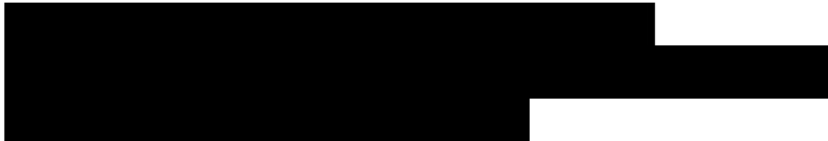


**ARKANSAS DEPARTMENT OF EDUCATION**

**Special Education Unit**



**PETITIONERS**

**VS.**

**Case No. H-23-37**

**PULASKI COUNTY SPECIAL  
SCHOOL DISTRICT**

**RESPONDENT**

**HEARING OFFICERS FINAL DECISION AND ORDER**

## **ISSUES PRESENTED:**

Whether the Pulaski Count Special School District (hereinafter “District” or “Respondent”) denied [REDACTED] (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between August 17, 2022 and May 16, 2023, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) Failing to comply with its child find obligation under IDEA; (2) Failing to provide Student a Free Appropriate Public Education during the 2022-2023 school year? and (3) by seeking to expel Student for exhibiting disability related behaviors.

## **Procedural History:**

On May 16, 2023, the Arkansas Department of Education (hereinafter referred to as the “Department” or “ADE”) received a request to initiate a due process hearing from [REDACTED] (“Parents” or “Petitioners”), as the Parents [REDACTED] (hereinafter referred to as “Student”), against the Pulaski County Special School District (hereinafter referred to as “District” or “Respondent”). Parents requested the hearing because they believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”) and the regulations set forth by the Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.<sup>1</sup>

At the time that Parent filed this request for a due process hearing, Student was an 8-year-old boy who was in second grade at [REDACTED] within the Pulaski County

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<sup>1</sup> See hearing officer File-Petitioner Complaint.

Special School District.<sup>2</sup> In 2021, student was diagnosed with Attention Deficit/hyperactivity Disorder.<sup>3</sup>

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the Prehearing conference was scheduled for June 27, 2023, and the Due Process hearing was scheduled for June 28-30, 2023.<sup>4</sup>

The Prehearing conference was conducted via zoom on June 27, 2023.<sup>5</sup> Counsel for both the Parent and the District 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.<sup>6</sup>

Thereafter the due process hearing in this matter began as scheduled on June 28, 2023. Testimony was heard in this case on June 28, 29, 30, 2023 and July 24 and 26, 2023.

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Cody Kees, and Phillip Brick attorneys for the District, [REDACTED] Parent, [REDACTED] Parent (via zoom), Audra Alumbaugh, advocate (via zoom) and Carolyn Norful, Special Education Director.

The following witnesses testified in this matter: Jennifer LaGory, Dr. Sabine Falls, Karen "Kari" Townsend, Anita Rutledge, Nicole Jackson, Diquan Hubbard, [REDACTED], [REDACTED] and Dr. Sheila Barnes.<sup>7</sup>

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

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<sup>2</sup> See Hearing Officer File-Petitioner Complaint, pg. 2.

<sup>3</sup> Parents Exhibits, pg. 24.

<sup>4</sup> See Hearing Officer file, Scheduling order.

<sup>5</sup> Transcript, prehearing conference.

<sup>6</sup> Id.

<sup>7</sup> Transcripts, Vol. I-V.

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, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>8</sup>

### **Findings of Fact**

1. Student is an 8-year-old boy [REDACTED] currently in the third grade in the Pulaski County Special School District.<sup>9</sup> Student was diagnosed with ADHD in 2021.
2. Student attended a private school, [REDACTED] for kindergarten and first grade. However, during his first-grade year, Student was assigned to virtual school because of anger outbursts that included yelling at and hitting a teacher.<sup>10</sup>
3. Parents decided to have Student evaluated in 2021 by Dr. Sabine Falls, a child psychologist. Dr. Falls administered the following tests:  
  
Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) The WISC-V measures the general thinking and reasoning skills of children aged 6-16 years. It provides a composite score that represents Student's overall intellectual ability (FSIQ), as well as index scores that measure the areas of cognitive functioning, verbal comprehension, visual spatial processing, fluid reasoning, working memory and processing speed.  
  
Student's scores were:

|                      | <u>Index Score</u> | <u>Percentile Rank</u> |
|----------------------|--------------------|------------------------|
| Full Scale IQ        | 124                | 95                     |
| Verbal Comprehension | 127                | 96                     |

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<sup>8</sup> See Hearing Officer File-post hearing briefs.

<sup>9</sup> See Hearing Officer File-Parent's Due Process Hearing Request.

<sup>10</sup> Transcript, Vol. III, pp. 138-143.

|                  |     |    |
|------------------|-----|----|
| Visual Spatial   | 119 | 90 |
| Fluid Reasoning  | 128 | 97 |
| Working Memory   | 91  | 27 |
| Processing Speed | 103 | 58 |

Dr. Falls explained, Student's Full Scale IQ score, a measure of overall intellectual ability, was in the very high range compared to other children his age (FSIQ = 124). Overall, his performance on these tasks was better than approximately 95% of children in his age group. Overall, Student may find it easy to keep up with his peers on most tasks that require age-appropriate thinking and reasoning abilities. However, there is some variation among the different index scores, and the individual index scores provide a better understanding of the various areas of functioning.

The Verbal Comprehension Index (VCI) measured Student's ability to use word knowledge, verbalize meaningful concepts, and reason with language-based information. His overall score on the VCI fell in the very high range (VCI = 127). This means that he performed better than approximately 96% of individuals the same age, indicating an advanced verbal reasoning system with strong word knowledge and a good ability to reason and solve verbal problems.

On the Visual Spatial Index (VSI), which measures the ability to evaluate visual details and understand part-whole relationships, Student's overall score was in the high average range (VSI = 119). Tasks on this index involve constructing designs and puzzles under a time constraint. His performance was better than approximately 90% of children his age. High scores in this area indicate a well-developed capacity to apply spatial reasoning and analyze visual details.

The Fluid Reasoning Index (FRI) measured Student's logical thinking skills and his ability to use reasoning to apply rules. His overall score on the FRI fell in the very high range (FRI=128). He performed better than 97% of children his age. High FRI scores indicate a well-developed ability to abstract conceptual information from visual details and effectively apply that knowledge.

The Working Memory Index (WMI) measured Student's attention, concentration, and mental control. His overall score on the WMI fell in the average range compared to other children his age (WMI= 91) but represents a personal area of weakness. He performed better than 27% of individuals his age. Low WMI scores occur for many reasons, including distractibility, difficulty actively maintaining information in conscious awareness, or low storage capacity. Within the performance, he did better when recalling and sequencing strings of numbers and showed greater difficulty when recalling series of pictures. This pattern suggests that Student's working memory is better when verbal rather than visual stimuli are used. On the Processing Speed Index (PSI), which measures the ability to quickly and correctly scan visual information, Student's score was in the average range (PSI= 103). His performance was better than approximately 58% of children his age.

The Behavior Rating Inventory of Executive Functions 2nd Edition (BRIEF-2), is a rating form of executive functions with 50 being average. Scores between 60 and 64 are mildly elevated, scores between 65 and 69 a potentially clinically elevated, and scores at or above 70 are clinically elevated. Student scored:

| <u>Subscale</u> | <u>T-Scores</u> |
|-----------------|-----------------|
| Inhibit         | 78**            |
| Self-Monitor    | 69*             |

|                           |      |
|---------------------------|------|
| Shift                     | 85** |
| Emotional Control         | 88** |
| Initiate                  | 69*  |
| Working Memory            | 72** |
| Plan/Organize             | 62*  |
| Task-Monitor              | 67*  |
| Organization of Materials | 65*  |

Student obtained clinically elevated scores in four areas, and mildly or possibly clinically elevated scores in the five remaining areas, suggesting that Student exhibits difficulty with several aspects of executive functioning. Student's scores indicate the following:

*Inhibit:* Elevated scores indicate problems with inhibitory control, which is the ability to resist or not act impulsively, and the ability to stop one's own behavior at the proper time.

*Self-Monitor:* Elevated scores indicate problems with the ability to keep track of the effect one's behavior has on others.

*Shift:* Elevated scores indicate problems with the ability to freely move from one situation, activity, or aspect of a problem to another as circumstances demand. Key aspects are the ability to make transitions, problem-solve flexibly, switch or alternate attention, and change focus from one topic or mindset to another.

*Emotional Control:* Elevated scores indicate problems with executive functions in the emotional realm such as the ability to modulate emotional responses. Deficits can show emotional ability or emotional explosiveness.

*Initiate:* Elevated scores indicate problems with beginning a task or activity, as well as independently generating ideas or problem-solving strategies.

*Working Memory:* Elevated scores indicate problems with the capacity to hold information in mind for the purpose of completing a task. Working memory is essential to carrying out multistep activities, completing mental arithmetic, and following complex instructions.

*Plan/Organize:* Elevated scores indicate problems with managing current and future-oriented task demands. It involves imagining or developing a goal and then strategically determining the most effective method or steps to attain that goal.

*Task Monitor:* Elevated scores indicate difficulties with checking work and assessing one's performance during and after finishing a task to ensure attainment of one's goal.

*Organization of Materials:* Elevated scores indicate difficulties with orderliness of work, play, and storage spaces such as desks, lockers, backpacks, and bedrooms.

Student also completed the Visual Motor Integration (VMI) which measures the development of hand-eye coordination. The results indicated that Student's development of visual motor integration skills are within normal limits for a boy his age.

Dr. Falls also administered the Conners' Kiddie Continuous Performance Test 2nd Edition (K-CPT-2). The K-CPT-2 is designed to assess attention-related problems in children aged four to seven years. It is an individually administered computerized attention test that is presented in a game-like format, starting with instruction and an optional practice session. During the 7-minute administration, examinees are required to press the space bar when any object picture appears, except for the soccer ball (non-target). It provides T-scores for the examinee's performance in the areas of inattentiveness, impulsivity, sustained attention, and vigilance. It performs a validity check based on the number of hits and omission errors as well as timing issues.

For Student, the results showed that he was less able to differentiate targets from non-targets, made more omission errors, responded more slowly, displayed less consistency in response speed, and displayed more of a reduction in response speed at the longer intervals in comparison to other children his age. Overall, Student had five atypical T-scores, which are associated with a moderate likelihood of having a disorder characterized by attention deficits, such as ADHD.

On the behavior rating scales completed by Student's Parents and Teacher (private school), Student's Parents rated Student's problems to be in the clinical range on the scale of Oppositional Defiant Problems, while his teacher reported additional concerns in the clinical range on the Aggressive Behavior, ADHD Problems, and Oppositional Defiant Problems.

Dr. Falls found that the results showed that Student is a young boy of very high intelligence. His working memory was somewhat weaker but still within the average range compared to his peers. Student's ability to function in the school environment is impaired by impulsivity and hyperactive behaviors that meet diagnostic criteria for Attention Deficit/Hyperactivity Disorder predominantly hyperactive/impulsive presentation. Due to his high intelligence, these symptoms have not yet affected his ability to learn. However, as Student moves into higher grades, as more independent work is required, and as he must attend to tasks for longer periods of time, it is possible that they will negatively impact his work.

Dr. Falls opined, it is important to understand in this context that ADHD is a disorder of executive functioning skills. Executive functioning skills help to control, organize, and direct behavior, and the development of these skills may lag behind the development of intellectual ability. Poor self-control, poor self-inhibition, poor time management, and poor mental control can be indicators of weak executive functioning. This weakness impairs study skills and increases impulsivity, and can even lead to social, emotional, and behavioral problems. Student's difficulties with emotional regulation and defiance need to be seen in this context, and an additional diagnosis of a behavioral disorder is not given at this time.<sup>11</sup>

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<sup>11</sup> Parents Exhibits, pgs. 17-27.

4. Dr. Falls testified that she is the person who recommended Parents enroll Student in a public school because of the services available. Dr. Falls said she definitely saw Student needing a 504 plan, and probably even needing an IEP.”<sup>12</sup>
5. Parents enrolled Student in the second grade at [REDACTED] in the Pulaski County Special School District for the 2022-2023 school year.<sup>13</sup>
6. Student was placed in Ms. Lagory’s classroom. Ms. Lagory has a BS in Psychology and a Master of Art in Education, as well as twenty years of teaching experience, and all evidence and testimony showed Ms. Lagory worked well with Student.<sup>14</sup>
7. Ms. LaGory met Student and his Parents at the open house night prior to the start of second grade, and at that time she was told by the Parents that Student had ADHD and some characteristics of stubbornness, and that the parents wanted Ms. LaGory to work with him on his behaviors.<sup>15</sup> Ms. LaGory also knew around this time that Student was receiving private counseling, but she did not know his therapist was Dr. Sabine Falls until the middle of the school year.<sup>16</sup>
8. On August 21, 2022, Parents emailed Student’s teacher Ms. Lagory with the following:

“We are looking forward for this new year! [REDACTED] is very excited.

As we talk to you when we met, [Student] suffers from ADHD and at his [REDACTED] he had trouble concentrating and listening to directions. We fortunately were able to set a plan with his teacher and with his therapist in order to help him with this behavior. He was receiving a sticker in the morning and a sticker in the afternoon if he behaved well and it seemed to work very well with him. On our side, at home, we allowed him to Watch TV (which he likes) if he got a chance IP win those two stickers. We would like to partner with you in order to continue this incentive to help [REDACTED] have a good behavior during class. We also used to have zoom conferences with the therapist and his teacher if the situation required, Is this something that we can do with you if it is needed? We were also told that there is a program/Accommodation for kids who suffer from ADHD at school and we would like for him to benefit from it. Also, I thought I would tell you that he is a great kid, but he is very stubborn so I think that he will need help with that (We are working on it at home

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<sup>12</sup> Transcripts, Vol. I, pg. 112.

<sup>13</sup> See Hearing Officer file Parents’ Due Process Complaint.

<sup>14</sup> Hearing Transcript Vol. I, pg. 9.

<sup>15</sup> Hearing Transcripts Vol. I., pg. 11

<sup>16</sup> Id., at pg. 28.

and he is doing a lot better lately). Hi therapist also told us that he is gifted and we would like to see if there is any special program in the school for him that could help him grow all his potential".<sup>17</sup>

9. On August 21, 2022, Ms. Lagory responded to the Parents email with the following:

"Thank you for speaking with me about this matter. I can definitely do the sticker chart with him. We do PSIS (Positive Behavior Interventions and Supports) at [REDACTED] as well. I can write on his reading calendar (that will be in his folder) how many points he earned for the day out of 5. We will have a treasure box reward at the end of the week 20/25 and for the other goals discussed in my brochure. He will also be able to shop with his points earned at our school store once a quarter. I will speak with my 504 coordinator about the documented accommodations you mentioned with the counselor. I can meet with his therapist on Zoom as well. We can do that after school 3-4pm. I also do not mind him standing to work, moving to another spot in the class, or needing a minute to get some energy out. I will definitely work with you to make sure [REDACTED] has a successful school year. I will work to build a good relationship with him. I will communicate with you. bout behaviors or concerns I have so you can report them to his therapist.

In PCSDD, students are screened for gifted/talented classes at the end of 2nd grade by the GT teacher. Mrs. Pounders will send paperwork for you to fill out." <sup>18</sup>

10. On August 27, 2022, Ms. Lagory sent an email to Anita Rutledge explaining that the Parents wanted to meet about a 504 plan and explaining that Student had trouble at the car line and in PE.<sup>19</sup>
11. On August 29, 2022, Parents received an email from Ms. Lagory letting them know that the District was setting up a 504 meeting for Student.<sup>20</sup>
12. On September 6, 2022, Parent sent a message to Ms. LaGory, explaining that she had just received a voice message from Carrie Townsend regarding the 504 meeting. She further explained that in her meeting she had with Anita Rutledge the previous Friday, Ms. Rutledge stated that there was no need to start a 504 now but we could if we needed to in the future.<sup>21</sup>

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<sup>17</sup> Parents Exhibits, pg. 31

<sup>18</sup> Id.

<sup>19</sup> Id., at pg. 31A.

<sup>20</sup> Id., at pg. 32.

<sup>21</sup> Id., at pg. 37.

13. On September 29, 2022, Student' received a "Major Referral" for inappropriate behavior and language. Student said something about a creepy cartoon character "murdering people except for us and his mom and dad".<sup>22</sup>
14. On October 12, 2022, Student had two behavior incidents. The first incident Student was saying bad words on the playground. The second incident Student was slapping hands, shoving, and thumping people.<sup>23</sup>
15. On November 10, 2022, Student received a major referral for defiance/disrespect and inappropriate behavior and language. This incident occurred in PE, and Student left the area without permission and refused to follow the PE teacher's directions.<sup>24</sup>
16. On December 1, 2022, Ms. Lagory messaged mom stating that Student was rushing through his work and not completing it neatly or doing his best. Further, she stated that Student argued pretty aggressively with the monitor at lunch.<sup>25</sup>
17. On December 9, 2022, a 504-plan meeting was held with Parents participating and a 504 plan was developed for Student. The plan states that Student has a diagnosis of ADHD which is resulting in him being defiant to his teachers and administrators.<sup>26</sup> The 504-plan included Student sitting close to the teacher, having a cool down place, a sticker chart, the ability to stand up while doing his work, repeating directions, and allowing Student an opportunity to be heard and explain himself.<sup>27</sup>

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<sup>22</sup> Parents Exhibits pg. 45.

<sup>23</sup> Id., at pg. 47.

<sup>24</sup> Id., at pg. 51.

<sup>25</sup> Id., at pg. 52, 54.

<sup>26</sup> Id., at. 42-45.

<sup>27</sup> District Exhibits, pgs. 31-45.

18. On January 9, 2023, Student received a Major Referral for insubordination, defiance, and disrespect. This incident happened in the gym and involved a game that Student wanted to play. Student was disruptive to the point that the PE teacher told Student he had to leave the gym and then he escorted Student to the office.<sup>28</sup>
19. On February 21, 2023, Student received a Major Referral for defiance, disrespect, bullying and harassment. Student shoved another student at lunch and the other student shoved/hit him back. The two students were arguing over a pretend video game. They were both told they would have to walk five laps at recess. Student said he wasn't walking laps and then he was given the option to have a time out in the office. Student said he wasn't doing either. He tried to shove past the teacher to get out to recess and the administration was called.<sup>29</sup>
20. On March 3, 2023, a meeting was held to develop a Behavior Intervention Plan. Dr. Falls attended this meeting<sup>30</sup>. Dr. Falls testified that she recommended the District consult with a behavioral specialist by making a CIRCUIT<sup>31</sup> referral. Dr. Falls testified that the District objected to a CIRCUIT referral "because Student was too high functioning". The District explained to the Parents and Dr. Fall that the CIRCUIT referral was "for lower functioning kids, or kids with Autism." Dr. Falls

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<sup>28</sup> Parents Exhibits, pg. 58.

<sup>29</sup> Id., at pg. 76.

<sup>30</sup> Transcripts, Vol. I, pg. 113.

<sup>31</sup> Centralized Intake and Referral/Consultant Unified Intervention Team. A service offered through the Arkansas Department of Education. The Individuals with Disabilities Education Act (IDEA) of 2004 (Public Law 108-446) authorizes State activities to Local Education Agencies, accessed through a referral to CIRCUIT. These include direct and supportive service activities, to improve results for children with disabilities, ages 3 to 21, by ensuring a free, appropriate public education (FAPE), in the least restrictive environment (LRE). For this purpose, State Special Education Consultants are available to assist with the identification and interventions needed for students with sensory, intellectual and multiple disabilities, disruptive and/or self-injurious behavior, autism spectrum disorders, or brain injuries.

testified that this surprised her as she thought CIRCUIT was for every kid with behavior issues.<sup>32</sup>

21. On April 11, 2023, Student received a Major Referral for defiance, and disrespect. Student was extremely defiant and was given several opportunities to take a calm down outside of the classroom. Student received a one day out of school suspension.<sup>33</sup>
22. On April 13, 2023, Dr. Falls testified that she attended another meeting to discuss Student's behavior. She stated that Ms. LaGory reported that Student's problems mainly occurred in less structured environments, such as, with a substitute teacher or when in PE or music. Although Student had good days, "the difficult days are really bad".<sup>34</sup>
23. Dr. Falls further testified that Student's ADHD is pretty severe. She stated that it is important to understand that Student's problems are "neurological". "It has nothing to do with the maturation of the prefrontal cortex," Dr. falls explained, "It has nothing to do with intelligence."<sup>35</sup>
24. On April 26, 2023, Student received a Major Referral for inappropriate behavior and language. This incident happened in PE class. Student refused to follow the rules of a game and at one point threatened to beat the PE teacher with a badminton racquet. Later this same day Student was taken to the Principal's office by Ms. Lagory because he was upset because the playground was muddy and he couldn't play on the playground equipment. Student told the principal that he had no friends and

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<sup>32</sup> Transcripts, Vol. I, pg. 115-116.

<sup>33</sup> Id., at pg. 111.

<sup>34</sup> Id., at pg. 116.

<sup>35</sup> Id., at pg. 127.

threatened to break things in her office. Student was officially suspended for five days.<sup>36</sup>

25. On April 28, 2023, Karen Townsend sent an email to Parents stating that she had spoken with the 504 director to ask if they needed to do a Functional Behavior Assessment (FBA) and she said that since we have a behavior plan already in place we do not have to do one at this time.<sup>37</sup>
26. On May 12, 2023, Student received a Major Referral for hitting, kicking, pushing, and pinching a teacher. He received a 10-day suspension with a recommendation for expulsion.<sup>38</sup>
27. On May 12, 2023, the District sent Parent notification of 504 Manifestation determination meeting to occur on May 16, 2023.<sup>39</sup>
28. On May 16, 2023, the District held a Section 504 manifestation conference. The Parents attended the meeting briefly to let the District know that they had hired counsel and ask that they not hold the manifestation conference. Parents left after being notified that the District would continue with the manifestation conference in their absence. The Parents did not participate in the manifestation conference. The District determined that Student's alleged diagnosis of ADHD does not impair his awareness and understanding of the consequences of his behavior. He can easily identify right from wrong and the consequences of his actions. Aggression towards

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<sup>36</sup> Id., at pg. 120.

<sup>37</sup> Parents Exhibits, pg. 123.

<sup>38</sup> Id., at pg. 143.

<sup>39</sup> District Exhibits, pg. 46

adults and peers is not a characteristic of ADHD.<sup>40</sup> On May 16, 2023, Parents filed this Due Process Hearing request.<sup>41</sup>

## **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*, 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 (8<sup>th</sup> Cir. 2019), *J. P. v. County School Board*, 516 F.3d 254, 261 (4<sup>th</sup> 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. The documentation and testimony were sometimes

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<sup>40</sup> Id., at pg.1

<sup>41</sup> Hearing Officer file Complaint.

conflicting, although the hearing officer does not necessarily find that any one witness was intentionally untruthful, these inconsistencies did play a role in the hearing officer's decisions. In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

### **Applicable Legal Principles**

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is " 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's individual circumstance". The U.S. Supreme Court considered the application of the *Rowley* standard, and it observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, 137 S.

Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09). The *Endrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352.

*Endrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Endrew F.* In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.' " *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A free appropriate public education (FAPE), as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, i.e. local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017).

### **Procedural Violation of FAPE-Child Find**

It must first be determined whether District complied with the procedures set forth in the IDEA between August 17, 2022, and March 16, 2023. In the present case Petitioners alleged that Respondent failed to evaluate and identify Student for special education services. Essentially, Petitioners have alleged a "child find" violation on the part of the District.

"In order that all children with disabilities may receive a FAPE, the IDEA imposes a 'child find' obligation on school districts." Indep. Sch. Dist. No. 283 v. E.M.D.H. by and through L.H., 357 F.Supp.3d 876, 888 (D. Minn. 2019) (citing 20 U.S.C. § 1412(a)(3)) (aff'd in relevant part E.M.D.H., 960 F.3d at 1083). Pursuant to this obligation, districts have a duty to ensure that:

All children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A). This provision imposes an affirmative duty on school districts to "identify, locate, and evaluate all children with disabilities ... to ensure that they receive needed special-education services." Forest Grove Sch. Dist., 557 U.S. at 245 (internal quotation marks and brackets omitted). Fitzgerald ex rel. S.F. v. Camdenton R-III School District, 439 F.3d 773 (8th Cir. 2006).

Child find extends to children who are suspected of having a disability and in need of special education, even though they are advancing from grade to grade and performing on grade level. 34 C.F.R. §300.111(c)(1). Once a child is identified as potentially having a disability, the school district "shall conduct a full and individual initial evaluation" to determine whether the child has a disability. 20 U.S.C. § 1414(a)(1)(A). Jacksonville N. Pulaski Sch. Dist. v. D.M., 4:20-CV-00256-BRW (E.D. Ark. May 21, 2021). "An unreasonable delay in complying with this duty 'may constitute a procedural violation of the IDEA.'" Krawietz by Parker v. Galveston Indep. Sch. Dist., 900 F.3d 673, 676 (5th Cir. 2018) (quoting D.K. v. Abington 696 F.3d 233, 249-50 (3d Cir. 2012)).

Some circuits have expressly stated that child find and failure to evaluate claims are procedural in nature and, therefore, must be analyzed prior to determining whether there was a substantive violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-250 (3d Cir. 2012); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

The District argues throughout that Student's needs could be and were met through a 504 plan.<sup>42</sup> It should be noted that there is nothing in the IDEA that indicates that a student whose needs are being met by a 504 plan is ineligible for special education programming and related services. On the contrary, it is quite possible that a student's disabilities could qualify him or her for either, depending on the circumstances. Therefore, the prevailing question for school districts in determining IDEA eligibility is not that of whether a student's needs can be met by a 504 plan, but, instead, notwithstanding 504 eligibility, whether a student qualifies for special education programming and related services pursuant to the IDEA. If a student meets the eligibility criteria set forth in the IDEA, he or she is entitled to special education programming and related services thereunder. In that instance, whether a 504 plan is or would be effective is wholly irrelevant.

Courts around the country have recognized that the IDEA's child find requirement imposes an "affirmative duty" on school districts. See, e.g. *Strock v. Indep. Sch. Dist. No. 281*, No. 06-cv-3314 (JMR/FLN), (D. Minn. Mar. 21, 2008). This duty is the sole responsibility of the school districts—it may not be discharged simply by passing the burden on to private school educators or parents. See, e.g., *N.B. and C.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202,

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<sup>42</sup> District Exhibits, pgs. 42-45.

1209 (9th Cir. 2008) ("A school district cannot abdicate its affirmative duties under the IDEA."); N.G. v. District of Columbia, 556 F. Supp. 2d 11, 28 ("[E]ven though a parent may help a school district satisfy the IDEA's requirement that it identify children in need of services, the school district is not relieved of its requirement to further locate and evaluate those children."). The reason for this requirement is self-evident—private school officials and parents may be unwilling or unable to recognize the need for an evaluation and are under no duty to assist the district. See, e.g., M.G. ex rel. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) ("[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) . . ."). "Once a child is identified as potentially having a disability, the child's District '*shall conduct a full and individual evaluation*' to determine whether the child has a disability." *Independent School District No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F. Supp.3d 1100, 1108 (D. Minn. 2015) (quoting 20 U.S.C. § 1414(a)(1)(A)) (emphasis added), *Lawrence County. Sch. Dist. v. McDaniel*, No. 3:17-CV-00004 BSM (E.D. Ark. Mar. 30, 2018).

Here, from the testimony Parents did not understand the process for either IDEA or Section 504 of the Rehabilitation Act. Dr. Falls (Student's psychologist) testified that she suggested Parents enroll Student in public school, so that he could get services to address his maladaptive behaviors. As early as the day before school started, Parents notified Ms. Lagory, that Student was diagnosed with ADHD and that he was seeing a therapist. Parents requested Ms. Lagory work with Student on behavior, and she agreed. Ms. Lagory discussed with the Parents putting Student on a 504 plan. On September 6, 2022, Parent reached out to Ms. LaGory and stated that she had received a voice message from Carrie Townsend (assistant principal) regarding a 504 plan, and that Anita Rutledge (school counselor) in their meeting the

previous Friday, explained to Parents that they didn't need to start a 504 now but could if they needed to in the future.<sup>43</sup> The District argues that it was Parents who didn't want the 504 plan but the evidence shows that there was a serious lack of communication with Parents about both section 504 of the Rehabilitation Act and IDEA. Parents were new to the District, new to public school and the evidence shows Parents were unsure of what to do to help student with his maladaptive behaviors. Additionally, Parents communicated their concerns to the District on numerous occasions and depended on the District for guidance and expertise. Evidence also indicates that Parents were willing to share any information with the District if the District asked them to. There was great communication between Parents and Ms. Lagory regarding Student. However, the evidence shows that the District didn't contact Parents again about a 504 plan or any plan until November 28, 2022, after Student's behavior continued to escalate.<sup>44</sup>

The District argues that Student still performed well academically. The problem is not so much Student's lack of performance but that he has been unable to remain in school. He was suspended for more than 15 days during the 2022-2023 school year<sup>45</sup>, sent home early numerous times (these were not counted as official suspensions, but Parent's testimony regarding days he was called to pick Student up was credible), and ultimately recommended for expulsion after the May 12, 2023, incident in which Student hit, kicked, pushed and pinched a teacher. Student's inability to remain in school while in a regular school environment indicates that his needs were not accommodated within the regular education system, and minimally should have alerted the District that Student may need to be evaluated to determine if Student

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<sup>43</sup> Parent exhibits, pg. 36.

<sup>44</sup> District Exhibits, pgs., 31-41.

<sup>45</sup> In its Post Hearing Brief, the District discusses that Student was not suspended until the end of the 2022-2023 school year. While Student may not have been officially suspended the evidence shows that Student was sent home numerous times for maladaptive behavior incidents, and Parents were asked to come pick Student up and they obliged.

has a disability and is in need of special education services. Further, Ms. Lagory, on December 1, 2022, messaged mom that Student was rushing through his work and not completing it neatly or doing his best. Also, Dr. Falls evaluation<sup>46</sup> found that Student's ability to function in the school environment is impaired by impulsivity and hyperactive behaviors that meet diagnostic criteria for ADHD predominantly hyperactive/impulsive presentation. Additionally, Dr. Falls testified that she recommended the District consult with a behavioral specialist by making a CIRCUIT<sup>47</sup> referral. Dr. Falls testified that the District objected to a CIRCUIT referral "because Student was too high functioning". The District explained to the Parents and Dr. Falls that the CIRCUIT referral was "for lower functioning kids, or kids with Autism." Dr. Falls testified that this surprised her as she thought CIRCUIT was for every kid with behavior issues.<sup>48</sup> Further during the two meetings that Dr Falls attended one on March 3, 2023, and one on April 13, 2023, Dr. Falls provided information on Student's diagnoses, and during her testimony she stated that she believed Student may have some additional anxiety or oppositional defiance occurring in addition to his ADHD. Not some four weeks after that April 13, 2023, meeting, Student's behavior had escalated to a level that the District recommended expulsion.<sup>49</sup> Between August 17, 2022, and May 16, 2023, the District never initiated an evaluation of Student to determine if he was a Student with a disability in need of special education and related services.

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<sup>46</sup> Dr. Falls Evaluation conducted in 2021 is the only evaluation of Student entered into evidence in this case.

<sup>47</sup> Centralized Intake and Referral/Consultant Unified Intervention Team. A service offered through the Arkansas Department of Education. The Individuals with Disabilities Education Act (IDEA) of 2004 (Public Law 108-446) authorizes State activities to Local Education Agencies, accessed through a referral to CIRCUIT. These include direct and supportive service activities, to improve results for children with disabilities, ages 3 to 21, by ensuring a free, appropriate public education (FAPE), in the least restrictive environment (LRE). For this purpose, State Special Education Consultants are available to assist with the identification and interventions needed for students with sensory, intellectual and multiple disabilities, disruptive and/or self-injurious behavior, autism spectrum disorders, or brain injuries.

<sup>48</sup> Transcripts, Vol. I, pg. 115-116.

<sup>49</sup> Student was recommended for expulsion on May 12, 2023.

This Hearing Officer finds that based on all the evidence and testimony the District had reason to believe that Student had a disability and a corresponding obligation to initiate the evaluation process and failed to do so. The passivity of the School District's child find activities evidenced an abrogation of its responsibilities that the IDEA simply does not permit. It is the opinion of this Hearing Officer that District did not fulfill its child find obligations with regard to Student, thus procedurally violating IDEA.

### **SUBSTANTIVE VIOLATIONS OF IDEA**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District procedurally violated IDEA, it is now necessary to consider whether this procedural violation resulted in a substantive denial of FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the child a FAPE. *K.E. v. Indep. Sch. Dist.* 15, 647 F.3d 795, 804 (8<sup>th</sup> Cir. 2011). Rather, a school district's educational plan for a given student will only be set aside for IDEA procedural violations "if the procedural inadequacies compromised the pupils right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefit." *Id.* At 804-805.

Here, the District's failure to meet its child find obligations under IDEA seriously hampered Parents opportunity to participate in the formulation process. There was no IDEA process for Parents to participate because for an entire year, as Student's behaviors increased in intensity and severity, the District, even with the knowledge that Student has ADHD, and exhibited other maladaptive behaviors that might indicate other disabling conditions, failed to initiate the evaluation process, and thus seriously hampered Parents' opportunity to participate in the formulation process. There is no evidence that the District ever discussed Parents' rights

under IDEA, or moved to evaluate Student. Thereby seriously hampering Parents' opportunity to participate in the formulation process, and thus substantively violating Student's right to a FAPE under IDEA.

It is the opinion of this Hearing Officer that District's failure to properly evaluate Student and properly consider him for special education programming and related services between August 17, 2022, and March 16, 2023, resulted in a substantive denial of FAPE. During this period, Student potentially lost almost an entire year of special education services. In addition, Student's Parents were prohibited from participating in Student's education.

### **Expulsion**

After the May 12, 2023, incident in which Student hit, kicked, pushed and pinched a teacher, the District recommended Student for Expulsion. Testimony from Ms. Townsend and District's counsel statements, was that the District withdrew the expulsion recommendation and Student was not expelled and welcome to return to the District for the 2023-2024 school year.<sup>50</sup> Therefore, this hearing officer need not address Parents argument on this issue.

### **Conclusion**

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents introduced sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between August 17, 2022, and May 16, 2023, by failing to engage in appropriate child find activities for the purpose of determining whether

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<sup>50</sup> Transcript Vol. I, pg. 71, Transcript Vol. II., pgs. 217-218.

Student was eligible for special education programming and related services pursuant to IDEA.

District is hereby ordered to take the following actions regarding Student:

1. Within Thirty (30) days The District shall conduct a comprehensive evaluation of Student to include all suspected areas of disability. This evaluation shall be completed by an evaluator agreeable to the Parents.
2. Within thirty (30) days the District shall conduct a Functional Behavior Assessment by a behavior specialist or BCBA agreeable to the Parents.
3. Within 15 days after the completion of all evaluations and Functional Behavior Assessment, the District shall convene an IEP meeting with Parents to discuss the evaluation results and determine whether Student is a student with a disability in need of special education services under IDEA. If the evaluation results demonstrate and the IEP team determines that Student is a Student with a disability in need of special education services, the IEP team shall develop an appropriate IEP for Student.

If Parents also allege that the District's conduct constitutes disability discrimination in Violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. §12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims. See ADE Spec. Ed. Rules §10.01.22.1. Accordingly, to the extent Parents' due process complaints raise disability discrimination claims, those claims are dismissed.

**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**

8/30/2023  
**DATE**