provide to enable V.R. to make progress appropriate in light of the circumstances. *Andrew F.*, 137 S.Ct at 1001. Neither social work services or early intervention group membership were a part of V.R.'s November 18, 2019 BIP or IEP. While both were discussed, an LEA is not required to provide IDEA services that are not included on a student's IEP or BIP.

The IEP noted that V.R. and T.S. shared responsibility for V.R.'s education. V.R. elected not to utilize certain IEP services at times, such as school counselor services. V.R. bore personal responsibility for several listed items on the IEP, such as assignment management. The IEP also listed T.S. as responsible to provide positive reinforcement at home.

The positive behavior strategies identified in the November 18, 2019 BIP met the requirements of the IEP's focus on positive behaviors. The positive behavior strategies were designed to allow V.R. to make appropriate progress towards the behavioral goals identified in his November 18, 2019. SCS considered data sheets collected by teachers, in-class and school observations of V.R., the parental concerns, and developed a BIP that was accepted by T.S. As demonstrated in his Mid-3d Quarter Progress report V.R. made progress toward 6/8 of his IEP goals. V.R. also demonstrated general academic progress over the school year.

SCS implemented the positive behavior strategies in the IEP sufficiently to comply allow V.R. to make progress towards his behavioral goals. There is sufficient evidence to show that SCS implemented the BIP positive behavior strategies. SCS staff did not perfectly apply the protocol in filling out the weekly checklists. However, such a showing does not prove a denial of FAPE under the current standard. SCS did attempt to correct any errors in entry on the form by training and re-training staff. To the extent that errors persisted, the forms were still filled out

with data that could be reasonably compiled to get an idea of V.R.'s behavioral progress. Moreover, the IEP does not on its face state that *only* positive behaviors are to be recorded. The IEP states that the goal is to include additional positive reinforcement strategies and not to only note negative behaviors.

The specific behaviors identified Weekly Checklist are as follows: raised hand to speak, completes and turns in classwork/homework, appropriate conversation with others/no profanity or inappropriate language; positive interaction with peer; writes down important info in agenda book; remains in seat; keeps hands, feet, and objects to himself (no throwing). It is reasonable to conclude that the absence of any mark indicates that V.R. did not engage in any of the identified positive behaviors for that class that day. Only 1 of 66 Weekly Conduct Reports is missing a conduct grade, excluding 3 reports where teachers were absent.

In part, T.S.' sole focus on positive behaviors contributed to the confusion in filling out the checklists. T.S.' concerns were only for positive behaviors. While the IEP places emphasis on identifying positive behaviors, it does not outline only positive behaviors. SCS' chief duty under the IDEA is to provide FAPE. It is not to assent to every parental concern or preference. If SCS had fully assented to T.S.'s requests, there would have been insufficient and inaccurate data collection. This would have caused difficulty in identifying V.R.'s behaviors and possible solutions to those behaviors.

The IDEA does not require perfection in terms of implementation. Rather, a school district must make reasonable, good faith efforts to comply with the material terms of an IEP, including a BIP that allow the student to make reasonable progress under the circumstances. As such, SCS followed terms of the November 18, 2019 BIP/IEP.

“Progressive” Discipline

Extensive time was spent on determining the meaning of the term “progressive” within the context of disciplinary action. Conflicting testimony was offered as to whether the discipline was to be sequential or based on the severity of the infraction.

The disciplinary options are progressively and sequentially listed from least to most severe. While they are listed sequentially by severity, there is no mandate to sequentially apply them to every infraction. There are behaviors and actions that students may exhibit that would never be disciplined by a simple teacher conference (ie. physical harm, narcotics, sexual harassment, etc.). As such, the interpretation of which discipline to apply depends on the type and frequency of the infraction, among other factors. While SCS teachers and staff are to use the progressive model as a guide, a decision to “skip” a step is within the confines of the IEP since it also depends on the conduct.

SCS issued discipline to V.R. in accordance with his IEP and BIP, which specifically incorporated SCS’s discipline policy. Teachers and administrators have authority to issue progressive discipline that is appropriate under the circumstances, including considering whether a student has a disability, BIP and/or IEP.

Manifestation Determination

SCS issued discipline within terms of the BIP when issued the OSS, ISS, and supervised study V.R. The discipline did not trigger V.R.’s right to a Manifestation Determination Review. 34 CFR § 300.530 States the following regarding a manifestation determination:

- (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

The IDEA does not permit a challenge a short-term suspension (10 days or less) even if the student's conduct was related to a disability. *Letter to Owoh*, 54 IDELR 129 (OSEP 2009). V.R.'s supervised study and ISS are not automatically categorized as changes in placement, as services can change based on a change in setting and still allow students to progress toward meeting their IEP goals. A Federal Register comment on § 300.530 (d) states the following:

We caution that we do not interpret "participate" to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.

Federal Register, Volume 71, No 156, p. 46716. August 14, 2006.

Petitioners were unable to show that V.R. did not receive FAPE during his supervised study or ISS. T.S. testified that V.R. informed her that he was not given "very much" to work on and spent some of the ISS time sleeping. Petitioners did not elaborate on what "very much" meant or how the classroom instruction was a denial of FAPE during that time. Similarly, there was no showing that V.R. was denied FAPE in supervised study. Ms. Silvestri remained

involved during both ISS and supervised study. Therefore, Petitioners' counting of 10 cumulative days of a change in placement is inaccurate. Even if every instance of V.R.'s conduct was determined to be a manifestation of his disability, he would not have been subject to a change in placement under the IDEA which would not have triggered the requirement that SCS go through the manifestation determination process.

Placement at CBHS

Even if Petitioners had met their burden of proof, they would not qualify for tuition reimbursement. Limitations on the cost of reimbursement are in the statute and the implementing regulations. The cost of reimbursement may be reduced or denied if at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents fail to provide written notice to the public agency of the information described in paragraph (d)(1)(i) of 34 C.F.R. § 300.148. A hearing officer may also find that parents actions are unreasonable and limit or deny the cost of reimbursement. 34 C.F.R. § 300.148(d)(3).

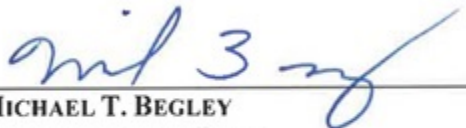
T.S. never provided written notice to SCS of her intent to enroll V.R. in CBHS. T.S. unilaterally enrolled V.R. at CBHS on February 2, 2020., prior to the March 9, 2020, resolution conference. T.S. either cancelled or chose not to pursue 2 proposed IEP meetings in February and March of 2020. While T.S. may have been unaware, V.R. had already been accepted to East T-STEM Academy in the SCS school system at the time T.S. enrolled V.R. at CBHS.

Petitioners also presented no proof of the appropriateness of the placement at CBHS beyond the fact that V.R. is doing well and enjoys the school. There was no showing of curriculum, behavioral plans, or any substantive information regarding the instruction.


It is therefore **Determined** that Respondent is in compliance with IDEA procedures. It is also **Determined** that Respondent has not committed any procedural or substantive violations of the IDEA. Therefore, it is **ORDERED** that the remedies and relief sought by Petitioners are **DENIED**. Respondent is the prevailing party in this matter.

It is so **ORDERED**.

This FINAL ORDER entered and effective this the **7th day of April, 2021**.


MICHAEL T. BEGLEY
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **7th day of April, 2021**.


STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

NOTICE OF FILING PROCEDURES

Due to the COVID-19 pandemic, APD has changed its filing procedures. Until further notice, filings should be made by **email** to APD.Filings@tn.gov or by **facsimile** to 615-741-4472. Paper filings should only be made by mail if a litigant has no access to either email or facsimile. If you are filing by email, documents should be saved in PDF format prior to filing. Each document to be filed must be a separate PDF. Only one filing method should be used. Please name PDFs for filing in the following format:

“APD CASE NUMBER YOUR NAME ABBREVIATED NAME OF DOCUMENT BEING FILED AGENCY NAME”

NOTICE OF APPEAL PROCEDURES

REVIEW OF FINAL ORDER

The Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, was entered on **April 7, 2021**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **April 22, 2021**.

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **June 7, 2021**. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **June 7, 2021**, by:

(a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or

(b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

STAY

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **April 14, 2021**. See TENN. CODE ANN. § 4-5-316.

FILING

To file documents with the Administrative Procedures Division, use this address:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue, 8th Floor
Nashville, TN 37243-1102
Fax: (615) 741-4472

**IN THE MATTER OF:
V.R., THE STUDENT AND T.S., THE STUDENT'S
PARENT V. SHELBY COUNTY SCHOOLS**

APD CASE No. 07.03-200758J

NOTICE OF APPEAL PROCEDURES