ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit

MALVERN SCHOOL DISTRICT

PETITIONER

VS. **Case No. EH-24-17**

[redacted]

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

Issue Presented:

Whether the Malvern School District pursuant to 20 U.S.C. §1415(k) and 34 C.F.R. §300.532 may change Student's placement to an appropriate interim alternative educational setting for not more than forty-five (45) school days because maintaining the current placement of Student is substantially likely to result in injury to District staff, Student or to others? Whether the Malvern School District pursuant to 20 U.S.C. § 1415(k)(1)(G)(iii) may remove Student to an interim alternative education placement for not more than forty-five (45) school days because Student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency?

Procedural History:

On October 17, 2023, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate an expedited due process hearing from Malvern School District (hereinafter referred to as "District" or "Petitioner") against [redacted], (hereinafter referred to as "Parent" or "Respondent"), as parent of [redacted] (hereinafter referred to as "Student")[1]

This is the second Due Process Hearing Request (H-23-20) between these same parties. Parent filed for due process on November 9, 2022, and the parties reached a settlement agreement in which Student would be privately placed at the Farm, a program for people with developmental disabilities. After almost a year in the program at the Farm, the district now brings the Expedited due process hearing request.

[1] District request for expedited Due Process Hearing EH-24-17.

In response to the Parent's request for a Due Process hearing, the Department assigned the case to this impartial hearing officer. Thereafter, the Prehearing conference was scheduled for November 13, 2023, and the Expedited Due Process Hearing set for November 15-16, 2023.[2] On October 29, 2023, attorney for the Parent sent an email explaining she had a separate due process hearing scheduled for November 13 and asked if the prehearing conference could be held on November 10, 2023. All parties agreed and this hearing officer agreed to conduct the prehearing conference on November 10, 2023.

The Prehearing conference was conducted via zoom on November 10, 2023.[3] Counsel for both the District and the Parent participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.[4]

Thereafter testimony was heard in this case on November 15th and 16th, 2023.[5] At the hearing counsel for Parent was to call an expert witness who became ill and was unable to testify on November 16, 2023. The expedited due process hearing was held open until November 20, 2023, to allow for expert testimony. However, the expert was still not available, and the expedited due process hearing was closed on a zoom call on November 20, 2023. This small continuance to allow for an expert to testify did not interfere with the timeline for this expedited due process hearing.

Present for the Hearing were Cody Kees, attorney for the District, Theresa Caldwell, attorney for the parent, [redacted] parent, Audie Alumbaugh, advocate, Keyosha Olive, parent support, Laura Loy, special education supervisor, and Janet Blair, Superintendent.

[2] See Hearing Officer file, Scheduling order.
[3] Transcript, prehearing conference.
[4] Id.
[5] Hearing Transcripts Vols. I-II.

The following witnesses testified in this matter: Laura Loy, Benjamin Dial, and [redacted] [redacted] [6]

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

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, both submitted their briefs within the timeline set forth by this hearing officer. [7]

Findings of Fact

1. Student is a thirteen-year-old girl, identified as a child with a disability as defined by the IDEA, 20 U.S.C. 1401(23).
2. Student has been diagnosed with autism spectrum disorder and exhibits profound deficits in cognitive and academic functioning.
3. Student is in the eighth grade at Malvern Middle School in the Malvern School District.
4. Although Student has been in the Malvern School District for many years, this case really centers on the fall of the 2023-2024 school year.
5. Student was transported to school by Parent and arrived daily around 7:30 a.m. Student was then transported by the District to the Farm, a program for people with developmental disabilities. The Farm offers services in a natural environment for the

[6] Id.
[7] See Hearing Officer File-post hearing briefs.

development and progression of skills in all areas. It allows for functional therapy through exploration, play, and activities of daily living.

6. Student was then transported back to school by the District and returned to District campus around 1:30p.m.-3:30p.m where she was to receive services implementing the educational goals in the IEP.

7. Student was recently diagnosed with Diabetes and put on the medication Metformin. One of the side effects of taking Metformin is diarrhea. Student's diarrhea issues began after she started taking Metformin. The school diabetes plan states that "there is nothing that can be given to stop this and once it is in her system more, this will hopefully lessen".[8]

8. The District points to two incidents to support its position that Student should be removed to an appropriate interim alternative education setting for not more than forty-five (45) school days because maintaining the current placement of Student is substantially likely to result in injury to District staff, the Student or to others.[9]

9. The District provides the letters sent home to Parent regarding Student being suspended for an incident that occurred on October 5, 2023, and an incident that occurred on October 17, 2023. These letters do not provide write ups of the incidents, they simply cite to the student handbook. The District does not provide any write ups of the incidents as evidence in this case.

10. On October 5, 2023, according to the testimony of Laura Loy, district special education director, Student likes to play in water, and it had rained. When Student returned to the district after being at the Farm (where they have water activities), she

[8] District's exhibits pg. 34.
[9] District Exhibits, pgs. 28, 27.

went into a mud hole to sit and play, and Jennifer tried to stop her, and Shamee (paraprofessional) got hurt. According to Mrs. Loy, Student hit Shamee on her hand causing injury to her hand. There is no write-up of this incident, so the only information provided in evidence is Mrs. Loy's testimony. Mrs. Loy did not personally observe the incident on October 5, 2023; therefore her testimony is from information she obtained from the individuals involved in the October 5, 2023 incident.[10] Student was suspended for one day for the October 5, 2023 incident.[11] It is unclear from the record and testimony the extent of the paraprofessional's injuries on October 5, 2023.

11. Mrs. Loy testified that on October 12, 2023, Student was being transported to the Farm and she had feces in her diaper, and feces got all on one side where she was seated. Again, there was no write up of this incident and no documentation written.[12]

12. Mrs. Loy also testified the following as to why there were no write up of incidents before October 12, 2023:

"I mean, I know she can be aggressive. I mean, unless she brought blood or she was causing a safety hazard for the other kids, we didn't write her up and we didn't call [Parent]"[13]

13. On October 17, 2023, Mrs. Loy testified that she received a phone call from Student's driver. On the way back from the farm, Student had gotten out of her seatbelt and smeared feces all over the Expedition she was being driven in.[14]

[10] Hearing Transcripts, Vol. I, pgs. 70-72.
[11] District Exhibits, pg. 28.
[12] Hearing Transcript, Vol. I., pg. 74.
[13] Id., at 75.
[14] Id., at pgs., 76-77

14. The District introduced a video of the incident on October 17, 2023, from the time the expedition Student was being transported in arrived on the District campus until Parent picked up Student. This video is 28:08 minutes long. It shows Student being kept inside the car for twenty-five minutes. Staff is seen walking around outside the vehicle. No one attempts to help Student out of the car. However, two staff members are covered in what look like gowns for protection. District staff is aware that Student is nude from the waist down yet no one gets Student a towel, sheet or anything that Student can put on so that she may exit the vehicle. Instead, the District leaves Student in the vehicle in feces for 25 minutes. You can see Student doing a rocking motion inside the car. Student doesn't seem to be violent while in the car. Mom arrives and immediately helps Student out of the expedition. Student appears cooperative. Student is still nude from the waste down, and the Expedition is parked in front of the school building with classroom windows that look directly on the incident. Students could see what was happening. No one attempts to assist Parent or shield Student in any way. After getting Student out of the expedition, Parent helps Student put on pants. Parent and Student then proceed toward Parent's car.[15]

15. Pictures show the inside of the expedition with feces all over it.[16]

16. October 17, 2023, the District filed this expedited due process hearing request.

[15] District video District page 95, 10-17-2023 digital file.
[16] District Exhibits, pgs. 51-69.

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 District's 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 District.

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

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

Change in Placement Under 20 U.S.C. §1415 (k)(3)

First the District seeks a change in placement under 20 U.S.C. §1415 (k) which states:

(k) **Placement in alternative educational setting**

(1) **Authority of school personnel**

(A) **Case-by-case determination**

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) **Authority**

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) **Additional authority**

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) **Services**

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

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

(E) **Manifestation determination**

(i) In general

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

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

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

(ii) **Manifestation**

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

(F) **Determination that behavior was a manifestation**

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

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

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

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

(G) **Special circumstances**

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) **Notification**

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) **Determination of setting**

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) **Appeal**

(A) **In general**

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

Here the District specifically argues for a change in placement under 20 U.S.C. § 1415(k)(3). However, when 20 U.S.C. §1415 is read in its entirety, it requires the district to hold a manifestation determination or an IEP meeting to discuss changing Student's placement with Parent. Further, it requires proper notification to the parent. 20 U.S.C. §1415 (k)(1)(H) states:

> "Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section."

District in its post hearing brief claims that it gave notice to Parent when it filed its request for an expedited hearing. However, an expedited hearing request fails to meet the requirements under 20 U.S.C. 1415 (k)(1)(H). Further the District did not hold a manifestation determination review or an IEP to discuss changing Student's placement to an Interim Alternative Education Setting. Because of the District's failure to follow the requirements under IDEA, its request under 20 U.S.C. 1415(k)(3) is not properly before this hearing officer.

Even if the District had met its obligation under 20 U.S.C. §1415 (k)(3) the District fails to provide any evidence that having Student at school will likely result in injury to the child or to others. Of the three incidents that the District presented as evidence[17], only one of those happened on the school campus and that was the one on October 5, 2023, in which a paraprofessional was injured (although it is unclear to what extent because the District did not present evidence showing the severity of said injury). However, even Mrs. Loy testified that, "It's not really that she is a danger, I would say. It's the sanitary. I mean, she is -- I mean, just don't think it's healthy for the other kids be exposed to that."[18] While this hearing officer understands that dealing with diarrhea and feces can be difficult especially given Student's unique circumstances, the District failed to present sufficient evidence to show Student is a danger to self or others.

Unilateral Change in Placement – Serious Bodily Injury

The IDEA provides disciplinary protections to children with disabilities that prevent schools from unilaterally changing a student's placement if the disciplinary infraction is

[17] September 21, 2023, October 5, 2023, and October 17, 2023.
[18] Hearing Transcript, Vol. 1, pg. 188.

manifestation of the child's disability. See generally, 20 U.S.C. § 1415(k). However, the IDEA recognizes three special circumstances under which schools "may remove a student to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(G). Those special circumstances concern weapons, drugs, and serious bodily injury (SBI). Of those three, only SBI is applicable in this case. Schools may unilaterally place a child with a disability into a 45-day IAES if the child "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency." 20 U.S.C. § 1415(k)(1)(G)(iii). The IDEA borrows the definition of SBI from federal criminal law. As used in the IDEA, the "term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18." 20 U.S.C. § 1415(k)(7)(D). As defined by 18 U.S.C. § 1365(h)(3): The term "serious bodily injury" means bodily injury which involves— A. a substantial risk of death; B. extreme physical pain; C. protracted and obvious disfigurement; or D. protracted loss or impairment of the function of a bodily member, organ, or mental faculty. The definition of SBI uses the term "bodily injury," which is defined at 18 U.S.C. § 1265(h)(4) as follows: The term "bodily injury" means: A. a cut, abrasion, bruise, burn, or disfigurement; B. physical pain; C. illness; D. impairment of the function of a bodily member, organ, or mental faculty; E. or any other injury to the body, no matter how temporary.

Here the District failed to provide any evidence that would support this hearing officer finding that Student inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency. The District presented two incidents in which Student had diarrhea and this created

unsanitary conditions but there was no evidence that either incidence rose to the level that could cause serious bodily injury. Even if this hearing officer looked at the incident involving Student's paraprofessional who Mrs. Loy testified was injured by Student. The District did not introduce any evidence that showed the paraprofessional's injury involved:

> (A) a substantial risk of death;
>
> (B) extreme physical pain;
>
> (C) protracted and obvious disfigurement; or
>
> (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.] 18 U.S.C. § 1365(h)(3).

Additionally, Student's classroom staff were instructed by Mrs. Loy to record incidents of Student that showed concerning behaviors. These videos were introduced in this case and show Student sitting in the floor crying, while what sounds like staff in the background (staff is never in the video), laughing at Student. Student does not appear aggressive or violent in any of these videos. To the contrary Student appears upset, crying, with mucus coming out of her nose and she continually wipes this mucus with her hand and staff never assists Student.[19] The District fails to present any evidence that Student "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency." 20 U.S.C. § 1415(k)(1)(G)(iii).

The District cites *Light v. Parkway C-2 Sch. Dist*., 41 F.3d 1223, (8th Cir. 1994), to support it's position that Student should be removed to an alternative education setting for not more than forty five days. This hearing officer finds the District's reliance on *Light* is misplaced. In *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), the

[19] Parent exhibits, pg. 259, 15 Digital files.

Eighth Circuit Court of Appeals determined that courts could exercise their equitable power to remove an allegedly dangerous student from current placement. *Light* was decided before the 2004 Reauthorization of the IDEA that amended §1415(k). See 118 Stat. 2726. Additionally, the facts in Light are distinguishable from the current case. *Light* involved a thirteen-year-old girl that school records documented "in the two years prior to her suspension Lauren committed eleven to nineteen aggressive acts per week, with a mean of fifteen per week. Her daily tally of aggressive acts ranged from zero to nine, with a mean of three per day. Of these incidents, approximately thirty required the attention of the school nurse." Further, the district in *Light* set out extensive duties for the district to accommodate student's disabilities. Particularly, in *Light*, student's IEP required that she have two-on-one staff support at all times. Thus, in addition to the classroom teacher assigned to her room, student was accompanied by one full-time teacher and one full-time teacher's assistant. In addition, the District in *Light* provided special training to members of the staff who regularly came into contact with Lauren, including training in behavior management, inclusion, and crisis prevention and intervention. To ease the transition from Riverbend, the SSD agreed to retain the services of a consultant selected by the Lights.

Here, there is evidence of three incidents presented none of which rise to the level of serious bodily injury, as discussed supra. Only one incident, the one on October 5, 2023, even involved an injury at all and that injury did not appear to be significant. District did not document any of the incidents relied on in this case. The only documentation presented was the suspension letters to Parent and they failed to describe what occurred. The suspension letters simply cited the student handbook but failed to provide any other description of the incidents. Further, the District did not present any evidence that it had tried anything other than some type of harness to accommodate Student's disability. Mrs. Loy testified that she believed Student

needed ABA therapy but that Medicaid wouldn't pay for it in the school and so she didn't believe the District could provide ABA therapy in school for Student. The District did agree to private placement for Student but it appeared from the evidence presented that this placement was no longer an option.

Light also provides a two-part test which states:

> "a school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury."

Here the District failed to present evidence to show that maintaining Student in the District is substantially likely to result in injury to either herself or others or that the District has done all that it reasonably can to reduce the risk that Student will cause injury. So even if this hearing officer believed *Light* applied in this case, the District's request to move Student to an interim alternative education setting would still fail.

AUTHORITY OF HEARING OFFICER

20 U.S.C. 1415(k)(2)(B) states:

> (B) Authority of hearing officer
>
> (i) In general
>
> A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

see also 34 C.F.R §§ 300.532(a) and (b).

Order

The results of the testimony and evidence warrant a finding for the Parent. Specifically, District failed to present sufficient evidence in the record to establish that maintaining Student in her current placement is substantially likely to result in injury to Student or others under 20 U.S.C. §1415(k), or that Student "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency." 20 U.S.C. § 1415(k)(1)(G)(iii). District's request to move Student to an interim alternative education setting for not more than forty-five (45) school days is denied and Student is to be immediately returned to the Malvern Middle School within the Malvern School District..

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

12/6/2023

DATE