
UTAH STATE BOARD OF EDUCATION
SPECIAL EDUCATION SERVICES
BEFORE THE DUE PROCESS HEARING OFFICER

[STUDENT], a student, by and through
his parent, [PARENT],
Petitioners,

vs.

EARLY LIGHT ACADEMY,
Respondent

DECISION AND ORDER

Exp. DPH 2223-10

(Hearing Officer: Wallace J. Calder)

APPEARANCES

[Parent] appeared pro se on behalf of Petitioners [Student] and [Parent] ("Petitioners"). Erin Preston, Esq., Utah Education Law, appeared on behalf of Respondent Early Light Academy ("Respondent"). This matter was assigned to the undersigned Due Process Hearing Officer, Wallace J. Calder ("Hearing Officer").

PROCEDURAL HISTORY

The student who is the subject of this due process hearing, [Student] (the "Student" or "[Student]") is a [REDACTED] year old boy who attended [REDACTED] at Respondent's school (the "School" or "ELA") during the 2022-2023 school year. Petitioners submitted a written Request for an Expedited Due Process Hearing to the Utah State Office of Education ("USOE") dated May 24, 2023, which was received and

entered of record on May 24, 2023. Petitioners alleged violations of the Individuals With Disabilities Education Act, 20 U.S.C.A. §1400 et seq. (“IDEA”), among other claims. The Hearing Officer was formally appointed on May 24, 2023. On May 25, 2023, the Hearing Officer filed an initial Minute Entry, which is copied to all parties, which included initial deadlines and instructions for communicating with the Hearing Officer.

The parties met for two Resolution Meetings on May 31, 2023, and June 8, 2023, which did not result in a settlement. However, the parties agreed to engage in mediation, which was approved by the Hearing Officer. A mediator was appointed on June 13, 2023, and the parties engaged in mediation thereafter until an impasse was declared by the mediator on June 28, 2023. On June 29, 2023, Petitioner sent an email to all parties stating that she would be unavailable from that date until July 15, 2023, with no access to email through July 8 and limited access after that. On July 5, 2023, the Hearing Officer sent an email to all parties to schedule a pre-hearing conference call during the week of July 8 in order to schedule the hearing later in July. The Petitioner was asked to respond to the Hearing Officer’s request for scheduling dates as soon as possible. Both parties responded on July 10 and indicated they could both be available that week, both parties eventually agreed to a pre-hearing telephone conference on July 17.

On July 11, 2023, the Petitioner sent an ex parte email communication to the Hearing Officer, contrary to the previous order of the Hearing Officer. The Petitioner stated that she had concerns about the time and energy this matter was taking, and stated: “To ask me to take off work, pay for attorneys, spend hours and days compiling information when I have already sent the emails from the school as proof, when I don’t even have a fair shake with the hearing, isn’t sitting well with me.” On July 12, 2023, the Hearing Officer sent an email to the Petitioner copied to all parties, which again

instructed the Petitioner not to make any further ex-parte communications. The Petitioner was further reminded that she had filed the due process complaint, and that both parties would be provided an opportunity to present documents and testimony to the Hearing Officer at a hearing. The Petitioner was further informed that the decision whether to move forward to the hearing was the Petitioner's, but the process that would be followed is set forth in the IDEA and state Rules under the direction of the Hearing Officer. The Petitioner replied on July 13 and indicated that she had already filed a state complaint, and asked what the expectations were for the hearing. The Hearing Officer responded and described in detail how a due process hearing is conducted and how that differs from a state complaint. The Petitioner was again asked to confirm a date and time for a pre-hearing conference. Petitioner responded and stated she could meet on July 18 at 4:00 p.m., to which the Respondent also agreed.

On July 17, 2023, the Hearing Officer emailed to the parties a two-page agenda for the pre-hearing conference call scheduled for the next day at 4:00 p.m. On the day of the scheduled pre-hearing conference, Petitioner sent a series of emails indicating that for various reasons, including that she was hiring an attorney, she could not attend the meeting. The pre-hearing conference was thereafter re-scheduled to July 31, 2023. The Petitioner later informed the parties that her participation at the pre-hearing conference would "be minimal." At the pre-hearing conference, among other things, the issues for Petitioner and Respondent were discussed, the one-day hearing was scheduled for August 18, the five-business day deadline for documents and witness lists was set for August 11, and other deadlines for pre-hearing motions and briefs were agreed to. No attorney has entered an appearance in this matter on behalf of Petitioners. The Hearing Officer's Pre-Hearing Order was emailed to the parties on August 2.

On August 2, 2023, Respondent requested several changes to the Pre-Hearing Order, which the Hearing Officer agreed to include. On August 3, 2023, Petitioner sent an email which described a whole host of personal issues that were making it difficult for her to comply with the Pre-Hearing Order deadlines, including: meeting with an attorney, cleaning the apartment she just moved in to, finding an attorney to issue a subpoena in another case, working full-time, and dealing with a housing discrimination case, all of which were “putting unnecessary pressure” on Petitioner. In addition, Petitioner stated that someone at the “Utah Courts” informed her that it would take her 14 days to subpoena some unidentified documents, so the August 11 timeline for providing documents would not work. On August 4, 2023, in response to Petitioner’s August 3 email, the Hearing Officer sent an email to the parties indicating that after several confusing emails from Petitioner, a discussion was needed regarding pushing back the hearing date to the week of August 21 or August 28. Petitioner sent an additional email on August 5 stating additional conflicts with the hearing process. On August 7, 2023, Petitioner responded to the Hearing Officer’s August 3 email stating “I have not requested to change the dates. . . This must be resolved before school starts. . . I do not agree with a stay.” In response to this communication from Petitioner, the Hearing Officer informed the parties that the dates set forth in the Pre-Hearing Order regarding the five-business day deadline of August 11 for submitting documents and witness lists, and the hearing date of August 18, would continue as ordered, Respondent’s requested issue would be included and Respondent was granted leave to file a pre-hearing motion, which Respondent later declined to file. Petitioner sent an email stating that she would not have any documents because she had to get subpoenas, her Internet was not working, she was experiencing bad chest pains and could not really deal with the stress and may end up in the emergency room.

On August 8, 2023, the Hearing Officer filed the Amended Pre-Hearing Order in this matter and emailed it to all parties. Respondent replied and informed the Hearing Officer that Respondent was ready to go forward, and Petitioner replied and stated that she was available as well. However, petitioner stated that she did not have enough time to collect documents and get her witnesses together, and further stated as follows: "I will also have to work while in the hearing. I do not have any days. I'll see what meetings I can move but work is my priority and I will have to pause for important meetings." In a second email Petitioner asked if "we need a whole day to talk about suspensions? Petitioner further stated that she would not have her paperwork by the 11th and asked, "why are we meeting and wasting time?" Petitioner further stated as follows: "I'm honestly not in the mood for this. I'm not willing to give up pay for this, and I have no chance of winning with the deck stacked against me like this. You are asking me to break a law and it's not right." In six additional emails on August 8 and August 9, Petitioner continued arguing her case, accusing Respondent of lying and asking why a hearing was needed.

On August 11, 2023, Respondent's counsel submitted to Petitioner and the Hearing Officer Respondent's proposed documents and witness lists, which were acknowledged by Petitioner. In a further series of emails Petitioner continued to question the need for a full-day hearing and continued to argue her case, while at the same time indicating she did not have the mental or physical stamina to participate in the hearing. The Hearing Officer responded to the complaints of the Petitioner as follows:

As you are aware from the original Pre-Hearing Order and my Amended Pre-Hearing Order, the five-business day deadline for providing documents and witness lists to the opposing party is today. We are still scheduled for the due process hearing on the 18th. I don't think we will be able to get through the hearing in less than a half day and probably a full day. This is what we discussed

and agreed to at the pre-hearing conference. I realize that you are expressing concerns with your work schedule and other issues, but you have previously clearly stated that you do not want to delay this and you want to move forward with this process. Everyone involved in this process is committed to spending the time necessary to prepare for and participate at the hearing.

You will be disadvantaging yourself significantly if you are working at the same time this hearing is going forward. You will need to be present and actively participating in the presentation of your evidence that supports your claims. If you are not present during the presentation of the school's evidence in opposition to your claims and supporting its claim, you will not be able to ask questions of the witnesses. That may not be helpful to your case. Under the federal regulations and Rules, I do not have any discretion regarding the ultimate deadline for conducting this expedited due process hearing and my written decision. All parties are required to comply with the current hearing order deadlines, and we will proceed to hearing on all issues on the 18th. Please prepare accordingly.

In response, Petitioner sent an email arguing that the Hearing Officer is biased and has a conflict of interest because the Hearing Officer is paid by the USBE. Petitioner stated she wants to move forward, but then stated that she was "not providing or doing anything more because I have to protect my mental and physical health. I have the legal right to do so." In an effort to further describe the due process hearing system and Petitioner's need to participate, and the Hearing Officer's role in the process, the Hearing Officer sent the following email to Petitioner:

The reason for the due process hearing system under the IDEA is to provide an opportunity for a person filing a complaint to provide testimony and evidence supporting their claims, and to allow the opposing party an opportunity to provide testimony and evidence responding to those claims, and have a decision based upon the law and the facts provided to the Hearing Officer. As the Hearing Officer I am a neutral party as I do not have a stake in the outcome of the hearing other than that is fair to both parties and complies with the procedural requirements. I may be paid by the USBE for my services, but the USBE does not dictate an outcome or tell me how to conduct the hearing. It is as fair to you as it is to the school, and that is the intent of the IDEA.

At this point we are moving forward with the hearing. It is certainly your choice as to what level of participation you decide to have. It is also your choice as to whether you decide to continue with your complaint to the hearing or to withdraw your request for a due process hearing. Please let me know what you intend to do at this point. Thank you.

Petitioner responded that she was “not trying to cancel the hearing,” but that the hearing “should be 2 (sic) hour meeting to discuss solutions.”

On August 14, 2023, Petitioner sent a very long email to all parties again arguing her case in the email and indicating the hearing should take no more than two hours. Petitioner further alleged many unfounded and unsupported procedural flaws with the hearing process. Petitioner sent another email on August 15, 2023, and alleged that she read the “hearing officer manual” which shows that the Hearing Officer’s Pre-Hearing Order contains various lies regarding the burden of proof and the Hearing Officer’s jurisdiction in this matter. The Hearing Officer provided two responses to Petitioner’s allegations. In an email sent on August 15, 2023, the Hearing Officer responded as follows:

We are moving forward with the hearing on Friday, beginning at 9:00 a.m. in the conference room at the offices of the Utah State Board of Education, as stated in the Pre-Hearing Order. Any party or witness who has been authorized to appear remotely needs to provide a current email address to receive a Zoom invitation. Each party is entitled, and expected, to present their evidence and arguments at the hearing. The hearing will not be limited to two hours, but will include the entire day, if needed by the parties. All documents must be admitted by the Hearing Officer into the record and all individuals who will be testifying will do so under oath administered by the court reporter. I look forward to receiving your proposed exhibits and witness lists that were exchanged in compliance with the five-business day rule deadline. Please work together to stipulate to as many of the documents as possible so we can limit the time required to discuss the admission of the documents at the hearing.

[Parent], in response to your question regarding the burden of proof and moving forward, please refer to the U.S. Supreme Court case of *Schaffer v. Weast*,

546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has also held that “the burden of proof in such a challenge rests with the party claiming a deficiency in the school district’s efforts.” *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1148 (10th Cir. 2008). These cases are the precedents with respect to this issue. In addition, you have referenced information in your emails from a 2006 Hearing Officer Manual from the Bureau of Indian Education, a federal agency, not the state of Utah.

The hearing on Friday will deal with the specific issues of the Petitioner and the issue from Respondent identified in the Pre-Hearing Order. Please prepare accordingly.

In response, Petitioner sent another series of emails indicating that Petitioner would only attend two hours, and then that she would not attend the hearing without a new hearing officer.

Second, the Hearing Officer treated the Petitioner’s allegations of bias and lack of impartiality as a motion for the Hearing Officer to recuse himself from this hearing. After careful consideration of all of Petitioner’s allegations of bias and lack of impartiality by the Hearing Officer, the Hearing Officer filed a Minute Entry denying Petitioner’s motion. The denial of Petitioner’s motion is based upon the fact that the Hearing Officer does not have a personal relationship with Petitioner or Respondent, is not an employee of the State or the Respondent and does not have a personal or professional interest in the outcome of this hearing. Moreover, Petitioner has not provided, nor does there exist, any actual facts or evidence of a bias or a lack of impartiality by the Hearing Officer. “ [A] substantial showing of personal bias is required to disqualify the hearing officer or tribunal in order to obtain a ruling that the hearing is unfair.” *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1977), cert denied, 434 U.S. 834 (1977). The Petitioner has further alleged that the Hearing Officer is biased because he was chosen, and is paid, by the USBE. However, it is not a violation of IDEA or due process for the State Educational Agency to choose the hearing officer without

any input from parents. *L.C. v. Utah State Board of Education*, 188 F. Supp. 2d 1330, 1338 (D. Utah 2002).

Upon receipt of the Hearing Officer's August 16 Minute Entry denying her request for recusal, Petitioner sent another series of emails clearly stating that she would not attend or participate in the hearing. On August 17, 2023, the Hearing Officer sent an email to Petitioner further explaining the Hearing process and the need for Petitioner's participation as follows:

Each party in a due process hearing must make their own determination as to what evidence to present and request that it be included in the record at the hearing. However, all such documentation and witness lists must be relevant and comply with five business day deadline for submission to the opposing party. With respect to any documentary evidence that you previously provided to the school within the time required, you are entitled to request that it be submitted into the record at the hearing. Because this is a hearing and not a complaint investigation, any witnesses that you wish to testify must appear at the hearing and be sworn in prior to providing their testimony. All witnesses of both parties at the hearing will be sworn in by the court reporter.

It is also important to note that Petitioner did not request an extension of the hearing date, and did not withdraw her Request for a Due Process Hearing.

On August 17, 2023, Respondent filed its Pre-Hearing Brief, which included a Motion for Judgment as a Matter of Law. The Hearing Officer filed a Minute Entry on August 17, 2023, denying Respondent's Motion for Judgment based on the fact that the motion was not timely filed and would not provide Petitioner with a reasonable opportunity to respond prior to the hearing scheduled for the following day.

On August 18, 2023, an impartial due process hearing was conducted at the offices of the USBE in Salt Lake City, Utah, in this matter. The hearing was held in accordance with the procedural requirements of the IDEA and its implementing regulations found at 34 CFR §300.507-515 and 532, and the USBE SpEd Rules IV.G-N

and V, (November, 2022). Petitioner did not appear at the hearing in person or virtually, and did not submit any documents or provide any witness testimony. Respondent called four witnesses and submitted 48 exhibits containing 200 pages. The hearing transcript is one volume, totaling 212 pages, and includes an index of exhibits.

On August 25, 2023, Respondent's counsel filed Respondent's Closing Argument and Motion for Judgment as a Matter of Law, which includes proposed Findings of Fact. Petitioner did not file a closing brief by the deadline of Friday, August 25, 2023.

BURDEN OF PROOF

Petitioners, as the party challenging the Respondent's determination or implementation of special education and related services, has the burden of proof by a preponderance of the evidence for all issues raised by Petitioners in this matter. *Schaffer v. Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has held that "the burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts." *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1148 (10th Cir. 2008). The Hearing Officer informed Petitioners at the pre-hearing conference that Petitioners would have the burden of proof and the duty to present their evidence first at the hearing. Respondent has the burden of proof by a preponderance of the evidence for the issue raised by Respondent in this matter. *Id.*

ISSUES

The following issues raised by Petitioner in Petitioner's Complaint were set forth in the Amended Pre-Hearing Order, but were not presented to the Hearing Officer at the hearing for decision because Petitioner failed to appear at the hearing personally or through counsel:

- 1) Whether the Student is a student with a disability and is in need of special education and related services?
- 2) Whether the Student is entitled to the disciplinary protections for a student with a disability set forth in 34 CFR §300.530 and SpEd Rules V?
- 3) Whether the Student is entitled to the protections for children not determined eligible for special education and related services set forth in 34 CFR §300.534 and SpEd Rules V,J;
- 4) Whether the Student was removed by Respondent from his current placement for more than 10 consecutive school days, or was subjected to a series of removals that constitute a pattern for more than 10 consecutive school days, during the 2022-2023 school year without conducting a manifestation determination review in violation of 34 CFR §300.530 and SpEd Rules V; and
- 5) Whether the alleged disciplinary removals of the Student by Respondent during the 2022-2023 school year violated the Student's right to a Free Appropriate Public Education (FAPE).

The following issue was presented by Respondent to the Hearing Officer at the hearing for decision:

- 1) Whether the Petitioner ever gave consent, or if given, withdrew consent for services as set forth in 34 CFR § 300.300 and SpEd Rules II.C.

FINDINGS OF FACT

After considering all the evidence received at the hearing in the form of testimony and exhibits, as well as the oral and written arguments of Respondent's counsel, the Hearing Officer's Findings of Fact are as follows:

1. The student in this matter is [Student], a [REDACTED] year-old boy who, during the times in question, attended a [REDACTED] class at the School operated by Respondent. (Petitioner's Complaint; Testimony of [Principal], Tr. P. 13).
2. Petitioner, [Parent], is [Student]'s mother, and [Student] lives with her. (Petitioner's Complaint).
3. The Student began attending the School on August 23, 2022 (Testimony of [Principal], Tr. p. 13..)
4. Within the first three days of school the Student became frustrated with other students and "put hands on them or threw toys or classroom objects at them." (Testimony of [Principal], Tr. p. 14.)
5. The School uses a system called ASPIRE to track student behaviors that are serious enough to warrant interventions or additional disciplinary process. (Testimony of [Principal], Tr. p. 15; Exhibit 6, ELA-R-1728.)
6. The first behavior incident of Student recorded in ASPIRE occurred on August 31, 2022. The Student dug his fingernails into another student's arm until it bled, and later threw a chair and other objects at students. Administration had a conference with Petitioner to discuss the behaviors, and Petitioner checked the Student out early. (Testimony of [Principal], Tr. p. 16; Exhibit 6, ELA-R-1728.)
7. Between August 31, 2022, and May 23, 2023, the Student was involved in 36 behavior incidents that were recorded in ASPIRE. (Exhibit 6, ELA-R-1724-1728.)
8. The School's Behavior Specialist observed the Student in the classroom and noted that when the Student was escalated the Student exhibited negative behaviors approximately every 2 to 4 minutes. (Testimony of [Behavior Specialist], Tr. p. 69.)

9. On three occasions during the 2022-2023 school year, the Student drew pictures, or made statements, regarding using a gun to shoot other students and the principal. (Testimony of [Principal], Tr. p. 29; Exhibits 6, 7 and 8.)
10. In early September, 2022, Petitioner and the Student's teacher requested an Occupational Therapy (OT) screening to look at fine motor skills and behaviors around writing. This screening was completed by an Occupational Therapist on September 15, 2022. The OT noted that the Student had difficulty with following directions, participation in class activities, impulsivity, and aggressive behaviors. The OT indicated that the Student may benefit from occupational therapy testing if attention and participation issues continued. (Exhibit 26.)
11. The School began providing interventions for the Student which included building trust, morning check ins, reward charts, setting goals around safe bodies, use of fidget toys, access to breaks, and zones of regulation. School Administration spoke to the Petitioner about conducting a special education evaluation of Student. (Testimony of [Principal]; Testimony of [Behavior Specialist]; Testimony of [Special Education Director].)
12. On September 27, 2022, the School's Special Education Director emailed to the Petitioner a Consent to evaluate the Student to determine special education eligibility, which included academic and cognitive testing requested by Petitioner. Petitioner did not sign this consent because she requested a functional behavioral assessment (FBA) be added to the evaluation, which the School agreed with. (Testimony of [Special Education Director], Tr. pp. 118-119.)
13. On October 3, 2022, the Special Education Director prepared a new consent to evaluate which included all of the previously identified assessments plus an FBA and emailed it to Petitioner. This consent was not signed by Petitioner. (Testimony of [Special Education Director], Tr. p. 119.)

14. On October 5, 2022, the Student received a 2-hour in-school suspension (ISS) for kicking and digging his nails into his teacher. This was the Student's first suspension of the 2022-2023 school year. Student was given a second two-hour ISS on the same day, which was served on October 6, 2022 (Testimony of [Principal], Tr. p. 20; Exhibit 3.)
15. On October 6, 2022, the Student hit the Special Education Director in the head with a metal water bottle and received a one day out-of-school suspension (OSS), which was served on October 7, 2022. (Testimony of [Special Education Director], Tr. p. 148)
16. The School determined that it would be important to include adaptive behavior testing, as well as a medical and developmental history, for the Student. This was added to the Consent form and emailed to the Petitioner on October 10, 2022. This Consent was not signed by Petitioner because she did not want to complete a medical and developmental history. School staff explained to Petitioner the importance of the medical and developmental history as they relate to many eligibility's under the IDEA that require such information. Petitioner consented to completing a form with her doctor. (Testimony of [Special Education Director], Tr. pp. 119-120.)
17. On October 10, 2022, School staff, and the Petitioner, reviewed and signed a general education Behavior Intervention Plan (BIP) for the Student. The three behaviors noted in the BIP were physical aggression, not following directions, and emotional regulation. (Testimony of [Special Education Director], Tr. p. 121; Testimony of [Executive Director], Tr. p. 163; Exhibit 10.)
18. On October 10, 2022, the student eloped from class, and afterward assaulted a student and a counselor, which required a classroom clear. The Student was

- given a two-hour ISS on October 10th, and a one day OSS served on October 11th. (Testimony of [Principal], Tr. p. 19; Exhibits 1, 3 and 11.)
19. On October 11, 2022, the School removed the medical and developmental history from the Consent, and the fourth version was emailed to Petitioner. (Testimony of [Special Education Director], Tr. p. 120.)
 20. On October 11, 2022, the Petitioner sent an email to School staff stating, among other things, that the BIP was “null and void.” (Petitioner email dated October 11, 2022, Exhibit 11.)
 21. On October 13, 2022, School staff and the Petitioner and the Student’s psychologist met, and the Petitioner signed the Consent to evaluate the Student. (Testimony of [Special Education Director], Tr. p. 121.)
 22. After the Consent was received from Petitioner, the Special Education Director notified the OT, Speech Language Pathologist, and School Psychologist regarding the requested evaluations. The various evaluators conducted academic, cognitive, Adaptive, Behavior, Speech/Language, and OT, which was completed on December 7, 2022. (Testimony of [Special Education Director], Tr. pp. 121-130; Exhibits 26-41.)
 23. On November 8, 2022, Petitioner filed a State Complaint against the School alleging Child Find violations, disciplinary protections outlined in SpEd. Rules V.J, and denial of FAPE. No violations were found by the complaint investigator in the January 6, 2023, report. (Testimony of [Executive Director], Tr. p. 163; Exhibit 2.)
 24. On November 22, 2022, the school hired a Behavior Specialist, who spent approximately 99% of her time working with the Student. At that time, the Student was the highest behavior concern for the School among all of the students at the School. (Testimony of [Behavior Specialist], Tr. p. 74.)

25. School records indicate that the Student did not receive any ISS or OSS regarding any behavior incidents through the end of 2022. School ended for the holidays on December 21, 2022. (Exhibit 3.)
26. On January 11, 2023, the Student's Eligibility Determination Team (EDT), which included Petitioner, met to review the Student's evaluation results and determine eligibility for the Student. (Testimony of [Special Education Director], Tr. p. 131; Exhibit 24.)
27. The special education eligibility proposed by the EDT for the Student was Emotional Disturbance (ED). This eligibility was supported by the evaluation results, specifically an "extremely high" T-score for aggression and clinically significant scores for hyperactivity and conduct problems. On parent interviews, the Petitioner rated the Student in the average range on behavior. (Testimony of [Special Education Director], Tr. p. 132-137; Exhibit 24.)
28. The School chose ED as the proposed eligibility because the Student "showed these behaviors over a long period of time at school, and they were clinically significant. There were no other areas of deficit that we saw at the time." The Petitioner did not initially disagree with the proposed eligibility of ED (Testimony of [Special Education Director], Tr. p. 138; Exhibit 24.)
29. The EDT discussed, but did not agree to, a date to hold an IEP team meeting to develop an IEP for Student. The Petitioner was informed that the School would send her the "Team Evaluation Summary Report and Prior Written Notice of Eligibility Determination: Emotional Disturbance," and a "Prior Written Notice and Consent for Initial Placement in Special Education" documents for her review. Petitioner was further informed that once Petitioner signed and returned the consent, the School would reach out to schedule an IEP team

meeting with in the 30-day window. (Testimony of [Special Education Director], Tr. p. 138.)

30. On January 17, 2023, the school sent the Petitioner a second Consent for Initial Placement and requested that Petitioner sign it and return it to the School. The Petitioner replied on January 22, 2023, that petitioner was going to hold off on signing or giving consent at that time. (Testimony of [Special Education Director], Tr. p. 139; Email from [Executive Director] to Petitioner dated February 3, 2023, Exhibit 15.)

31. On February 3, 2023, the Executive Director of the School sent an email to Petitioner again requesting that Petitioner sign and return the Consent for Initial Placement. The school also sent a version that stated that the Petitioner did not consent to the Student's initial placement in special education. The School Dir. Requested that the Petitioner sign one or the other document as the date for conducting an IEP team meeting was fast approaching. (Email from [Executive Director] to Petitioner dated February 3, 2023, Exhibit 15.)

32. On February 5, 2023, Petitioner sent an email to the Special Education Dir. indicating that she was not ready to sign off on special education eligibility for the Student based on ED. Petitioner further indicated that the Student's behavior issues may be the result of an autism spectrum disorder, other developmental disability and/or learning disability rather than ED. Petitioner requested additional evaluations for autism and learning disabilities be completed and that his current teacher complete the assessments. In an email the same day the Petitioner expressed that from her perspective there were some things that were inaccurate and/or misstated and she wanted to ensure the team had the right information going forward. (Emails from Petitioner to Special Education Director dated February 5, 2023, Exhibit 15.)

33. In response to the Petitioner's request for additional testing, the School sent another consent to evaluate for autism using the autism spectrum rating scale (ASRS) and consent for assessment by the Student's then current teacher. (Testimony of [Special Education Director], Tr. p. 139.)
34. On February 7, 2023, the student was involved in two behavior incidents where he bit the stomach of the Behavior Specialist and spit in the face another staff member. The student was given OSS for the remaining of that day which totaled four hours.
35. The School conducted the additional autism evaluations requested by Petitioner. (Exhibits 35, 40.)
36. On February 21, 2023, the Special Education Director sent an email to Petitioner informing her that the additional testing had been completed and asking to meet on March 2, 2023. Through a long string of 22 emails thereafter the parties proposed various dates to meet with the School, eventually agreeing to meet on March 16, 2023. The Petitioner complained about needing to meet again to discuss eligibility and the school explained that the results of the recent additional evaluations to be discussed as well as providing medical information requested from Petitioner's doctor. (Testimony of [Special Education Director], Tr. p. 142; Various emails between the parties, Exhibits 42, 43.)
37. On March 2, 2023, Petitioner requested "an independent evaluation." The School responded that the School could not approve or consider that request until the Petitioner identified what testing the Petitioner wanted independently evaluated. The school later indicated that Petitioner's request for an IEE was premature because Petitioner did not yet know what the results of the testing was because they had not met to discuss it. (Testimony of [Executive Director], Tr., pp. 176-177; Various emails between the parties, Exhibits 42, 48.)

38. After Petitioner requested to reschedule the March 16 meeting, the Student's EDT, including Petitioner, eventually met on March 22, 2023, to determine eligibility for the Student. The eligibility classification proposed by the EDT was developmental delay (DD). (Testimony of [Special Education Director], Tr. p. 143.)
39. At the EDT meeting on March 22, 2023, the Petitioner and an invited individual were in attendance with the School staff, and Petitioner had arranged for five additional individuals to join via a Zoom link. School staff testified that one of the invited individuals was a child psychologist, one was a musician, one was a social media influencer and one was a public speaker trainer, but none of the individuals were educators or special education professionals. The comments made by the invited individuals, with the exception of the child psychologist, were not substantive in nature, but dealt more with recommendations to have trainings to become more culturally sensitive and learn more about inclusion. The School currently has 58 African-American students and many other English learning students. The School has not had other complaints about cultural insensitivity, bias or racism. (Testimony of [Executive Director], Tr. pp. 170-174.)
40. At the conclusion of the March 22, 2023, EDT meeting, the Petitioner declined to sign any documents, including a Consent to Initial Placement for the Student because she wanted to think about it. The Special Education Director sent the consent to Petitioner on DocuSign, and Petitioner did not sign it there. Petitioner thereafter sent a number of emails to different School staff indicating that she would not sign the Consent because she did not want her child to be labeled as a child developmentally delayed or special ed because he would not be able to be admitted into the top private schools she wanted him to go to. (Testimony of

[Executive Director], Tr., p. 174; Testimony of [Special Education Director], Tr. p. 146-147; Exhibit 46-48.)

41. Prior to the filing of Petitioner's Request for a Due Process Hearing, Petitioner did not provide consent for initial placement in special education, and did not agree to proceed with an IEP team meeting, for the Student. (Testimony of [Special Education Director], Tr. p. 146.)
42. On April 7, 2023, the School sent the Petitioner Prior Written Notice of Refusal to Take an Action indicating that the School's request for a determination of eligibility for special education placement and services has been declined by Petitioner. The Notice further indicated that on April 5, 2023, Petitioner "specifically states that she is not willing to place her student in special education. Without the consent of the parent, the school cannot proceed with the necessary determination of eligibility and the subsequent development of an IEP where appropriate special education and related services that would have been determined in the creation of an IEP for the child (see 34 CFR 300.300) the student will be provided general education services and support consistent with law and policies and procedures of the school." (Testimony of [Executive Director], Tr., p. 188; Exhibit 44.)
43. On April 25, 2023, the Student was involved in a behavior incident at the beginning of school witnessed by Petitioner where Student punched another student in the chest. Petitioner did not support Student's actions during this incident. The student received an ISS for 3.5 hours before Petitioner checked Student out early from school. (Exhibits 1, 3.)
44. On April 28, 2023, the School sent parent an additional Prior Written Notice of Refusal to Take an Action regarding Petitioner's request for an IEE. The School indicates that due to Petitioner's refusal to consent to any of the eligibilities

proposed by the School, the School cannot proceed with initial placement in special education and development of an IEP for the Student. The School further stated in the notice that since the School has no legal authority to proceed with the creation of an IEP for Student, there is no reason to further pursue determination of eligibility and the School denied the request for an IEE. (Testimony of [Executive Director], Tr. p. 188; Exhibit 43.)

45. On May 23, 2023, Student was involved in a serious violation of the School's code of student conduct after an altercation with another student when he threatened to bring a gun to school "next time." The Student was given an OSS which totaled five days three hours and 20 minutes. (Exhibit 1.)

46. There have been 1,028 emails exchanged between Petitioner and the School staff since the beginning of school year. (Testimony of [Executive Director], Tr. p. 200.)

47. Throughout the school year the Petitioner has blamed the Student's behaviors on School staff and other students, and has accused School staff of bias, antagonizing and triggering Student. The School staff have informed School administration that they are afraid of Petitioner due to her constant harassing and threatening calls and emails. (Testimony of [Special Education Director], Tr., p. 148; Testimony of [Executive Director], Tr. p. 158-159, 173-174, 179-180, 199-200.)

48. During the 2022-2023 school year, school records indicate that the Student was checked out early from school by Petitioner a total of 67 times, had 23 excused absences, and had 5 unexcused absences. (Testimony of [Principal], Tr. p. 34; Exhibit 3.)

49. The Petitioner did not attend any of the due process hearing held on August 18, 2023, either in person, by telephone or virtually. (Hearing Officer, Tr. p. 210.)

DISCUSSION

I. GENERAL LEGAL STANDARDS

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC §1400(d); 34 CFR '300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC §1415(b)(6). The IDEA further provides protections to students who have not been determined eligible for special education and related services, set forth in 34 CFR §300.534 and Rules V.J.

The IDEA and its implementing regulations provide that in order to qualify as a “student with a disability” under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities . . . , and (2) need special education and related services as a result of the student’s disability. CFR §300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student’s educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg’l Sch. Dist.*, 59 IDELR 61 (1st Cir. 2012).

II. PETITIONERS’ ISSUES

This matter was filed by Petitioner on May 24, 2023, as a Request for an Expedited Due Process Hearing. “Whenever a hearing is requested, the parent(s) or student who is an adult or the LEA involved in the dispute must have an opportunity for an impartial due process hearing. The LEA is responsible for arranging the

expedited due process hearing with the State Director of Special Education, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within ten school days after the hearing. Unless the parent(s) or student who is an adult and LEA agree in writing to waive the resolution meeting, or agree to use mediation, a resolution meeting must occur within seven calendar days of receiving notice of the due process complaint, and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint. Parties may not mutually agree to extend the resolution period to resolve an expedited due process complaint. Therefore, when the parties have participated in a resolution meeting or engaged in mediation and the dispute has not been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint, the expedited due process hearing may proceed. A hearing officer may not extend the timeline for making a determination in an expedited due process hearing. The decisions on expedited due process hearings are final, unless meeting the requirements of 34 CFR § 300.514(b) or 34 CFR § 300.516.” SpEd Rules V.H.3.

As noted above, Petitioner filed her Request for an Expedited Due Process Hearing on May 24, 2023, which was five school days prior to the end of the 2022-2023 school year. A resolution meeting was held with both parties present on May 31, 2023. The parties thereafter agreed to participate in mediation in an effort to resolve the dispute. Mediation began on June 13, 2023, and finally reached an impasse on June 28, 2023. The hearing in this matter occurred on August 18, 2023. The School was not in session between June 1, 2023, the end of the 2022-2023 school year, and August 23, 2023, the beginning of the 2023-2024 school year. This means that there were no school days between June 1 and August 23, 2023. Therefore, it is concluded that all of the required timelines for conducting the expedited due process hearing in this matter

were met. The written decision by the Hearing Officer is due within 10 school days of the hearing, which date is September 6, 2023.

All parties to a hearing conducted pursuant to 34 CFR §300.530 through 34 CFR §300.534 , or an appeal conducted pursuant to 34 CFR §300.514 have the right to:

Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities. (Note that the 2008 revisions to the 2006 regulations added to this provision, as follows: "except that whether parties have the right to be represented by non-attorneys at due process hearings is determined under state law.");

Present evidence and confront, cross-examine, and compel the attendance of witnesses;

Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

Obtain a written or, at the option of the parents, electronic verbatim record of the hearing; and

Obtain written or, at the option of the parents, electronic findings of fact and decisions.

34 CFR §300.512 (a). Parents who waive these expressly provided rights in a due process hearing will not be able to later present testimony and exhibits in a case in federal court. In *P.R. and J.R. v. Shawnee Mission Unified School District No. 512*, 58 IDELR 283 (D. Kan. 2012), the parents fired their lawyer before the due process hearing and failed to introduce any evidence during the proceedings. The parents later filed their lawsuit in federal court and tried to supplement the record with testimony and exhibits. The District Court acknowledged that parents have the right to be represented by counsel and present evidence in due process hearings, but the parents in this case simply failed to invoke those rights. The court found that "although the parents may now regret their decisions, they were afforded every opportunity that due process required."

The Procedural History and the Statement of Facts set forth above clearly show that the Petitioner intentionally and expressly waived her right to appear at the hearing, and present testimony and exhibits and confront and cross-examine the witnesses and exhibits of Respondent. Petitioner was informed of her hearing rights on several occasions, and was also informed that the burden of proof was on Petitioner as to Petitioner's issues. It is concluded that Petitioner failed to meet her burden of proof in this matter as to Petitioner's issues presented for this hearing, by intentionally failing to appear and present any testimony or exhibits at the hearing supporting Petitioner's issues. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

III. RESPONDENT'S ISSUE

In this hearing, Respondent has raised the issue of whether the Petitioner ever gave consent, or if given, withdrew consent for services. The IDEA federal regulations and the SpEd Rules provide that an LEA that is responsible for making a FAPE available to a student with a disability must obtain informed consent from the parent(s) of the student before the initial provision of special education and related services to the student. An LEA must make reasonable efforts to obtain informed consent from the parent(s) for the initial provision of special education and related services to the eligible student with disabilities. If the parent(s) of a student fail to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the LEA may not use the procedures in of these Rules IV., including the mediation procedures or the due process procedures, in order to obtain agreement or a ruling that the services may be provided to the student, will not be considered to be in violation of the requirement to make available a FAPE to the student for the failure to provide the student with the special education and related services for which the LEA requests consent, and is not required to convene an IEP Team meeting or develop an

IEP for the student for the special education and related services for which the LEA requests such consent. 34 CFR § 300.300(b); and Rules II.C.2.

The facts set forth above clearly indicate that the School complied with its Child Find obligations to identify and evaluate the Student for special education services. The School sought, and eventually obtained, consent from Petitioner to conduct a special education evaluation of the Student. The initial evaluations were conducted within 45 school days of obtaining Petitioner's consent. SpEd Rules II.D.2(a). However, thereafter Petitioner either refused consent, or if given thereafter revoked her consent, to each eligibility determination proposed for, and the provision of initial special education services to, the Student. Prior to the filing of the complaint herein, Petitioner expressly refused to consent to the eligibility classification of emotionally disturbed or developmental delay, and refused to provide written consent for the provision of initial special education services for the Student. Therefore, it is concluded that the School is not in violation of the requirement to make available a FAPE to the Student for the failure to provide the Student with the special education and related services for which the School requests consent, and is not required to convene an IEP Team meeting or develop an IEP for the Student for the special education and related services for which the School requests such consent. 34 CFR § 300.300(b); and SpEd Rules II.C.2.

Moreover, even though Petitioner failed to present any evidence on the issues as to Student removals by the School, and whether the School was required to conduct a manifestation determination review for Student, the evidence presented by Respondent clearly establishes that Petitioner's actions did not violate the rights afforded to Student under the IDEA and SpEd Rules. School personnel may remove a student with a disability who violates a code of student conduct from the student's current placement to an appropriate interim alternative educational setting (IAES),

another setting, or suspension, for not more than ten consecutive school days (to the same extent those alternatives are applied to students without disabilities), and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct, (as long as those removals do not constitute a change of placement because of disciplinary removal as set forth in 34 CFR § 300.536 and these Rules V.D.). SpEd Rules V.B.2. The facts set forth above show that prior to the filing of Petitioner's Request for an Expedited Due Process Hearing, the Student had not received ISS and OSS based on the Student's violations of the School's code of student conduct for more than 10 consecutive school days within the 2022-2023 school year. Therefore, the School was under no obligation to conduct a manifestation determination review for Student. 34 CFR §300.530(e); and SpEd Rules V.B.2.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of issues and the Hearing Officer's own legal research, the Hearing Officer now enter the following Conclusions of Law:

1. Petitioners did not meet Petitioners' burden of proof as to whether the Student is a student with a disability and is in need of special education and related services. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
2. Petitioners did not meet Petitioners' burden of proof as to whether the Student is entitled to the disciplinary protections for a student with a disability set forth in 34 CFR §300.530 and Rules V. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
3. Petitioners did not meet Petitioners' burden of proof as to whether the Student is entitled to the protections for children not determined eligible for special education and related services set forth in 34 CFR §300.534 and Rules V.J. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

4. Petitioners did not meet Petitioners' burden of proof as to whether the Student was removed by Respondent from his current placement for more than 10 consecutive school days, or was subjected to a series of removals that constitute a pattern for more than 10 consecutive school days, during the 2022-2023 school year without conducting a manifestation determination review in violation of 34 CFR §300.530 and SpEd Rules V. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
5. Petitioners did not meet Petitioners' burden of proof as to whether the alleged disciplinary removals of the Student by Respondent during the 2022-2023 school year violated the Student's right to a FAPE. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).
6. Respondent did meet Respondent' burden of proof to show that Petitioner never gave consent or, or if given, withdrew consent for services, as set forth in 34 CFR § 300.300 and SpEd Rules II.C.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED as follows:

1. Petitioner's requests for relief under Petitioners' Issues Nos. 1, 2, 3, 4, and 5 are hereby DENIED, and Petitioner's Complaint is dismissed with prejudice.

All other relief not specifically ordered herein is DENIED.

The decision made in this hearing conducted is final, unless a party to the hearing appeals the decision to a civil action under 34 CFR § 300.516 and these SpEd Rules IV.Q.

Dated this 6th day of September 2023.

By: /s/ Wallace J. Calder

Wallace J. Calder
Hearing Officer