



6. During all times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Student:

Dr. Aaron Zalis	Superintendent
Craig Hounsom	Assistant Superintendent
Stacey Reed	Special Services Director
Monica Davis	Principal, Rolla Middle School
Josh Smith	Assistant Principal, Rolla Middle School
Sherri Thomas	Assistant Principal, Rolla Middle School
Erin Coverdale	Administrative Assistant
Jill Sederburg	Special Services Process Coordinator
Nancy Strassner	Speech Pathologist
Shonna McFarland	School Psychological Examiner/Process Coordinator
Aaron Bartle	School Counselor, Rolla Middle School
Jarena Raper	School Counselor, Rolla Middle School
Ginger King	Technology Director, Rolla Middle School
Sally Tillema	SPED Classroom Teacher, Rolla Junior High School
Richard Anderson	7 <sup>th</sup> Grade Teacher
Neil Arthur	7 <sup>th</sup> Grade Social Studies Teacher
Ike Bonebrake	7 <sup>th</sup> Grade Science Teacher
David Cox	7 <sup>th</sup> Grade Computers Teacher
Cara Hanlin	7 <sup>th</sup> Grade Math Teacher
Richard Sawyer	7 <sup>th</sup> Grade Teacher
Joseph Schisler	7 <sup>th</sup> Grade English, Reading and Homeroom Teacher
Joe Schuchardt	7 <sup>th</sup> Grade Physical Education Teacher
Jason Bartelsmeyer	Music Teacher, Rolla Middle School
Gail Booke	Guidance Secretary, Rolla Middle School
Michelle Froehlich	Administrative Assistant
Colleen Kelly	Librarian/Paraprofessional, Rolla Middle School
Sgt. Wayne Rapiet	Resource Policy Officer, Rolla Police Department

### **B. Procedural Background**

7. The expedited due process complaint was filed by the Student's Mother with the Department of Elementary and Secondary Education ("DESE") on April 22, 2011. (HOX 1). DESE assigned the Hearing Officer and notified the parties (HOX 2 and 3) and the Hearing Officer corresponded with the parties that same day. (HOX 4).

8. On April 22, 2011, Petitioner's Counsel sent an email to the Hearing Officer requesting that he recuse himself from hearing the expedited complaint. In response the Hearing Officer issued Order Number 1 (Petitioner's Motion Requesting Hearing Officer To Recuse), which denied Petitioner's email request. (HOX 5).

9. On April 25, 2011, Heidi Atkins-Lieberman of the law firm of Thomeczek & Brink, LLC, entered an appearance on behalf of the District. (HOX 6).
10. On April 26, 2011, the District filed a Response to Petitioner's Expedited Due Process Complaint (HOX 7), District's Notice of Insufficiency (HOX 8) and Motion to Dismiss Expedited Due Process Complaint. (HOX 9).
11. On April 27, 2011, the Hearing Officer issued Order Number 2 (Respondent's Notice of Insufficiency) which found that Petitioner's expedited due process complaint lacked sufficiency, in part, and gave the Parent an opportunity to file a First Amended Complaint. (HOX 10).
12. On April 28, 2011, the Hearing Officer issued Order Number 3 (Notice of Pre-Hearing Telephone Conference) which set the pre-hearing telephone conference in this case for April 29, 2011. (HOX 11). The pre-hearing telephone conference took place on April 29, 2011. During this conference the parties were orally informed that the Hearing Officer would take the District's Motion to Dismiss with the case, dates for the hearing were agreed upon and the issues were discussed. On May 2, 2011, the Hearing Officer issued Order Number 4 (Notice Of Hearing And Hearing Order) which scheduled the hearing in this matter for May 16-17, 2011 in Rolla, Missouri. (HOX 12).
13. On May 4, 2011, Petitioner filed the Amended Expedited Due Process Complaint (HOX 13) and on May 5, 2011, the District filed Respondent's Response to Petitioner's Amended Expedited Due Process Complaint. (HOX 14).
14. On May 10, 2011, the Hearing Officer issued Order Number 5 (Issues To Be Heard At Hearing), which set forth the issues that would be presented to, and decided by the Hearing Officer. (HOX 15).
15. On May 12, 2011, the District filed its Motion in Limine. (HOX 16).
16. The expedited due process hearing in this matter was held on May 16, 2011 in Rolla, Missouri.
17. During the hearing the following exhibits were accepted into evidence:
  - A. Hearing Officer's Exhibits ("HOX") – HOX 1-16. (Tr p. 7).
  - B. Petitioner's or Student's Exhibits ("PEX") – PEX 3-4, 6, 11, 13-14 and 16. (Tr. pp. 10, 20, 22, 38, 51, 62).
  - C. Respondent's or District's Exhibits ("DEX") – 1, 3 and 6. (Tr pp. 4, 80)

D. Joint Exhibits (“JEX”) – 3-4, 6, 8-11 and 15-17. (Tr p. 10).

### **C. Time Line Information**

18. As noted above, this matter is an expedited due process proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), the Missouri State Plan for Special Education (2010) and the IDEA Regulations, 34 C.F.R. § 300.532(c). The expedited due process complaint was filed by the Student’s Mother with the Department of Elementary and Secondary Education (“DESE”) on April 22, 2011. (HOX 1).

19. The IDEA Regulations, 34 C.F.R. § 300.532(c)(2) provide that an expedited due process hearing must be conducted within twenty (20) school days of the date the complaint requesting the hearing was filed. In this case, the twentieth (20<sup>th</sup>) school day was calculated by the parties to be May 20, 2011. The Hearing in this matter took place and was completed on May 16, 2011.

20. The IDEA Regulations, 34 C.F.R. § 300.532(c)(2) also provide that the Hearing Officer’s decision must be made within ten (10) school days after the hearing. The term “school days” is defined by the Regulations, 34 C.F.R. § 300.11(c) as “any day when children are in attendance for instructional purposes.” The regular session of the District ended on May 26, 2011 and the Summer session begins on June 2, 2011. In this case, the tenth (10<sup>th</sup>) school day following the end of the hearing is June 3, 2011. The decision in this case issued on May 26, 2011.

### **D. The Issues and Proposed Remedy**

21. The following issues were presented to the Hearing Officer for decision:

Issue No. 1. Whether the District changed Student’s educational placement under the IDEA Regulations, 34 C.F.R. Sections 300.530 and 300.531, during School Year 2010-11.

Issue No. 2. If so, did the District fail to conduct a manifestation determination during School Year 2010-11, concerning the Student under the IDEA Regulations, 34 C.F.R. Section 300.530(e)?

Issue no. 3. If a violation of the these provisions occurred, what is the remedy?

### **E. Background Facts**

22. On April 19, 2010, the Student was enrolled in the District. (JEX 3, p. 7). The District’s Enrollment Form, states that the last school the Student attended was Diedrichsen Elementary School in Sparks, Nevada, which is a part of the Washoe County School District. The IDEA Transfer Student Documentation Form (DEX 1, pp. 18-19) states that the District requested the

Student's special education records on April 19, 2010 and received them from Washoe on April 30, 2010. The form states:

“An IEP was received before [the Student's] first day of attendance. His parents enrolled him at the end of last school year so the district would be ready for him to attend the first day of the 2010-2011 school year. [the Student] was been home schooled from 12/7/09 to 8/1/10. The IEP was rejected and rewritten within 30 days of attendance.”

(DEX 1, p. 19). The Student's Mother testified that she enrolled the Student in April, 2010, to get summer school services and so the District “. . . would know in advance that I intended to enroll him for the following school year.” (Tr p. 17, lns 22-25; p.18, lns 1-2)

23. According to the Student's most recent educational evaluation, dated April 27, 2011, (PEX 13), the Student has been medically diagnosed by a psychiatrist as having Bipolar Disorder – Early Onset. (PEX 13, p. 45). The evaluation states that the Student's most common symptoms are: frequent mood swings, rages and explosive tantrums, impulsivity, distractibility and restlessness, oppositional irritability and behavior, aggressive behavior and oversensitivity to environmental triggers. (PEX 13, p. 45). The evaluation also notes that:

(A) The Student's teachers in the Albuquerque Public Schools in February, 2008, reported that the Student “has frequent significant rage incidents characterized by yelling, noncompliant behavior when adults attempt to redirect him verbally; aggression toward students (hitting, choking, biting, lunging at others, kicking) and adults.” (PEX 13, p. 44).

(B) The Student's teacher in the Washoe County School District in February, 2009, reported that “there has been significant improvement in behavior as compared to the behaviors described by his previous school. He is no longer physically or verbally aggressive toward adults and actually tries to please. However, he rages and becomes physically aggressive in response to perceived slights at the hands of his peers. Even so, he quickly de-escalates and will admit his contribution to the problem.” (PEX 13, p. 44).

24. On or around August 17, 2010, the Student began attending the 7<sup>th</sup> Grade at Rolla Middle School. (Tr p. 17).

25. On August 31, 2010, the Student's IEP Team met and developed an Individual Education Program for him. (DEX 1). Present at this meeting were: the Student's Mother, the Student, Monica Davis, Susan Bales, Richard Sawyer and Richard Anderson. At the time of this IEP meeting, the Student had a primary educational diagnosis of Emotional Disturbance and a secondary educational diagnosis of Speech Impairment. (DEX 1, p. 1). The Services Summary in the IEP states that the Student would be receiving one hundred eighty (180) minutes per day of specially designed instruction for behavior and thirty (30) minutes a week in speech. (DEX 1, p. 10). The Student's IEP Team determined that the appropriate placement for the Student was

“Inside regular class less than 40 percent of the day.” (DEX 1, p. 14). The IEP further states that the Student would participate in Regular Education twenty five percent (25%) of the time because “behavior impedes [the Student’s] as well as his classmates’ learning. (DEX 1, p. 12).

26. On September 15, 2010, the Student received a two day out-of-school suspension for insubordination. The Student did not leave school early on September 15, 2010, but served the out-of-school suspension on September 16 and 17, 2010. (DEX 3, p. 21; Tr p. 87). The Behavior Detail Report describes the incident as follows:

“[The Student] is frustrated about his afternoon. He feels he needs to be leaving at the same time another student is leaving. When it was explained to him he did not like the answer, he pushed a desk into another student and turned the desk over. He then balled up his fists and made loud sounds and refused to stop. He required the principal to come to the room and remove him from the resource room. He refused and did finally come. The student refused to leave the office, would not go to the resource room or the ISS room for the remainder of the day. Mrs. Thomas conferenced with the parent and she was concerned about him. The decision was made to send him home at 2 pm. She felt like this would help. Mrs. Bales and Mrs. Thomas and parent had just finished the IEP from a previous meeting and the team made the decision for him to leave at 2 pm on the special needs bus.”

(DEX 3, p 23). The letter sent to the Student’s Mother concerning this suspension states that the Student “has been suspended out-of-school on Thursday, September 16, 2010 and Friday, September 17, 2010” (DEX 3, p. 24) and “. . . will be allowed to return to school on Monday, September 20, 2010.” (DEX 3, p. 24). The Student did not leave early on September 16, 2010 as a result of his suspension (Tr p. 88). The total length of this suspension was 2.0 days.

27. On September 20 through September 22 and on September 24, 2010, the Student left school at 2:00 p.m., one class period early. These four occasions totaled four tenths (.4) of one school day. (DEX 3, p. 21).

28. On September 27, 2010, the Student received a 2.8 day out-of-school suspension for assault on school staff. The Student left school at 9:37 a.m. on September 27, 2010 and remained out of school on suspension on September 28, 2010 and September 29, 2010. (DEX 3, p. 21; Tr p. 77). The Behavior Detail Report describes the incident as follows:

“The student threw a chair at another student in the music room. When principals came in to ask him to leave the classroom he refused. He then kicked the principal Mrs. Davis leaving a bruise on her stomach and kicked Mrs. Thomas leaving bruise on her thigh bone. Parent was called after he was removed from the room. A conference was held and she stated that she may request the IEP

team look into all day in the BD resource room she also mentioned that she may home school him.”

(DEX 3, p. 26). The District’s revised attendance record indicates that the Student left school before second period on September 27 and was out on suspension on September 28 and 29, 2010. (DEX 6, p. 47). The letter sent to the Student’s Mother states that the Student “has been suspended out-of-school on Monday, September 27, 2010, Tuesday, September 28, 2010 and Wednesday, September 29, 2010 for physical violence towards staff.” (DEX 3, p. 27). The letter further states that the Student “. . . will be allowed to return to school on Wednesday, September 30, 2010.” (DEX 3, p. 27).

29. On October 1, 2010, the Student’s Mother informed the District that she was “disenrolling” the Student and would be home schooling him. (Tr p. 26, Ins. 21-24). That same day, the Student’s Mother filed a Voluntary Home School Declaration form with the District which stated that the Student was attending a home school. (JEX 6, p. 12). The Student was officially dropped from enrollment by the District on October 1, 2010. (JEX 4, p. 10).

30. The Student was home schooled from October 1, 2010 through December 5, 2010. (JEX 8, p. 16; JEX 10, p. 33; Tr p. 108, Ins. 12-15).

31. On December 2, 2010, the Student’s IEP Team met and developed an Individual Education Program for the Student. Present at this meeting were: the Student’s Mother, the Student, Jill Sederburg, Susan Bales and Sherri Thomas. (JEX 8, p. 15). At the time of this IEP meeting, the Student had a primary educational diagnosis of Emotional Disturbance and a secondary educational diagnosis of Speech Impairment. (JEX 8, p. 15). The Services Summary of the IEP states that the Student would be receiving one hundred eighty (180) minutes per day of Specially designed instruction for behavior and thirty (30) minutes a week in speech. (JEX 8, p. 24). The Student’s IEP Team determined that the appropriate placement for the Student was “Inside regular class less than 40 percent of the day.” (JEX 8, p. 28). The parties stipulated that at the December 2, 2010, IEP meeting the District and the Student’s Mother agreed that the Student’s school day should be shortened to one-half day, running from 8:15 a.m. until 12:15 p.m. (Tr pp. 5-6).

32. On December 2, 2010, the District provided the Student’s Mother with a Notice of Action form which states that the proposed action is a “change of placement” and a “change of services.” (JEX 9, p. 31). The explanation for the proposed action set forth on the Notice of Action states:

“It is proposed by RPSD for [the Student] to return to school with ½ day placement with 100% of the day in special education.”

The Notice of Action sets forth the following options that were considered:

“It was considered to continue with his previous placement. The team determined ½ day placement with a more restrictive environment is the LRE for [the Student] at this time.”

The Student’s Mother signed the Notice of Action and wrote on the form that she “would like to waive 10 days so the change can occur immediately.” (JEX 9, pp. 31-32).

33. Following the development of the December 2, 2010 IEP, the Student attended school during Periods 1 through 5 (DEX 6, p. 47) beginning school at 8:15 a.m. and ending school at 12:15 p.m. each school day. (Tr p. 108, lns 16-24). The Student’s Schedule indicates that the Student continued on this half day schedule until at least the beginning of Term T8 on April 6, 2011. (PEX 16, p. 66). The District’s attendance record for the Student indicates that the half-day school assignment continued until April 18, 2011. (DEX 6, p. 47). While the hearing record is not totally clear, since the Student was reassigned to the Alternate Program effective April 19, 2011, it is likely that the his half-day assignment was changed at that time.

34. On December 6, 2010, the Student’s Mother filled out the enrollment forms for the District and re-enrolled him in the District at the Rolla Middle School. (JEX 10, pp. 33-36).

35. On February 16, 2011, the Student received a five day out-of-school suspension for assault on school staff. The Student left school at his normal time on February 16, 2011, but served the suspension on February 17, 2011 through February 22, 2011. (DEX 3, p. 21). The Behavior Detail Report describes the incident as follows:

“Student was sitting at his desk and no one was talking to him or bothering him. Next thing the teacher knew the student had thrown a chair and his desk across the room. The chair almost hit the teacher and another student. From Mr. Smith: When I went in, we cleared the room and I tried to get [the Student] to walk to the office with me. He refused, so I tried to escort him down. When I did this he hit and kicked me. We then called Officer Rapiere and he came over. Student finally calmed down after about 30 minutes.”

(DEX 3, p. 29). The letter sent by the District to the Student’s Mother states that the Student “has been suspended out-of-school for five days from Wednesday, February 16, 2011 through Tuesday, February 22, 2011 for assaulting staff.” The letter further states that the Student “. . . will be allowed to return to school on Wednesday, February 23, 2011.” (DEX 3, p. 30). The District’s Attendance data indicates that the Student was on an out-of-school suspension on February 17, 18, 21 and 22, 2011. (DEX 6, p. 47). Notwithstanding, since the Student left at his normal time on February 16, the total length of this suspension was actually 4.0 days.

36. On April 11, 2011, the Student’s Mother provided the District with an electronic message which stated in pertinent part as follows:

“As you know, my consent for [the Student] to receive special education services and be treated as a child with a disability was revoked by me at noon today because the school district refused to honor its agreement to allow him to attend a full day of school and refused to honor other IEP Team decisions made at the meeting on Friday.

I am now, effective at 12:05 p.m. today, after having previously revoked consent, requesting that you evaluate [the Student] for eligibility under Section 504 and IDEA and set up an IEP meeting to provide [the Student] an appropriate IEP and Section 504 plan. Obviously, until this is completed, he must continue to attend school for the full day.”

(PEX 3, p. 8; Tr. p. 20).

37. On April 11, 2011, the District provided the Student’s Mother with a Notice of Action which indicates a change of placement and change of services for the Student. The explanation for the action contained on the Notice of Action states:

“Pursuant to the parent’s written revocation of consent for special education services and placement, [the Student’s] placement will be changed from inside regular education class less than 40 percent of the day to the regular education classroom 100% of the time. [The Student’s] special education services for 180 minutes per day in the ED resource room and speech services for 30 minutes per week will be discontinued as of 4/11/11.”

The Notice of Action further informed the Student’s Mother that due to her revocation of consent for special education services, the child and his parent no longer have the protections provided under the procedural safeguards of Part B of the Individuals With Disabilities Education Act. The Student’s Mother signed the Notice of Action on April 11, 2011, and indicated she wished to have the proposed action be “effective 12 o’clock noon today.” (JEX 15, pp. 44-45). The Student’s Mother understood that the Student would not be provided special education services by the District until she again consented to allow the District to provide such services. (Tr p. 68, lns 3-18).

38. On April 15, 2011, the District provided the Student’s Mother with a Notice of Action which indicates it is for an Initial Evaluation of the Student. The explanation for the action contained on the Notice of Action states:

“Rolla Public Schools proposes that an evaluation for eligibility for Emotional Disturbance be conducted for [the Student] based on record review, previous assessments, and previous placement. Additional assessment is requested for a comprehensive evaluation in the area of cognitive, behavioral, psychiatric and academic, yet eligibility is not contingent upon consent for said assessments.”

The Notice of Action also states that “[the Student] has received special education services under eligibility as a student with an Emotional Disturbance. . . His mother revoked consent for placement on 4/11/11 and initiated an evaluation the same day.” (PEX 4, pp. 10-11). The Student’s Mother signed the Notice of Action on April 18, 2011. (PEX 4, p. 11).

39. On April 19, 2011, the Student received a five day out-of-school suspension for assault on another student. The Student left school at noon on April 19, 2011 and remained out of school on suspension on April 20, 2011 through April 26, 2011. (DEX 3, p. 21; Tr pp. 29-30). The Behavior Detail Report describes the incident as follows:

“Hit and kicked the student behind him multiple times. The room had to be cleared. Mr. Bartle and I tried to calm him down and he stood up and pushed two desks around [and] threw a stack of papers across the room. He also threw his earrings across the room. When Officer Rapiere came in, the student walked to the office and told us that other students were calling him gay because of his earrings.”

(DEX 3, p. 32). The letter sent by the District to the Student’s Mother states that the Student “has been suspended out-of-school from Tuesday, April 19, 2011 through Tuesday, April 26, 2011 for assaulting a student.” The letter further states that the Student “. . . will be allowed to return to school on Wednesday, April 27, 2011.” (DEX 3, p. 33). The District’s Attendance data indicates that the Student was on an out-of-school suspension on April 20, 21, 22, 25 and 26, 2011. (DEX 6, p. 47). The total length of this suspension was 5.4 days.

40. On or around April 19, 2011, the District reassigned the Student to the District’s Alternative Program which is a Regular Education Setting. The Student’s Mother was informed that when the Student returned from his suspension, he would be assigned to the Alternative Program. The Alternative Program is located in a trailer near the District’s Middle School building. (Tr p. 106). The Alternative Program is designed to assist Secondary Students who have disciplinary problems to stay in school. (Tr p. 109). The Alternative Program has a maximum of fifteen (15) students at any one time. (Tr pp. 85-87).

41. On April 22, 2011, the Student’s Mother filed the expedited due process complaint in this case.. (HOX 1).

42. On April 27, 2011, the Student was eligible to return to school following his out-of-school suspension. However, the Student’s Mother held him out of school from April 27, 2011 until May 11, 2011. (Tr p. 33; Tr p. 87).

43. On April 27, 2011, the District conducted a Review of Existing Data of the Student. Present for the Review of Existing Data were the following persons: Stacey Reed, Monica Davis, Jill Sederburg, Susan Bales, Sally Tillema, Nancy Strassner and Joseph Schisler. The District’s Team made the following determination:

“Sufficient information exists on which to base the decision that [the Student] meets eligibility and needs special education services. Additional assessment in the areas of cognitive, academic, behavioral and psychiatric are beneficial for programming, yet qualifying [the Student] as a student who qualifies for special education services is not contingent upon such assessments. The signed consent for additional assessment was returned on 4/18/11.”

(JEX 20, pp. 61-65).

44. On April 27, 2011, the District conducted an Initial Evaluation of the Student. Present for the Review of Existing Data were the following persons: the Student’s Mother, Stacey Reed, Monica Davis, Jill Sederburg, Susan Bales, Nancy Strassner and Joseph Schisler. The Student’s Team determined that the Student’s primary educational disability was Emotional Disturbance and his secondary educational disability was Sound System Disorder. (JEX 20, pp. 55-59).

45. On April 29, 2011, the District sent the Student’s Mother a Notice of Action which indicated that the District was proposing to provide the Student with an initial special education placement “due to meeting IDEA eligibility criteria of a primary disability of Emotional Disturbance and secondary disability of Sound System Disorder.” (PEX 14) On April 29, 2011, the Student’s Mother signed Section 1 of the Notice of Action, but did not waive the ten (10) days for implementation by signing Section 2 of the Notice of Action. Next to her signature, the Student’s Mother made the following handwritten notation:

“I consent to initial placement, but am not waiving stay put. I will waive stay put as soon as the school district offers a placement we agree on in writing??? I will also waive stay put if the school district would implement the IEP developed April 18, 2011 and not place [the Student] in the Alternative Program. I will also waive stay put if the school district would implement the December 2, 2010 IEP with the modification of allowing [the Student] to attend school all day and not place [the Student] in the Alternative Program. I am also open to other options. Although I would waive stay put for certain solutions to be implemented that does not mean I believe the solutions would provide him FAPE in the least restrictive environment.”

(PEX 14, p. 56).

46. On or around May 11, 2011, the Student returned to school and was assigned to the District Alternative Program. (Tr p. 33; Tr p. 87).

47. On May 13, 2011, the parties conducted an IEP meeting No IEP was completed at this meeting and the Student’s Team did not determine the appropriate placement for the Student.

48. At the hearing the parties stipulated that the District did not conduct a manifestation determination meeting concerning the Student during school year 2010-2011. (Tr pp. 5-6).

49. Petitioners, in their Proposed Findings and Conclusions and Brief, which was filed with the Hearing Officer following the hearing, allege that the Student was suspended from school on May 13, 2011. (Petitioner's Proposed Findings, p. 4, ¶ 20). Petitioners' Amended Due Process Complaint does not contain an allegation concerning the alleged May 13, 2011, disciplinary action. (HOX 13).

## **II. CONCLUSIONS OF LAW**

The Hearing Officer makes the following Conclusions of Law:

50. Respondent District is a Missouri Public School District which is organized pursuant to Missouri statutes.

51. The Student is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo. The Student is now and has been during all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA Regulations, 34 C.F.R. § 300.8 and Section 162.675 (1) RSMo.

52. Article IX § 2(a) of the Missouri Constitution states in pertinent part that "[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . ." The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

53. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2010), ("State Plan") which constitutes regulations of the State of Missouri, further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

54. The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). Here the Parent filed the expedited due process complaint and she therefore bears the burden of proof on the issues presented in this proceeding.

55. The Student's Mother filed this expedited due process complaint on April 22, 2011 ("Complaint"). The Complaint is brought pursuant to the discipline procedures of the Individuals With Disabilities Education Act ("IDEA"), 34 C.F.R. §§ 300.530-300.537, the State Plan, Regulation V – *Procedural Safeguards/Discipline*, pages 80-85 and Section 162.961.4 RSMo. The IDEA, its regulations, the State Plan and the Missouri statutes substantially limit the scope and extent of the authority of a Hearing Officer in an expedited due process proceeding.

Specifically, the IDEA Regulations limit the scope of the rights which are subject to expedited due process. The Regulations, 34 C.F.R. § 300.532 provide that “[t]he parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e) . . . may appeal the decision by requesting a hearing pursuant to §§ 300.507 and 300.508(a) and (b).”

56. The issues raised in the Complaint are limited to the statutory jurisdiction of this Hearing Officer and encompass school year 2010-11 through April 22, 2010, the date of the filing of the Complaint. (“Relevant Period”). Petitioner’s allegations concerning a disciplinary removal which was on-going at the time of the filing of the expedited due process complaint are considered to be a part of the Relevant Period, even though the disciplinary removal continued for several days following April 22, 2010.

57. Petitioners’ allegations concerning alleged discipline that occurred on May 13, 2011 (three days before the expedited due process hearing in this case) are outside the scope of the Relevant Period and the jurisdiction of the Hearing Officer for the following reasons:

A. The allegations were not set forth in the Amended Complaint (HOX. 13), and the District did not agree to litigate the alleged incident. “The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint . . . unless the other party agrees otherwise.” (34 C.F.R. § 300.511(d).

B. The only mention of this alleged discipline during the hearing was in passing. Even if this allegation was considered to be a part of the Relevant Period, there is insufficient information on the record to even verify the allegation. The Petitioner bears the burden of proof and has failed to provide sufficient information concerning this matter.

58. During the Relevant Period, the Student was enrolled in the District from August 17, 2010 (the first school day of school year 2010-11) until September 30, 2010. On October 1, 2010, the Student’s Mother officially notified the District in writing that the Student was being home schooled and the District dropped the Student from enrollment. Beginning on October 1, 2010 and ending on December 5, 2010, the Student was home schooled and was not enrolled in the District. On December 6, 2010, the Student was re-enrolled in the District by his Mother and he remained enrolled in the District through April 22, 2011, the remainder of the Relevant Period.

59. During the period of time beginning on October 1, 2010, and ending on December 5, 2010, the Student was a “parentally-placed private school child with disabilities” (34 C.F.R. § 300.130) in that, on October 1, 2010, the Student was removed from enrollment in the District and was not otherwise enrolled in any other public or private school and was being home schooled by his Parent.

60. At noon on April 11, 2011, the Student’s Mother withdrew consent for special education and related services by providing the District with a written withdrawal of consent. That same day, the District provided the Student’s Mother with a Notice of Action indicating its intent to cease providing special education and related services.

61. The State Plan, Regulation V – *Procedural Safeguards/Discipline*, states as follows:

“Parental Revocation of Consent (34 C.F.R. § 300.9 and 300.300)

A parent may unilaterally withdraw a child from further receipt of special education and related services by revoking their consent for the continue provision of special education and related services to their children. A public agency may not, through mediation or a due process hearing, challenge the parent’s decision or seek a ruling that special education and related services must continue to be provided to the child. Parental revocation of consent must be in writing.

Upon receipt of the parent’s written revocation of consent, a public agency:

- > must provide the parent with prior written notice before ceasing the provision special education and related services.
- > will not be considered in violation of requirement to make FAPE available to the child because of the failure to provide the child with special education and related services.
- > is not required to convene an IEP team meeting or develop an IEP for the child.
- > is not required to amend the child’s education records to remove any references to the child’s receipt of special education and related services.”

(State Plan, Regulation V – *Procedural Safeguards/Discipline*, page 63).

62. The United States Department of Education (“DOE”), Office of Special Education Rehabilitative Services (“OSERS”) issued a *Questions and Answers On Discipline Procedures* in June, 2009. This document states the following regarding discipline decisions made after a parent has revoked consent for special education and related services:

**Question A-3:** Do the discipline provisions apply if the child violates the school’s code of student conduct after a parent revokes consent for special education and related services under §300.300(b)?

**Answer:** No. Under §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. *When a parent revokes consent for special education and related services under §300.300(b), the parent has refused services as described in §300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections.* It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special education and related services. 73 Federal Register 73012-73013.

(See: the DOE website at [www2.ed.gov/policy/speced/quid/idea/discipline-q-a.pdf](http://www2.ed.gov/policy/speced/quid/idea/discipline-q-a.pdf)) The Federal Register reference set forth in the OSERS *Questions and Answers On Discipline Procedures*, 73 Federal Register 73006, 73012-73013, provides the following comments concerning the effect of a parent's revocation of consent for special education and related services:

Comment: One commenter requested that § 300.300 be amended to specifically state that, for discipline purposes, a public agency will not consider the child to be a child with a disability if the parent refuses consent, fails to respond to a request for consent, or revokes consent for special education and related services. Other commenters stated that revocation of consent for special education and related services should not impact discipline protections for children whose parents have revoked consent because the school has prior knowledge that the child is a child with a disability and the child has been determined eligible for services. The commenters stated that § 300.534, consistent with section 615(k)(5) of the Act, applies to children not yet determined to be eligible for special education and related services who have engaged in behavior in violation of a code of student conduct. One commenter expressed concern that subjecting previously eligible students to general education discipline procedures would leave these students without any education.

Discussion: Section 300.534 generally provides protections for children not yet determined eligible for special education and related services in instances when the public agency is deemed to have knowledge that a child is a child with a disability before the behavior that precipitated the disciplinary action occurred. *However, § 300.534(c)(1)(ii) states that a public agency is not deemed to have knowledge under this section if the parent of the child has refused services under the regulations implementing Part B of the Act. When a parent revokes consent for special education and related services under § 300.300(b), the parent has refused services as described in § 300.534(c)(1)(ii); therefore, the public agency*

*is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections.*

[emphasis added]. (73 Federal Register 73006, pp. 73012-73013).

63. At 12:05 p.m. on April 11, 2011, the Student's Mother provided the District with an electronic message which stated in pertinent part as follows:

"I am now, effective at 12:05 p.m. today, after having previously revoked consent, *requesting that you evaluate [the Student] for eligibility under Section 504 and IDEA* and set up an IEP meeting to provide [the Student] an appropriate IEP and Section 504 plan. Obviously, until this is completed, he must continue to attend school for the full day."

[emphasis added]. (PEX 3, p. 8; Tr. p. 20). The IDEA Regulations, 34 C.F.R. § 300.534(b)(2) state:

"(b) *Basis of Knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred – . . .

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311. . ."

This request of the Student's Mother that the District conduct an evaluation of the Student caused the District to again "be deemed to have knowledge that [the Student] is a child with a disability."

64. On April 29, 2011, the Student's Mother signed Section 1 of a Notice of Action which proposed to provide the Student with special education and related services. The Student's Mother did not waive the ten (10) days for implementation by signing Section 2 of the Notice of Action. Whether the April 29, 2011, signature of the Student's Mother on the Notice of Action constitutes consent for special education and related services is not decided here as it does not impact the limited issues raised in this expedited due process proceeding.

65. During School Year 2010-11, the District removed the Student from school as a result of violations of the Student Disciplinary code, on the following occasions:

A. Out-of-School suspension dated September 15, 2010 – the Student received a 2.0 day out-of-school suspension for insubordination. The suspension was served on September 16, 2011 and September 17, 2011. The actual out-of-school time for this suspension was 2.0 days.

B. Left Early on September 20 through September 22 and on September 24, 2010. On each of these days, the Student left school at 2:00 p.m., one class period early. These removals totaled four tenths (.4) of one school day.

C. Out-of-School suspension dated September 27, 2010 – the Student received a 2.8 out-of-school suspension for assault on school staff. The Student left school at 9:37 a.m. on September 27, 2010 and remained out of school on suspension on September 28, 2010 and September 29, 2010. The actual out-of-school time for this suspension was 2.8 days.

D. Out-of-School suspension dated February 16, 2011 – the Student received a 5.0 day out-of-school suspension for assault on school staff. The Student left school at his normal time on February 16, 2011, and served the suspension on February 17, 2011 through February 22, 2011. The actual out-of-school time for this suspension was 4.0 days.

E. Out-of-School suspension dated April 19, 2011 – the Student received a 5.0 day out-of-school suspension for assault on another student. The Student left school as noon on April 19, 2011, approximately fifteen minutes early, and remained out of school on suspension on April 20, 2011 through April 26, 2011. The actual out-of-school time for this suspension was 5.4 days.

66. The IDEA Regulations provide a definition of whether a disciplinary removal or removals constitute(s) a “change of placement” under the IDEA. The Regulations, 34 C.F.R. § 300.536(a) state as follows:

“1(a) For purposes of removals of a child with a disability from the child’s current educational placement under §§ 300.530 through 300.535, a change of placement occurs if –

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern –
  - (i) Because the series of removals total more than 10 school days in a school year;
  - (ii) Because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
  - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

The State Plan provides a similar definition in Regulation V, *Procedural Safeguards/Discipline*, page 80.

67. The comments in the Federal Register to 34 C.F.R. § 300.536(a)(2)(ii) are as follows:

“We are not changing the regulations because, in light of the Department’s longstanding position that a change in placement has occurred if a child has been subjected to a series of disciplinary removals that constitute a pattern, we believe requiring the public agency to carefully review the child’s previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions. Whether the behavior in the incidents that resulted in the series of removals is “substantially similar” should be made on a case-by-case basis and include consideration of any relevant information regarding the child’s behaviors, including, where appropriate, any information in the child’s IEP. However, we do not believe it is appropriate to require in these regulations that the “substantially similar behaviors” be recognized by the IEP Team or included in the child’s IEP as recommended by the commenter. The commenter is correct that what constitutes “substantially similar behavior” is a subjective determination. However, we believe that when the child’s behaviors, taken cumulatively, are objectively reviewed in the context of all the criteria in paragraph (a)(2) of this section for determining whether the series of behaviors constitutes a change in placement, the public agency will be able to make a reasonable determination as to whether a change in placement has occurred. Of course, if the parent disagrees with the determination by the public agency, the parent may request a due process hearing . . .”

(71 Federal Register, p. 46729 – August 14, 2006).

68. None of the Student’s disciplinary out-of-school suspensions or removals during the Relevant Period were for more than ten (10) consecutive school days. Therefore, the District did not change the Student’s current educational placement as defined by 34 C.F.R. § 300.536(a)(1) – “The removal is for more than 10 consecutive school days.”

69. The IDEA Regulations, 34 C.F.R. § 300.536(a)(2) provide a factor test to use to determine whether the Student’s disciplinary out-of-school suspensions or removals constitute a “pattern” and therefore a change of the Student’s Educational placement. The factors are analyzed in the conjunctive, not the disjunctive. An analysis of the “factors” follows:

A. Factor 1 – “the series of removals total more than 10 school days in a school year” – the Student was suspended out-of-school or removed from school during the Relevant Period for 14.6 school days. This factor is met.

B. Factor 2 – “the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals” – the Student’s conduct that resulted in his disciplinary suspensions or removals during the Relevant period is similar, but not “substantially similar.” This factor is not met for the following reasons:

(1) The September 15, 2010 suspension was for “insubordination” and is not similar to any of the other removals during the Relevant Period;

(2) The September 20-24, 2010 removals resulted from the Student leaving school one period early on four days and are not similar to any of the other suspensions during the Relevant Period.

(3) The September 27, 2010 and February 16, 2011 suspensions are similar, and perhaps even “substantially similar” to each other because they involved assaults on District personnel. However, the cumulative total of the days the Student was removed for these two suspensions was 6.8 school days, less than the cumulative ten (10) school days that is required to create a “pattern” of removals;

(4) The April 19, 2011 suspension was for assault on a fellow student and was not similar to any of the other removals during the Relevant Period.

C. Factor 3 – the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another” – The suspension were not similar in length and occurred a various times throughout the Relevant Period. This factor is not met for the following reasons:

(1) The removals were for 2.0, .4, 2.8, 4.0 and 5.4 school days which are relatively short in duration;

(2) The September 15, September 20-24 and September 27, 2010 removals all occurred within eight (8) school days but only constituted a cumulative removal of 5.2 school days. These suspensions were chronologically isolated from the February 16, 2011, removal by approximately eighty-two (82) school days and from the April 19, 2011 removal by approximately one hundred twenty-one (121) school days;

(3) The February 16, 2011 removal is chronologically separated from the April 19, 2011 removal by approximately thirty-nine (39) school days.

70. The Student’s out-of-school suspensions or removals during the Relevant Period – September 15, 2010; September 20-22 and September 24, 2010; September 27, 2010; February 16, 2011 and April 19, 2011 – do not constitute a “pattern” of out-of-school suspensions or removals as defined by the IDEA Regulations, 34 C.F.R. § 300.536(a)(2).

71. The District did not change the educational placement of the Student as a result of the Student's out-of-school suspensions or removals during the Relevant Period – September 15, 2010; September 20-22 and September 24, 2010; September 27, 2010; February 16, 2011 and April 19, 2011 – as defined by the IDEA Regulations, 34 C.F.R. § 300.536 and the State Plan, Regulation V, *Procedural Safeguards/Discipline*, pp. 80-81.

72. The District was not required to conduct a Manifestation Determination pursuant to the IDEA Regulations, 34 C.F.R. § 300.530(e) or the State Plan, Regulation V, *Procedural Safeguards/Discipline*, pp. 81-82, because the Student's educational placement was not changed during the Relevant Period.

73. Petitioner has failed to meet the burden of proof in this case for the reasons set forth above.

### **III. DECISION**

The Hearing Officer issues the following decision concerning the issues presented in this case:

74. **Issue Number 1.** Whether the District changed Student's educational placement under the IDEA Regulations, 34 C.F.R. Sections 300.530 and 300.531, during School Year 2010-11.

#### **Decision:**

The Student enrolled in the District in April, 2010, having transferred from the Washoe County School District, in Sparks, Nevada. The Student had previously been educationally diagnosed as a "child with a disability" with a primary educational diagnosis of Emotional Disturbance and a secondary educational diagnosis of Speech Impairment. The Student began attending the 7<sup>th</sup> Grade at Rolla Middle School at the beginning of school year 2010-11. On August 31, 2010, an annual IEP was prepared for the Student which provided him with an educational placement of "Inside regular class less than 40 percent of the day."

During the Relevant Period covered by the expedited due process complaint, the Student was removed from school on the following occasions:

- A. On September 15, 2010, the Student received a 2.0 day out-of-school suspension for insubordination. The Student missed September 16 and September 17, 2010 as a result of this suspension.
- B. On September 20 through September 22 and on September 24, 2010, the Student left school at 2:00 p.m., one class period early. These absences totaled four tenths (.4) of one school day.

C. On September 27, 2010, the Student received a 2.8 day out-of-school suspension for assault on school staff. The Student missed a portion of September 27, 2010 and remained out of school on suspension on September 28, 2010 and September 29, 2010.

D. On February 16, 2011, the Student received a 5.0 day out-of-school suspension for assault on school staff. The Student left school at his normal time on February 16, 2011, but served the suspension on February 17, 2011 through February 22, 2011. Since the Student left at the normal time on February 16, 2010, the total length of this suspension was 4.0 days.

E. On April 19, 2011, the Student received a 5.0 day out-of-school suspension for assault on another student. The Student left school as noon on April 19, 2011 and remained out of school on suspension on April 20, 2011 through April 26, 2011. The total length of this suspension was 5.4 days.

The question that must be answered is whether these removals constitute a change of the Student's educational placement.

The IDEA Regulations, 34 C.F.R. § 300.536, state that in order to constitute a change of a Student's educational placement, the disciplinary removals of the Student must:

- A. Constitute a removal for more than ten (10) consecutive school days; or,
- B. Constitute a "pattern" of removals:
  - (1) because the removals total more than ten (10) school days in a school year; and,
  - (2) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
  - (3) because of additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

An analysis of the factors set out in IDEA Regulations, 34 C.F.R. § 300.536(a), reveals that none of the Student's disciplinary out-of-school suspensions or removals during the Relevant Period were for more than ten (10) consecutive school days. Therefore, the factor described in the IDEA Regulations, 34 C.F.R. § 300.536(a)(1) is not met and the analysis proceeds to determine whether the removals constituted a pattern of removals as defined in the IDEA Regulations, 34 C.F.R. § 300.536(a)(2).

The IDEA Regulations, 34 C.F.R. § 300.536(a)(2), sets out three factors that must all be met in order for the series of suspensions or removals to constitute a “pattern” of removals. An analysis of these factors reveals the following:

A. The first factor under this section of the Regulations is whether “the series of removals total more than 10 school days in a school year.” During the Relevant Period, the Student was suspended out-of-school or removed from school for 14.6 school days, so this factor was met.

B. The second factor under this section of the Regulations is whether “the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals.” An analysis of the removals made during the Relevant Period reveals the following:

(1) The September 15, 2010, suspension was for “insubordination” and is not substantially similar to any of the other removals during the Relevant Period;

(2) The September 20-24, 2010 removals resulted from the Student leaving school one period early on four days and are not substantially similar to any of the other suspensions during the Relevant Period.

(3) The September 27, 2010 and February 16, 2011 suspensions are similar, and perhaps even “substantially similar” to each other because they involved assaults on District personnel. However, the cumulative total of the days the Student was removed for these two suspensions was 6.8 school days, less than the cumulative ten (10) school days that is required to create a “pattern” of removals;

(4) The April 19, 2011 suspension was for assault on a fellow student and was not substantially similar to any of the other removals during the Relevant Period.

This factor is not met.

C. The third factor under this section of the Regulations is whether “the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.” An analysis of the removals made during the Relevant Period reveals that the removals were of varying length and occurred at various time throughout the Relevant Period. More specifically:

(1) The removals were for 2.0, .4, 2.8, 4.0 and 5.4 school days which are relatively short in duration;

(2) The September 15, September 20-24 and September 27, 2010 removals all occurred within eight (8) school days but only constituted a cumulative removal of 5.2

school days. These suspensions were chronologically isolated from the February 16, 2011 removal by approximately eighty-two (82) school days and from the April 19, 2011 removal by approximately one hundred twenty-one (121) school days;

(3) The February 16, 2011 removal is chronologically separated from the April 19, 2011 removal by approximately thirty-nine (39) school days.

This factor is not met.

An analysis of the factors set out in IDEA Regulations, 34 C.F.R. § 300.536(b), reveals that only one of the three factors was met. Accordingly, the removals of the Student did not constitute a “pattern” of removals as defined in the Regulations, 34 C.F.R. § 300.536(a)(2). Therefore, the District did not change the educational placement of the Student as a result of the Student’s out-of-school suspensions or removals during the Relevant Period – September 15, 2010; September 20-22 and September 24, 2010; September 27, 2010; February 16, 2011 and April 19, 2011 – as defined by the IDEA Regulations, 34 C.F.R. § 300.536 and the State Plan, Regulation V, *Procedural Safeguards/Discipline*, pp. 80-81.

75. **Issue Number 2.** If so, did the District fail to conduct a manifestation determination during School Year 2010-11, concerning the Student under the IDEA Regulations, 34 C.F.R. Section 300.530(e)?

**Decision:**

The parties stipulated that the District did not conduct a Manifestation Determination concerning the Student. Since the Student’s educational placement was not changed during the Relevant Period, the District was not required to conduct a Manifestation Determination pursuant to the IDEA Regulations, 34 C.F.R. § 300.530(e) or the State Plan, Regulation V, *Procedural Safeguards/Discipline*, pp. 81-82.

76. **Issue Number 3.** If a violation of the these provisions occurred, what is the remedy?

**Decision:**

There was no violation of the provisions discussed above, so there is no remedy.

**IV. ORDER**

77. The Hearing Officer issues the following Order:

A. The expedited due process complaint filed by the Student’s Mother on April 22, 2011 is dismissed.

B. Respondent's Motion to Dismiss was taken with the case and is now moot as a result of the decision in this case.

### **V. APPEAL PROCEDURE**

**PLEASE TAKE NOTICE** that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

Dated: May 26, 2011

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Ransom A Ellis, III  
Hearing Officer

### **CERTIFICATE OF SERVICE**

This Order has been served by regular United States Mail, with courtesy copies sent electronic mail (where email addresses were provided to the Hearing Officer) on the following persons on this 26th day of May, 2011:

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Ransom A Ellis, III