

**ARKANSAS DEPARTMENT OF EDUCATION**

**Special Education Unit**



**PETITIONERS**

**VS.**

**Case No. H-23-41**

**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 May 17, 2023 and June 28, 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) Finding that Student’s conduct on May 12, 2023, was not a manifestation of his disability; (2) by violating IDEA Stay Put requirement when the District failed to return Student to his last agreed placement after the Manifestation Determination meeting held on May 16, 2023.

**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 of [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 Special School District. <sup>2</sup> In 2021, student was diagnosed with attention deficit hyperactivity

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

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

disorder (“ADHD”).<sup>3</sup> Student had not been identified under IDEA as a student with a disability in need of special education services.

In response to the Parents’ request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the Prehearing conference was scheduled for September 5, 2023, and the Due Process hearing was scheduled for September 6-8, 2023.<sup>4</sup> This is the second due process hearing filed involving these same parties. Parents filed their first due process hearing, H-23-37 on May 16, 2023, and a decision was issued on August 30, 2023. The record from H-23-37 is incorporated in its entirety into this case by agreement of the parties.<sup>5</sup>

The Prehearing conference was conducted via zoom on September 5, 2023.<sup>6</sup> Counsel for both the Parents 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>7</sup>

Additionally, there was a lengthy discussion about the issues to be decided in this due process hearing and the remedies sought. Parents’ Due Process Complaint was difficult for this hearing officer to understand as parts of it were identical to Parents’ Due Process Complaint H-23-37. Parents’ Due Process complaint inadvertently contained the same remedies sought in Parents’ first Due Process hearing request H-23-37. However, the issues raised in this Due Process Complaint (H-23-41) were different.<sup>8</sup> Therefore, the discussion about issues raised were agreed

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<sup>3</sup> H-23-37, Parents’ Exhibits, pg. 24.

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

<sup>5</sup> Prehearing conference Pgs.5-6.

<sup>6</sup> Transcript, prehearing conference.

<sup>7</sup> Id.

<sup>8</sup> Id.

by Parents' counsel to include an alleged stay put violation and a challenge to the District manifestation determination decision.<sup>9</sup>

Thereafter the due process hearing in this matter began as scheduled on September 6, 2023. Testimony was heard in this case on September 6, 7, and 8, 2023. On the first day of the Due Process Hearing there was a lengthy discussion on whether to proceed with an expedited due process hearing or a regular due process hearing. Because Parents' counsel had no other hearing dates available for months, and because the Student was back in the general education classroom, the parties and the hearing officer agreed to hear all issues as a regular due process hearing and thus the case was changed from EH-23-41 to H-23-41.<sup>10</sup>

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

The following witnesses testified in this matter: Yolanda Harris, Karen "Kari" Townsend, Anita Rutledge, Jennifer Lagory, Neely Claassen, Charles McNulty, Dr. Sheila Barnes, [REDACTED] Stephanie Cole.<sup>11</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 McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

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<sup>9</sup> Transcripts, Pre-Hearing conference.

<sup>10</sup> Transcripts, Vol. I. pgs. 1-45.

<sup>11</sup> Transcripts, Vol. I-III.

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>12</sup>

### **Findings of Fact**

1. Student is an 8-year-old boy (DOB: 10/23/2014) currently in the third grade in the Pulaski County Special School District.<sup>13</sup> Student was diagnosed with ADHD in 2021.
2. Student attended a private school, Pulaski Academy, 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>14</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
Visual Spatial	119	90
Fluid Reasoning	128	97
Working Memory	91	27
Processing Speed	103	58

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<sup>12</sup> See Hearing Officer File-post hearing briefs.

<sup>13</sup> See Hearing Officer File-Parents' Due Process Hearing Request.

<sup>14</sup> H-23-37, Transcript, Vol. III, pp. 138-143.

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>15</sup>

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<sup>15</sup> H-23-37, 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>16</sup>
5. Parents enrolled Student in the second grade at Chenal elementary school in the Pulaski County Special School District for the 2022-2023 school year.<sup>17</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>18</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>19</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>20</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] very excited.

As we talk to you when we met, [Student] suffers from ADHD and at his prior school, PA, 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>16</sup> H-23-27, Transcripts, Vol. I, pg. 112.

<sup>17</sup> H-23-37, See Hearing Officer file Parents’ Due Process Complaint.

<sup>18</sup> H-23-37, Hearing Transcripts Vol. I, pg. 9.

<sup>19</sup> H-23-37, Hearing Transcripts Vol. I., pg. 11

<sup>20</sup> H-23-37, Id., at pg. 28.

and he is doing a lot better lately). His 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>21</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 Chenal 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>22</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>23</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>24</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>25</sup>

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<sup>21</sup> H-23-37, Parents' Exhibits, pg. 31

<sup>22</sup> H-23-37, Id.

<sup>23</sup> H-23-37, Id., at pg. 31A.

<sup>24</sup> H-23-37, Id., at pg. 32.

<sup>25</sup> H-23-37, 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>26</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>27</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>28</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>29</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>30</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>31</sup>

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<sup>26</sup> H-23-37, Parents Exhibits pg. 45.

<sup>27</sup> H-23-37, Id., at pg. 47.

<sup>28</sup> H-23-37, Id., at pg. 51.

<sup>29</sup> H-23-37, Id., at pg. 52, 54.

<sup>30</sup> H-23-37, Id., at. 42-45.

<sup>31</sup> H-23-37, 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>32</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>33</sup>
20. On March 3, 2023, a meeting was held to develop a Behavior Intervention Plan. Dr. Falls attended this meeting<sup>34</sup>. Dr. Falls testified that she recommended the District consult with a behavioral specialist by making a CIRCUIT<sup>35</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>32</sup> H-23-37, Parents' Exhibits, pg. 58.

<sup>33</sup> H-23-37, Id., at pg. 76.

<sup>34</sup> H-23-37, Transcripts, Vol. I, pg. 113.

<sup>35</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>36</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>37</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>38</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>39</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>36</sup> H-23-37, Transcripts, Vol. I, pg. 115-116.

<sup>37</sup> H-23-37, Id., at pg. 111.

<sup>38</sup> H-23-37, Id., at pg. 116.

<sup>39</sup> H-23-37, Id., at pg. 127.

threatened to break things in her office. Student was officially suspended for five days.<sup>40</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>41</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>42</sup>
27. On May 12, 2023, the District sent Parent notification of 504 Manifestation determination meeting to occur on May 16, 2023.<sup>43</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 adults and peers is not a characteristic of ADHD.<sup>44</sup> On May 16, 2023, Parents filed

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<sup>40</sup> H-23-37, Id., at pg. 120.

<sup>41</sup> H-23-37, Parents' Exhibits, pg. 123.

<sup>42</sup> H-23-37, Id., at pg. 143.

<sup>43</sup> H-23-37, District Exhibits, pg. 46

<sup>44</sup> H-23-37, Id.



their first Due Process Hearing Request H-23-37.<sup>45</sup> Student was suspended for 10 days and recommended for expulsion.

29. The District withdrew its recommendation for expulsion shortly after the manifestation determination meeting on May 16, 2023.
30. The ten-day suspension started on May 12, 2023, and continued through May 26, 2023.<sup>46</sup>
31. Student returned to school on May 30, 2023.
32. Student received instruction while on suspension and this is reflected in the homebound instruction report by Ms. Lagory and by Ms. Lagory's testimony.<sup>47</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*,

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<sup>45</sup> H-23-37, Hearing Officer file Complaint.

<sup>46</sup> H-23-37, Parents' Exhibit 148A.

<sup>47</sup> Parents' Exhibits, Pgs. 165-168.

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. The documentation and testimony were sometimes 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 and 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. *Andrew 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 May 17, 2023, and June 28, 2023. District is correct in its post hearing brief that school was out on May 31, 2023, and May 29<sup>th</sup> was Memorial Day holiday and so this case only covered ten (10) school days. Here, Parents allege that District violated the Stay Put provision of IDEA by changing Student's placement after Parents filed their first Due Process Hearing Request H-23-37 on May 16, 2023.

The provision of special education to students with disabilities is governed by federal and Arkansas rules. (34 C.F.R. §§300.1-300.818; Arkansas Divisions of Elementary and Secondary Education Rules Governing Special Education and Related Services Discipline Procedures 11.07-11.07.4). Where a student is identified as a student with a disability, eligible for special education programming, provisions of IDEA provide that, under certain circumstances, infractions of the student code of conduct trigger procedural requirements before disciplinary consequences may be imposed upon the student. (34 C.F.R. §300.530). Additionally, IDEA provides that where "(a) child who has not been determined to be eligible for special education...and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the (school district) had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." (34 C.F.R. §300.534(a)) The 'section b' provisions noted above where a school district "must be deemed to have knowledge that a child is a child with a disability" include: (1) parents expressing concern

in writing to supervisory/administrative personnel of the school district, or a teacher of the child, that the child is in need of special education, (2) parents of the child requesting an evaluation of the child for special education, or (3) a teacher of the child, or other school district personnel, expressing specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or other supervisory personnel of the school district. (34 C.F.R. §300.534(b); This imputed school district knowledge must be gauged at a time “before the behavior that precipitated the disciplinary action occurred”. (Id.) Finally, the language of 34 C.F.R. §300.534(b) speaks to situations where a school district ‘must’ be determined to have knowledge of Student’s disability. As a result of fact-finding, however, other events may support a finding that a school district had knowledge of a student’s thought-to-be-eligible status. In short, the situations enumerated in 34 C.F.R. §300.534(b) are not exclusive.

Here, the record in its entirety supports a conclusion that prior to May 16, 2023, the District knew or should have known that Student should be considered a Student with a disability who might be eligible for special education services under IDEA. 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>48</sup> The District argues that it was Parents who didn’t want the 504 plan but the evidence shows that there was a serious

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<sup>48</sup> Parents’ exhibits, pg. 36.

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>49</sup>

Student was suspended for more than 15 days during the 2022-2023 school year<sup>50</sup>, sent home early numerous times (these were not counted as official suspensions, but Father'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. 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>51</sup> found that Student's ability to function in the school environment was impaired by impulsivity and hyperactive behaviors that met 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>52</sup>

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<sup>49</sup> District Exhibits, pgs., 31-41.

<sup>50</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.

<sup>51</sup> Dr. Falls' Evaluation conducted in 2021 is the only evaluation of Student entered into evidence in this case.

<sup>52</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)

referral. Dr. Falls testified that the District objected to a CIRCUIT referral “because Student was too high functioning”. 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>53</sup> Therefore, even outside of the specific conditions of 34 C.F.R. §300.534(b), the plethora of evidence in the record supports a conclusion that imputes to the District purported knowledge of the student’s thought-to-be-eligible status prior to May 12, 2023.

The IDEA requires that during the pendency of due process proceedings challenging the placement of a student, "the child shall remain in the then-current educational placement of the child." 20 U.S.C.A. § 1415(j). While protected under the stay-put provision, an IEP team or district cannot place a student in an Alternative Learning Environment (“ALE”) setting without the parent's consent. *Doe ex rel. Doe v. Todd Cty. Sch. Dist.*, 625 F.3d 459, 464 (8th Cir. 2010) (citing *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 463 (8th Cir. 2008), cert. denied, 555 U.S. 979 (2008)). "The statute does not define the term 'then-current educational placement.'" *Hale ex rel. Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002). "The stay-put provision is literally and

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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>53</sup> Student was recommended for expulsion on May 12, 2023.



rigorously enforced, consistent with its purpose 'to strip schools of the unilateral authority they had traditionally employed to exclude disabled students.'" *Hale ex rel. Hale*, 280 F.3d at 833 (quoting *Honig v. Doe*, 484 U.S. 305, 323 (1988) (emphasis in original)).

With regard to determining Student's stay-put placement, Defendants filed their due process challenge on May 16, 2023, and under the plain language of the statute, it appears that the regular classroom setting was the "then-current educational placement." Thus, when the District conducted its manifestation determination on May 16, 2023, and suspended Student for 10 days and recommended Student for expulsion it procedurally violated IDEA's stay put provision.

#### **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's stay put provision, 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 pupil's 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 Student was suspended for 10 days on May 12, 2022, when he hit and kicked his music teacher. Student received a 10-day suspension for this incident, following a manifestation determination review conference that found the actions of the Student of hitting and kicking his

teacher were not a manifestation of ADHD and that the Student's behavior plan had been properly followed.<sup>54</sup> The 10-day suspension started on May 12th and ran through May 26th.<sup>55</sup> Student returned on May 30th and was in school two days before summer break with no issues. Student received instruction while on suspension and this is reflected in the homebound instruction report provided by Ms. Lagory.<sup>56</sup>

It is the opinion of this Hearing Officer that District's procedural violation of the stay put provision of IDEA did not result in a substantive denial of FAPE. During this short period of time Student received instruction and as previously decided in the H-23-37, the District withdrew its recommendation for expulsion, and Student was returned to school in the regular classroom setting on May 30<sup>th</sup>, 2023.

### **Manifestation Determination**

Parent also challenges the District's decision at the May 16, 2023 manifestation determination meeting that Student's behavior was not a manifestation of Student's disability.

IDEA protects disabled children from being removed from the classroom because of their disability. 34 C.F.R. § 300.530(e); 34 C.F.R. § 300.536(a). If a child suffers (1) a change of placement for (2) a disciplinary reason, then the school must conduct a manifestation determination to determine if the behavior resulted from the child's disability. *Id.* The first issue in deciding whether a manifestation determination is required is determining whether the disabled child has suffered a change of placement. A change of placement has two sub requirements: (1) whether the removal is for greater than ten consecutive school days or qualifies as a "pattern" of removals, and (2) whether the removal constitutes a foundational change in the

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<sup>54</sup> H-23-37 District Exhibits, pgs. 51-52.

<sup>55</sup> H-23-37, Parents' Exhibits, pg. 148.

<sup>56</sup> Parents' Exhibits, pgs. 165-168.

student's education program. The first prerequisite to a change of placement is that the child's placement is changed for more than ten consecutive days or a series of removals that form a pattern: (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. After the prerequisite time duration has been met, it is then necessary to determine whether the removal constitutes a removal from the current educational program. *Id.* It is clear that a suspension is a change of placement. *Honig v. Doe*, 484 U.S. 305, 328 (1988).

While the Eighth Circuit does not define a change of educational placement aside from suspensions, other circuits have held that a change of an educational placement will only occur when a fundamental change in the educational program occurs.<sup>57</sup> After establishing the removal was a change of educational placement, the second criteria for requiring a manifestation determination is whether the change of placement was for a disciplinary reason. IDEA clearly states that a manifestation determination must take place if there is a decision to "change the placement of a child with a disability because of a violation of a code of student conduct." 34 C.F.R. § 300.530(e) (emphasis added).

Here even the District acknowledges in its post hearing brief that Student's ten day suspension after the May 12, 2023 incident resulted in student being suspended for more than ten days during the 2022-2023 school year. So, in the present case the prerequisite time duration has been met, and thus a change in placement occurred. Next, we have to determine whether the

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<sup>57</sup> See *Doe ex rel. Doe v. Todd Co. Sch. Dist.*, 625 F.3d 459, 464 (8th Cir. 2010) cert. denied, 132 S. Ct. 367 (U.S. 2011) (commenting in dicta that "a change of placement, often to a more structured educational setting, may be triggered by the child's violation of the school's code of conduct, but is primarily an educational, not a disciplinary, decision.").

change of placement was for a disciplinary reason. Here, every incident in which Student was sent home, or suspended during the 2022-2023 school year involved violations of Student Code of Conduct. So here, the change in placement was for disciplinary reasons.

Having determined that a manifestation determination was warranted here, it is now time to address the District's decision at the May 16, 2023 manifestation determination meeting. At the May 16, 2023, manifestation determination meeting, the district found that Student's conduct was not a manifestation of his disability. Parents first argues that the District excluded them from the manifestation determination meeting. This hearing officer disagrees. Parents were actually present at the May 16, 2023, manifestation determination meeting to serve the District with their due process hearing request H-23-37 and asked that the manifestation determination meeting be rescheduled. The District refused to reschedule the meeting and the Parents left with the knowledge that the meeting would continue without them. Parents could have attended and participated and provided information at the manifestation meeting but chose not to. This hearing officer finds that the District did not exclude Parents from the manifestation meeting, and thus did not significantly impede Parents' opportunity to participate in the decision making process regarding the provision of FAPE to Student. Second, Parents argue that the District did not conduct a manifestation determination review as required by IDEA but conducted a manifestation determination pursuant to Section 504. And although the manifestation review under IDEA and 504 have the same purpose, different regulatory requirements apply. Parents argue that because of this difference, District failed to ask the questions required by IDEA: "(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 [District's] failure to implement the IEP." See 20 U.S.C. §1415(k)(1)(E)(i)(I), (II). While the District's manifestation

determination was conducted under section 504 and not IDEA, which constitutes a procedural violation of IDEA, this procedural inadequacy did not compromise Student's right to an appropriate education, seriously hamper the Parents' opportunity to participate in the formulation process or cause a deprivation of educational benefit. Student has not been determined to be a student with a disability in need of special education and related services under IDEA.

The manifestation determination team did ask the question "is student's behavior related to his disability?" and based on the information available to the team found the answer to be no.<sup>58</sup> At best the manifestation determination meeting should have addressed the need for additional information and a comprehensive evaluation, which this hearing officer ordered in her decision in Parents' Due Process Hearing Complaint H-23-37. However, Student has not been identified as student with a disability in need of special education services, nor has there been sufficient evidence provided to determine such. Parents failed to put forth sufficient evidence to warrant a reversal of District's decision at the manifestation determination meeting.

### **Conclusion**

The results of the testimony and evidence warrant a finding for the District. Specifically, Parents failed to introduce sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between May 17, 2023, to June 28, 2023.

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.

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<sup>58</sup> Parents' exhibits, pg. 16.

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

10/25/2022

DATE