

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

**NORTH LITTLE ROCK  
SCHOOL DISTRICT**

**PETITIONER**

**VS.**

**NO. EH-22-22**

**XXXXXXXXXXXXXXXXXX**

**RESPONDENT**

**HEARING OFFICERS FINAL DECISION AND ORDER**

**Issue Presented:**

Whether the North Little Rock 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 the Student is substantially likely to result in further injury to District staff, the Student or to others?

**Procedural History:**

On December 9, 2021, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate a due process hearing from XXXXXXXXXXXX (hereinafter referred to as "Parents" or "Respondents"), the parents and legal guardians of XXXXXX (hereinafter referred to as "Student") against the North Little Rock School District (hereinafter referred to as "District" or "Petitioner").<sup>1</sup>

On December 17, 2021, the District filed an expedited due process hearing request seeking an order to change Student's placement to an appropriate interim alternative educational setting for not more than forty-five days alleging maintaining the current placement of the Student is substantially likely to result in further injury to District staff, the Student or others. 20 U.S.C. §1415 (k).<sup>2</sup>

On December 30, 2021, Parents filed a Motion to Dismiss the Expedited Hearing stating that it was improper because 20 U.S.C. §1415 (k) requires a disciplinary issue that gave rise to a change in placement or a manifestation determination in which the parties disagree.

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<sup>1</sup> Parent's Due Process Request is H-22-20.

<sup>2</sup> See Hearing officer file District request for Expedited hearing EH-22-22.

In response, the Department assigned both H-22-20 (Parent's request for Due Process Hearing) and EH-22-22, (District request for an Expedited Due Process Hearing) to this impartial hearing officer. Thereafter, a prehearing conference was scheduled for January 4, 2022, and the Hearing was scheduled January 5-6, 2022.<sup>3</sup>

A prehearing conference was held by Zoom on January 4, 2022. 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 expedited due process hearing and the witnesses and evidence necessary to address the same.<sup>4</sup> Additionally, the parties provided arguments regarding the Parent's Motion to Dismiss.<sup>5</sup>

On January 4, 2022, this Hearing Officer denied Parent's Motion to Dismiss finding that the District's Expedited Due Process request, on its face, meets the requirements of an expedited due process request under 20 U.S.C. 1415(k)(3). Whether Petitioner followed the appropriate procedures prior to the filing of the Expedited Due Process request is an issue to be decided after reviewing documentary evidence and hearing witness testimony. <sup>6</sup>

Thereafter the Due Process hearing in this matter began as scheduled on January 5, 2022. Testimony was heard on January 5-6, 2022. The Hearing was completed on January 6, 2022.

Present for the Hearing was Theresa Caldwell, attorney for Petitioners, Cody Kees, Attorney for the District, Audie Alumbaugh, advocate, XXXXX, Parent, XXXXXXXXXXXX, Parent, Leann Alexander, Executive Director of Special Services, and Leigh Anna Askins, Secondary Education Coordinator for Special Education for the District.

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<sup>3</sup> See Scheduling order, Due process file.

<sup>4</sup> Pre-Hearing conference transcript.

<sup>5</sup> Id.

<sup>6</sup> See Order Denying Motion to Dismiss, Due Process file.

The following witnesses testified in this matter: Leann Alexander, Bonnie Guthrie, XXXXXXXXXX, Claudia Moran, and Tina Santoro.<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 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 a 14-year-old boy in the North Little Rock School District. Student is in the 7<sup>th</sup> grade for the 2021-2022 school year.<sup>9</sup>
2. Student is identified as a student with a disability in need of special education services. Student has a diagnosis of Autism.<sup>10</sup>
3. Academically Student's abilities fall within the very low range. Adaptive behavior rating scales indicate scores in the extremely low range in the areas of conceptual, practical and social domains.<sup>11</sup>
4. Student is in a classroom by himself with a teacher and a paraprofessional.<sup>12</sup>

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<sup>7</sup> See Hearing Transcripts Vol. I-II.

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

<sup>9</sup> Parent's Exhibits, pg. 1.

<sup>10</sup> Parent's Exhibits, pg. 5

<sup>11</sup> District's Exhibits, pg. 130.

<sup>12</sup> Parent's Exhibits, pg. 8.

5. Student receives Speech Therapy, Occupational Therapy and transportation services.<sup>13</sup>
6. On August 30, 2021, Student became aggressive during an Occupational Therapy Session. During the incident Student was hitting and kicking staff and walls, pulled hair and threw objects at staff. While hitting the occupational therapist, she put her hand up and Student's hand hit the pinky of the therapist's right hand which resulted in a proximal phalanx of the little finger.<sup>14</sup>
7. September 1, 2021, Student was hitting staff and dad was called to pick student up.<sup>15</sup>
8. September 15, 2021, On the way to the bus, student was attacking staff, laid on the sidewalk and kicked the bus door breaking the bus door glass.<sup>16</sup>
9. September 17, 2021, Student was throwing objects in the classroom. Student threw an object at the Paraprofessional, causing injury.<sup>17</sup>
10. November 15, 2021, Student hit teacher in the back of the head while the teacher was adjusting his pants.<sup>18</sup>
11. November 16, 2021, Student went into the lunchroom bathroom and took off all his clothes. The Student then began to assault staff who were trying to get student to put his clothes back on. The Speech pathologist was called over and she was able to get the student to put his clothes back on and go to therapy.<sup>19</sup>

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<sup>13</sup> Id.

<sup>14</sup> District Exhibits, pg. 192. Transcripts Vol. 1, pgs. 264-265.

<sup>15</sup> District Exhibits, pg. 232,

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

12. On November 19, 2021, the District sent a Notice of Conference to the Parent stating that an I.E.P. meeting would be held on December 3, 2021, to review/revise the I.E.P. and change of placement and FAPE.<sup>20</sup>
13. On November 19, 2021, the District had a phone call with mom in which the District notified mom that they would be bringing their legal counsel to the December 3, 2021 meeting and that she might like to have legal counsel as well.<sup>21</sup>
14. On November 21, 2021, Parent emailed the District, letting them know that she needed to change the meeting on December 3, 2021, because she hadn't had enough time to acquire legal counsel.<sup>22</sup>
15. On November 30, 2021, The District sent a notice of conference letting Parents know that the I.E.P. meeting would now be held on December 14, 2021.<sup>23</sup>
16. On November 30, 2021, Student threw chairs at staff in his room. Student also destroyed light fixtures and ceiling tiles in the classroom.<sup>24</sup>
17. On December 9, 2021, Parents filed a request for a Due Process Hearing claiming the District denied Student FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years.
18. On December 17, 2021, The District filed for an Expedited hearing seeking to remove the student to an appropriate alternative educational setting for not more than 45 days alleging that maintaining Student in his current placement was a danger to the Student, Staff or others.<sup>25</sup>

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<sup>20</sup> District's Exhibits, pg. 225.

<sup>21</sup> Parent's Exhibits, pg. 261.

<sup>22</sup> Id.

<sup>23</sup> Parent's exhibits, pgs. 262-263.

<sup>24</sup> Id.

<sup>25</sup> See Hearing File Expedited Due Process Request.

## **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 claim, 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.

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 issue to be decided.

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.<sup>26</sup>

### **Applicable Legal Principles**

In the IDEA, Congress established procedural safeguards to ensure that individuals with disabilities have the opportunity to obtain a Free Appropriate Public Education (FAPE). 20 U.S.C. 1415(a). "The primary tool for implementing the aims of the IDEA is the I.E.P., which tailors the statutorily required "free appropriate public education" to each child's unique needs."

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<sup>26</sup> See Hearing File post hearing briefs

*J.B. ex rel. Bailey v. Avilla R-XIII sch. Dist.*, 721 F.3d 588, 592 (8<sup>th</sup> Cir. 2013) (quoting *Honig*, 484 U.S. at 311). The I.E.P. is developed to "meet the child's needs that result from the child's disability in order to enable the child to be involved in and make progress in the general educational curriculum." 20 U.S.C. §1414(d)(1)(A)(II)(aa).

The IDEA is intended to assure individualized attention to the needs of students with a disabilities. Such children have the right to an education in the least restrictive environment and, to the maximum extent possible, they must be "mainstreamed" with their non-disabled peers. *Honig v. Doe*, 484 U.S. 305, 311.

Some safeguards of the IDEA include "an opportunity to present complaints concerning any aspect of FAPE; and opportunity for 'an impartial due process hearing' with respect to any such complaints." *Id.* at 312 (quoting 20 U.S.C. 1415(b)(1),(2)). Along with procedural protections, the IDEA also includes the "stay put" provision, which provides that, during an administrative or judicial proceeding, the child shall remain in his "current educational placement." 20 U.S.C. §1415(j).

The congressional intent of the stay-put provision is to ensure that public schools do not remove handicapped children over parents' objections pending completion of legal proceedings. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985). The stay-put provision creates a strong presumption that students remain in their current educational placements while their parents and school districts sort out the legal ramifications. See *Honig v. Does*, 484 U.S. 305, 328.

Under controlling precedent, courts have limited authority to afford relief from the stay-put provision during the pendency of proceedings. In *Honig*, the Supreme Court declined to find an implied exception to the stay-put provision for allegedly "dangerous students." *Id.* at 323.



However, the Court found authority for a school board to seek relief "in those cases in which the parents of a truly dangerous child adamantly refuse to permit a change in placement..." *Id.* at 326. According to the Court, the authority for such relief, which includes injunctive relief, is found in the IDEA, as well as the equitable powers of the court. *Id.* at 327. The Court further opined that nothing in the IDEA "operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled student from attending school." *Id.*

In *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8<sup>th</sup> Cir. 1994), the Eighth Circuit Court of Appeals determined that courts could exercise their equitable power to remove an allegedly dangerous student from current placement. Importantly, in *light*, the court emphasized that the interim placement sought by the school district for a student should be maintained only until the student's long-term placement could be finalized through the IDEA's administrative review process. See *id.* at 1230-31.

Further, in *M.M. v. Special School Dist.*, 512 F.3d 455 (8<sup>th</sup> Cir. 2008), the court stated:

"When a parent and the school district's educational professionals agree that a child with a behavioral disability needs a change of placement but cannot agree on an appropriate alternative, the school district must maintain the current, admittedly inappropriate placement under the stay-put I.E.P. until the due process proceedings have concluded, unless the parties agree to an interim alternative placement. See *CP v. Leon County Sch. Bd. Fla.*, 483 F.3d 1151, 1157-58 (11<sup>th</sup> Cir. 2007)."

However, the stay-put mandate is not without limits. The provision carves out an express exception for proceedings "provided [for] in subsection (k)(4)," which governs disciplinary

proceedings related to certain forms of student misconduct. 20 U.S.C. § 1415(j) ; *see id.* § 1415(k)(4). Subsection (k)—titled "Placement in alternative educational setting"—gives schools limited authority to unilaterally suspend students with disabilities for such misconduct. *See* 20 U.S.C. § 1415(k). When that happens, the statute authorizes the school to place the student in 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)." *Id.* § 1415(k)(1)(B). That placement decision is to be made on a "case-by-case basis," taking into account each child's "unique circumstances." *Id.* § 1415(k)(1)(A).

Within the statutorily prescribed ten-day window, the school must determine whether the conduct was a "manifestation of the child's disability." 20 U.S.C. § 1415(k)(1)(E)(ii). If it was, then the default rule is that the child must be returned "to the placement from which [he or she] was removed." *Id.* § 1415(k)(1)(F)(iii) ; 34 C.F.R. § 300.530(f)(2). If, on the other hand, the misconduct was not tied to the student's disability, then the school can pursue the same disciplinary procedures that "would be applied to children without disabilities[.]" 20 U.S.C. § 1415(k)(1)(C).

Even for disability-related misconduct, the presumption favoring return of the student to school gives way when the misconduct involves weapons, drugs, or the infliction of "serious bodily injury upon another." 20 U.S.C. § 1415(k)(1)(G) ; *id.* § 1415(k)(7) In those "special circumstances," the IDEA authorizes the school to "remove [the] student to an interim alternative educational setting for not more than 45 school days." *Id.* § 1415(k)(1)(G).

When misconduct covered by Section 1415(k) occurs, parents may challenge either the "placement [or] manifestation determination[s]" by requesting a due process

hearing. 20 U.S.C. § 1415(k)(3) (A). Local educational agencies may do the same if they "believe that maintaining the current placement of the child is substantially likely to result in injury to the child or to others." *Id*

20 U.S. C. 1415(k) 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 I.E.P.; 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 I.E.P. 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 I.E.P., 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 I.E.P.

(ii) Manifestation

If the local educational agency, the Parent, and relevant members of the I.E.P. 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 I.E.P. Team make the determination that the conduct was a manifestation of the child's disability, the I.E.P. 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 I.E.P. 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.

(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.

The Eighth Circuit found in *Northshore Mining Co. v. Sec'y of Labor*, that "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (applying established rules of statutory construction to discern the plain language of the statute at issue). Thus, while not dispositive, the placement of a provision in a particular subchapter, for example, suggests that its terms should be interpreted consistently with its context. *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46–52, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008)." *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013).

## **DISCUSSION**

In the present case, the Stay Put protection was activated on December 9, 2021, when the Parent's filed their Due Process hearing request. This requires the District to maintain Student's current placement until Parent's Due Process Hearing is completed and a decision rendered unless the Parents and District agree to an alternative placement.

There was no evidence presented at the Expedited Hearing that there was an I.E.P. meeting held in which a disagreement occurred regarding the placement of Student, that the Student had been removed from his current placement for 10 days or that a manifestation

determination was conducted at any time prior to the filing of the expedited hearing request. There was also no evidence presented that the District had taken any disciplinary action against Student. Additionally, 20 U.S.C. §1415(k)(H) requires that 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. No evidence was presented that the District provided the notice required under U.S.C. §1415(k)(H).

The evidence showed that on November 19, 2021, and November 30, 2021, the District attempted to schedule an I.E.P. meeting to review/revise the I.E.P. and discuss placement options.<sup>27</sup> Evidence and testimony at the Expedited Due Process hearing confirmed an I.E.P. meeting was never held. Leann Alexander, executive director of special services, testified that the I.E.P. meeting they were trying to schedule was to consider changing Student's placement but that a decision on Student's placement had not been made.<sup>28</sup>

An expedited hearing under 20 U.S.C. §1415(k)(3) Appeal, as stated above is allowed in certain circumstances. 20 U.S.C. §1415(k)(3), requires a disagreement that occurs at an I.E.P. meeting between the Parents and the District regarding placement or a dispute regarding a manifestation determination or disciplinary action. In the present case we have none of these. In essence, the District has nothing to appeal from, and thus this hearing officer need not reach the merits of this case.

There is nothing in IDEA that allows the District to use 20 U.S.C. §1415(k)(3) and 34 C.F.R. §300.532 to eviscerate its stay put obligations. As discussed above, should the District believe maintaining Student in his current placement during Parents' pending due process hearing is dangerous, IDEA has a mechanism by which the District can address its concerns.

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<sup>27</sup> Parent's Exhibits, pgs. 261-263

<sup>28</sup> Transcript Vol. I, pgs. 32-33.

### **Conclusion**

Having considered the District's allegations, and in light of the findings of fact and conclusion of law above, this Hearing Officer concludes that the District failed to establish any of the prerequisites required under 20 U.S.C. §1415(k)(3) to warrant a decision on the merits of their expedited due process hearing request. Specifically, the District failed to prove that there was an IEP meeting in which there was a disagreement regarding Student's placement, that there was a disagreement regarding a manifestation determination or that there was any disciplinary action taken against student giving rise to a disagreement with the Parents, and thereby giving the District the right to seek an expedited hearing under 20 U.S.C. §1415(k)(3). Therefore, the District's request is denied.

### **ORDER**

The results of the testimony and evidence warrant a finding for the Parents. Specifically, District failed to introduce sufficient evidence in the record to establish a change in placement pursuant to 20 U.S.C. §1415(k)(3). Thus, the District's request to remove Student to an appropriate interim alternative educational placement is denied.

If Petitioners 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 A.D.E. 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

1/21/2022

DATE