

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>[Parent], Parent of [STUDENT],</b> Complainant,  vs.  <b>CHERRY CREEK SCHOOL DISTRICT,</b> Respondent.	▲ <b>COURT USE ONLY</b> ▲
	<b>CASE NUMBER:</b>  <b>EA 2023-0027</b>
<b>DECISION</b>	

[Student] was expelled from Cherry Creek School District (the District). Complainant alleges that [Student's] Manifestation Determination Review (MDR) team erroneously determined that the behavior underlying the expulsion was not a manifestation of his disability, which is based on a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). An expedited due process hearing, convened in accordance with 20 U.S.C. § 1415(k)(3)(B) was held before Administrative Law Judge (ALJ) Hollyce Farrell at the Office of Administrative Courts on September 26, 2023, in Courtroom 1. Charmaine Lindsay, Esq. represented Complainant. Elizabeth R. Friel, Esq., and Elliott V. Hood, Esq., Caplan and Earnest LLC, represented the District. Prior to hearing the parties had stipulated to the admission of the District's Exhibit's A through P and the Complainant's Exhibits 1 through 9, and those Exhibits were admitted as evidence. At hearing, the ALJ also admitted the District's Exhibits QQQ, WWW and AAAA. The ALJ also took judicial notice of the District's Exhibit QQQ. Complainant's Exhibits 6, 7, and 9 were not produced at hearing. However, the ALJ notes that Complainant's Exhibit 7 is identical to Respondent's Exhibit AAAA and Exhibit 9 is identical to Exhibit P. Exhibit 6 was not provided to the Court, and therefore, was not reviewed, and it's admission is rescinded. The hearing was recorded.

### Case Summary

[Student] started a physical altercation with another student at his high school. As a result of the altercation, [Student] received a citation for assault. He was ultimately expelled from school. After his expulsion, [Student's] mother requested that he be evaluated to determine if he had a disability and eligible for special education services. The District evaluated [student], and determined that he did have a disability based on his ADHD, classified as Other Health Impairment (OHI), and an Individualized Education Program (IEP) was developed for him. The District then held an MDR to determine if the conduct underlying [Student's] expulsion was caused by, or substantially related to, his disability. After the meeting, the District concluded that the conduct in question was not

caused by, and did not have a substantial relationship to, [Student's] disability. Complainant appealed that finding by filing the complaint in this matter. For the reasons set forth below, the ALJ concludes that the MDR team's conclusion was not erroneous and is supported by the credible evidence presented in this case.

### **Findings of Fact**

1. [Student] is a 16-year-old male (DOB -[month/date]/2006), who entered the District in 2012 when he was in kindergarten. He remained a student at the District until his expulsion.

2. Complainant [Parent] is [Student's] biological mother.

3. When [Student] was about seven or eight-years-old, he was having trouble focusing. [Parent] took [student] to the doctor, and he was diagnosed with ADHD.

4. [Parent] testified that [student] is a great kid who is fun and respectful, and helps take care of his younger siblings with whom he gets along. [Student] does not demonstrate any behavior issues or violence at home. He does, however, have issues focusing and loses things.

5. In May of 2023,[Student] was a sophomore at [High School] ([High School]), one of the District's schools. At school, [student] presented as he did at home; his teachers and an administrator described him as pleasant and mild-mannered, who did not exhibit emotional or violent behaviors. [Student's] teachers did notice that he had trouble focusing.

6. The teachers who knew [Student] well did not have concerns about his emotional behaviors. One teacher noticed that [Student] had made tremendous strides in his social and emotional abilities, and that he talked to his classmates and sports teammates in a healthy way. [High School's] Assistant Principal, [Assistant Principal], described [Student] as a "quiet leader."

7. Prior to the incident at issue, [Student] had been suspended for a physical altercation with another student during his freshman year and one other incident unrelated to fighting.

8. Another student (the other student) at [High School] was expressing dislike for [Student], which angered and frustrated [Student]

9. [Student] could have gone to [Assistant Principal], or [Restorative Practice Coordinator], who is at [High School] to help students navigate conflict, but he did not. [Student] is familiar with both [Assistant Principal] and [Restorative Practice Coordinator].

10. On Friday, May 12, 2023, [Student] and his friends waited for the other student outside of a classroom. When the student came out of the classroom, [Student] got close to the student, was face to face with him, and was backing him up against a wall. An adult broke up that altercation.

11. The following Monday, May 15, 2023, the other student was in the boys'

locker room at [High School], sitting on a bench. [Student] came into the locker room and began to verbally engage with the other student, and then started punching the other student. The other student tried to fight back in self-defense. The altercation ended when another student intervened, picked up the other student and walked away. [Student] received a citation for assault as a result of the incident.

12. One of the deans at [High School] investigated the incident by reviewing a video of the incident and witness statements. On Tuesday, May 16, 2023, the dean brought the information to [Assistant Principal]. As with all incidents where a ticket for assault is issued, [Assistant Principal] took the information to [High School's] principal for an expulsion review. [Student] was also suspended for five days, from May 16, 2023, to May 22, 2023.

13. [Assistant Principal] and [High School's] principal determined that expulsion could be appropriate, and they completed an expulsion template and submitted it to the District's Executive Director for High School Education for review. The Executive Director instructed [High School] to go through the expulsion review process.

14. On June 7, 2023, the District held an Expulsion Review Hearing before a Hearing Officer to determine if expulsion was appropriate. Present at the Expulsion Review Hearing were [Assistant Principal], [Parent], one of [High School's] deans, and [Student]. All parties at the Expulsion Review Hearing were given the opportunity to provide input, including their concerns, and they did so. [Student] accepted responsibility for his actions and expressed remorse.

15. At the conclusion of the Expulsion Review Hearing, the Hearing Officer recommended that [Student] be expelled for the term of one-year subject to readmission at the discretion of the District's Superintendent. The Hearing Officer issued written Findings of Fact and Recommendation on June 8, 2023. Notice of the expulsion was sent to [Student's] parents on June 14, 2023.

16. [Student] has moved out of the District, but he can attend the District's expulsion high school. [Student] has not attended the expulsion high school. He has been unable to enroll in his new school district because of the expulsion.

17. Following the expulsion decision, on June 16, 2023, [Parent] requested that the District conduct an evaluation to determine if [Student] had a disability and eligible for special education services. The District received consent from [Parent] on July 13, 2023, to evaluate [Student]

18. [School Psychologist/LPC], who was accepted as an expert in Special Education, ADHD and Student Mental Health, conducted a comprehensive evaluation of [Student] The District evaluated [Student] in the areas of general intelligence, communication, academic performance, social and emotional functioning, health and motor.

19. As part of the evaluation, [School Psychologist/LPC] administered several assessments, including a social-emotional assessment, to [Student], and looked at his

educational data to see if it correlated with his medical diagnosis of ADHD. As part of her evaluation and assessments, [School Psychologist/LPC] spoke with [Student], [Parent], [Student's] math teacher, [Student's] social studies teacher, [Assistant Principal], and [Student's] uncle.

20. [Assistant Principal] told [School Psychologist/LPC] that he did have multiple conversations with [Student's] peer group about decision-making, conflict resolution, and working with a trusted adult.

21. At the conclusion of her evaluation, [School Psychologist/LPC] concluded that her findings were consistent with a clinical diagnosis of ADHD as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR). She noted that [Student] had difficulty with attention and focus and had clinically executive function concerns. She further found that [Student] was in the average range of intelligence.

22. [School Psychologist/LPC] persuasively testified that in a school environment, one would expect a student to experience behavioral problems such as irritability, being off task in the classroom and leaving the classroom. [Student] demonstrated those behaviors.

23. [School Psychologist/LPC] also persuasively testified that the results of [Student's] assessments did not show aggression or impulsivity problems and his teachers did not report any anger control issues. Moreover, [School Psychologist/LPC] persuasively testified that [Student] has the ability to think things through, but he doesn't always think about the consequences of his actions.

24. According to the DSM-5-TR, when an individual with ADHD demonstrates impulsivity, the impulsivity "refers to hasty actions that occur in the movement without forethought, which may have potential harm for the individual (e.g. darting into the street without looking. Impulsivity may reflect a desire for immediate rewards or an inability to delay gratification. Impulsive behaviors may manifest as social intrusiveness (e.g. interrupting others excessively) and/or as making important decisions without consideration of long-term consequences (e.g., taking a job without adequate information)." The DSM-5-TR does not list aggression or physical violence as a feature of impulsivity in those diagnosed with ADHD.

25. The District held an eligibility meeting on August 9, 2023. Based on the eligibility meeting, [Student] was found eligible for special education services based on his diagnosis of ADHD, which is categorized as "Other Health Impairment."

26. The members of the eligibility team were [Student]; a general education teacher, [General Education Teacher]; [Student's] uncle, [Uncle]; an administrator, [Administrator]; a school psychologist, [School Psychologist]; the special education director or designee, [Special Education Director]; a speech language pathologist, [Speech Language Pathologist]; a special education teacher, [Special Education Teacher]; an orientation and mobility specialist, [Orientation and Mobility Specialist]; [School Psychologist/LPC] and [Parent].

27. [School Psychologist/LPC] provided her evaluation report to the [Student's] IEP team, which had a meeting on August 21, 2023. A meeting to develop an IEP for [Student] was held on August 21, 2023. [Student's] IEP team, which included his mother and his uncle, concluded that [Student] needed speech/language services, specialized math instruction, and specialized instruction. The IEP team further concluded that [Student] needed accommodations in the classroom to assist him with distractions, learning new content, instruction, and the ability to take breaks. There were no behavioral goals or services included in [Student's] IEP. No one on [Student's] IEP team voiced any disagreement with the IEP.

28. On August 22, 2023, the District held a virtual MDR to determine if [Student's] conduct of hitting the student in the locker room was caused by or substantially related to, his disability.

29. Present at the meeting were [Student], [Teacher/Coach], [Counselor], [Assistant Principal], [Uncle], [Administrator], special education teacher [Special Education Teacher 2], mental health provider [Mental Health Provider], speech language pathologist [Speech Language Pathologist], administrator [Administrator], [Manifestation Determination Coordinator], and [Parent].

30. At the meeting, the team considered information from [Parent] and [Uncle], as well as teacher observations. The team also considered the findings of the assessments in [School Psychologist/LPC] evaluation, [Student's] IEP, and all the relevant information in [Student's] student file. [Student's] teachers and [Assistant Principal] stated that they were shocked that [Student] had assaulted the other student as the behavior was inconsistent with behavior he had demonstrated in the past.

31. At the conclusion of the meeting, all of the members of the team, with the exception of [Student's] family members, determined that [Student's] disability was not a substantial or direct cause of his behavior towards the other student in the boys' locker room on May 15, 2023.

32. [Parent] appealed the MDR finding by filing a due process complaint on August 25, 2023.

## **Discussion and Conclusions of Law**

### *Burden of Proof*

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) ("The burden of proof . . . rests with the party claiming a deficiency in the school district's efforts.") Complainant therefore bears the burden of proving that the District erroneously concluded that the conduct that led to [Student's] expulsion was not caused by or substantially related to his disability.

### *MDR Reviews*

Per 20 U.S.C. Section 1415(k)(1)(i) and (k)(3), the issue before the ALJ is whether the conduct in question was caused by, or had a direct and substantial relationship, to [Student's] disability. Per 34 C.F.R. Sections 300.530(e) and 300.536(a), when a district proposes to make a disciplinary change in placement, meaning the removal of the child for more than 10 school days, a district must convene relevant members of the child's IEP team, including the parents, to determine whether the conduct that led to removal was a manifestation of the child's qualifying disability. In analyzing the conduct, the MDR team must consider: (1) was the conduct caused by or directly or substantially related to the child's qualifying disability, and (2) was the conduct the result of a failure by the district to implement the child's then-existing IEP? 34 C.F.R. Section 300.530(e). In this case, [Student] did not have an IEP at the time of the conduct in question. Thus, the second question is not relevant to this case. *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 949 (E.D. Va. 2010).

In this case, the disability at issue is ADHD, a condition [Student] has had since he was seven or eight-years old. While [Student] displays ADHD symptoms such as lack of focus and problems with executive functioning, no one, at home, or at school, had concerns about him being violent or aggressive towards others. To the contrary, [Student] was consistently described as a mild-mannered, respectful person. The teachers and [Assistant Principal] who knew [Student] well were shocked by his assault on the student in the boys' locker room. In her assessment of [Student], [School Psychologist/LPC] found that [Student] lacked the impulsivity characteristic sometimes found in those with ADHD. However, even if [Student] was impulsive as a result of his ADHD, the evidence established that impulsivity in individuals with ADHD does not manifest in violence or aggression towards others.

The credible evidence established that [Student] was angry and frustrated by the student he assaulted. The anger and frustration were first demonstrated on Friday, May 12, 2023, during a verbal altercation, and culminated in the incident in the boys' locker room the following Monday.

Having carefully considered the law and cases cited by the parties, as applied to the facts found above, the ALJ concludes that the District did not err in reaching the conclusion that [Student's] disability did not cause or substantially contribute to the conduct which resulted in his expulsion.

### **Decision**

The District's finding that [Student's] conduct which resulted in his expulsion was not caused by, or substantially related to, his disability is affirmed.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**Done and Signed**

October 5, 2023

/s/ Hollyce Farrell  
HOLLYCE FARRELL

Administrative Law Judge