

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Peabody Public Schools

BSEA #2304801

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC §1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC §794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

In early September 2022, Student, a then thirteen-year-old eighth-grader (Student turned fourteen in November 2022) who is eligible for special education services from the Peabody Public Schools (Peabody, District or School) was charged with a felony delinquency offense on the basis of alleged out-of-school conduct.¹ Peabody conducted a Manifestation Determination Review (MDR), concluded that the conduct of which Student was accused was not directly or substantially related to his identified disabilities (ADHD and a specific learning disability in reading), and determined that Student would be subject to long-term suspension under MGL c. 71, §37H ½. As such, while Student has been receiving out-of-school tutorial and counseling services since approximately November 2022, he has not been in school physically or virtually since mid-September 2022.

Notably, Student’s delinquency case has not been adjudicated or otherwise disposed of by the Juvenile Court. The conduct forming the basis of the MDR has been alleged, but not proven. As such the ability of the Hearing Officer to consider evidence regarding the MDR is severely limited by the existence of the open delinquency matter.

On December 8, 2022, Parent filed a request for an expedited hearing with the Bureau of Special Education Appeals (BSEA) in which she challenged Peabody’s determination that the conduct of which Student is accused was not directly and substantially related to his identified disabilities and was not a direct result of Peabody’s failure to implement Student’s IEP. In her hearing request, Parent seeks findings that the

¹On information and belief, Student was charged with assault and battery with a dangerous weapon (shod foot). The alleged conduct reportedly took place off school grounds but close to school property. The alleged victim was another middle school student. The record does not contain the police report (if any), application for complaint (if any), or complaint issued by the Juvenile Court (if any). However, the parties agree that Student was formally charged. The record is silent as to antecedents to the alleged behavior.

alleged conduct at issue was a manifestation of Student's ADHD and/or the result of Peabody's failure to implement Student's IEP, that neither she nor Student were able to meaningfully participate in the MDR, and that Student did not receive services in a timely manner during his suspension.

Peabody contends that the MDR correctly determined that Student's behavior was neither caused by or directly or substantially related to his disabilities nor the result of the District's failure to implement Student's IEP, and that a brief period of non-implementation of the IEP pre-dated the conduct in question and was caused by Parent's refusal to sign the IEP. Moreover, Peabody has offered and/or provided Student with tutoring and counseling services in an amount exceeding his statutory and regulatory entitlement.

On December 8, 2022, the BSEA granted the Parent's request for an expedited hearing, and set a hearing date of December 23, 2022. The parties attended a resolution meeting on December 15, 2022 which did not result in settlement of this matter. As such, the hearing went forward and concluded on the assigned date.

At the hearing, Parent represented herself and Student, and Peabody was represented by counsel. Each party presented documentary evidence and examined and cross-examined witnesses. At the close of the evidence, both parties presented oral closing arguments.

The record in this case consists of Parent's exhibits P-A (pp. 1-31), P-B (pp. 33-67), P-C (pp. 68-72)² School's exhibits S-1 through S-23, and approximately five hours of stenographically-recorded oral testimony and argument. Those present for all or part of the hearing were:

Parent	
Student's Aunt	
Shannon Crompton	Special Ed. Administrator, Peabody Public Schools
Timothy Hynick	School Psychologist, Peabody Public Schools
Michael Joyce	Attorney for Peabody Public Schools
Carol Kusinitz	Court Reporter, VeriText
Jessica Reid	Zoom Concierge, VeriText

ISSUES PRESENTED

The issues for hearing are:

²Pages 32, 64, 65, and a handwritten note attached to Page 4 were excluded from the record on the basis of the School's objections.

1. Whether the Peabody Public Schools was incorrect when it determined that the alleged conduct leading to Student's suspension was not caused by, or did not have a direct and substantial relationship to, Student's disability;
2. Whether the Peabody Public Schools was incorrect when it determined that the conduct in question was not the direct result of the District's failure to implement Student's Individual Education Program (IEP)
3. Whether the District failed to provide Student with required special education services during the period of suspension.

POSITION OF PARENT

Student's alleged misconduct, if it occurred, was a direct result of his longstanding diagnosis of ADHD, which causes him to behave impulsively and lack self-control. Student has a long history of impulsive, disruptive, behavior at school, and has been disciplined many times for offenses such as insubordination, wandering hallways, and throwing milk in the cafeteria. If the conduct for which Student was suspended occurred, such conduct was yet another manifestation of the impulsivity caused by his ADHD. The MDR team failed to consider Student's complete profile, including his behavioral impulsivity and lack of self-control, and thus was incorrect when it determined otherwise.

Further, during the first days of the 2022-2023 school year, Peabody wrongly removed Student from his IEP services because School personnel incorrectly claimed that Parent had failed to sign the proposed IEP. The School's failure to implement Student's IEP was another direct cause of Student's alleged misconduct.

Lastly, as a result of delays by Peabody, Student received no educational services from the time of his suspension in mid-September 2022 until tutoring began on November 10, 2022.

POSITION OF SCHOOL

Parent has failed to produce any evidence that the alleged conduct of September 6, 2022 was caused by Student's disabilities. On the contrary, none of the "behaviors" in Student's school record have involved aggression towards others.

Moreover, Student's IEP was being implemented at the time of the alleged misconduct, and Parent has presented no evidence suggesting that Student's alleged behavior resulted from non-implementation. Lastly, Peabody offered compensatory services in excess of what Student was entitled to.

SUMMARY OF THE EVIDENCE

1. Student is a fourteen-year-old eighth grader with disabilities who lives with Parent in Peabody and is enrolled in the Peabody Public Schools. Student's eligibility for special education and related services from Peabody is not in dispute. Student was diagnosed with ADHD at the age of six and received accommodations in school under a Section 504 plan prior to seventh grade. (Testimony of Parent)

At the end of Student's seventh grade year (June 2022), Peabody found Student eligible for special education based on his history of ADHD as well as a specific learning disability in reading and issued an initial IEP calling for services in a full-inclusion setting with pullouts for English Language Arts (ELA), counseling, and academic support. (P-4).

2. Student gets along well with family and peers, has many friends, and participates in social activities outside of school including organized football. He presents with no major emotional difficulties. His cognitive abilities span the low-average to average range. Despite these strengths, Student struggles to perform in school as a result of his disabilities. During his seventh-grade year (2021-2022) Student earned mostly failing grades, did not complete homework or in-class assignments, and had many absences. Although he enjoyed the social aspects of school, he felt disengaged from most academics because he did not understand the material. (S-2, S-4, Testimony of Hynick)
3. Student has a history of behavioral struggles in school during seventh and eighth grade. Student's "Conduct History" reveals several behavioral infractions during seventh grade and the first month of eighth grade. During seventh grade, between September 2021 and March 2022, Student was formally disciplined for five incidents, consisting of cutting class, being in the bathroom or hallway without permission, tardiness, disrupting class, skipping detention, and refusing to give up his phone when asked. Consequences for these behaviors included detention, loss of his phone for a day, and one in-school suspension (ISS). (S-20)

On April 29, 2022, Student received a one-day ISS for "creating a disturbance" in the school cafeteria, by "involve[ing] himself in an argument between two other students, pushing one of them, punches thrown but not landed." (S-20)

During May 2022, Student received detentions for skipping homeroom on a daily basis. (S-20)

On June 1, 2022, Student was cited for “disrespect” for “throwing small objects (erasers) at [a staff person].” As a consequence, Student spent one day in “SOAR.”³ On June 7, 2022, Parent sent an email to Associate Principal Peter Ginolfi stating that she was disappointed with Student’s behavior and that she had grounded student with no phone, or Chromebook. The email further stated that “I think putting him with Mr. Souza is a good idea. Mr. Souza was very good with [] and has a lot of patience.” While the record does not identify “Mr. Souza,” I infer from the context that he is a teacher or counselor. (P-A, p. 9)

4. On or about September 6, 2022, during the first week of eighth grade, Student was alleged to have committed a felony assault and battery on another student, away from, but near to, school property. This incident led to the long-term suspension that is the subject of the instant matter. (S-20)
5. Between the time of the alleged assault and imposition of the long-term suspension, Student was involved in additional misbehavior. On September 6, 2022, Student was cited for “insubordination,” (refusing to give up his phone when entering the bathroom) and three instances of “wandering” (walking in a hallway without permission). On September 9, 2022, Parent received an email, apparently from Associate Principal Peter Ginolfi,⁴ stating the following:

Good morning. Your son is in a group of four boys who we are having a hard time with in the morning as they eat their breakfast after 8:05 when breakfast in the cafeteria has ended. They are continually missing the first 15 minutes of...school each day as they are taking a very long time to eat and fool around with each other. Today they were playing around and one student threw milk at another student and all over the carpet in the guidance counselor’s office... (P-A, pp. 7-8)

6. Student’s aunt (Aunt), who sees Student almost daily and is very involved with his care, testified that Student’s behavior outside of school is problematic and can be “out of control.” Specifically, Student has a hard time listening and “keeping his hands to himself.” During the week of September 6, 2022, when the incident allegedly occurred that led to Student’s felony charge and subsequent long-term suspension, Student was staying with Aunt because Parent was out of town. According to Aunt, Student was “out of control,” “defiant,” “wrestling all night” with his cousin when he was supposed to go to bed. Aunt described the situation as “a nightmare.” Aunt has

³ The record does not indicate what “SOAR” is, but, from context, I infer that it is a room or rooms where students are sent for ISS or otherwise to address misbehavior.

⁴ The email was sent by school personnel but the identity of the original author is unclear. It also is unclear whether this email was sent solely to Parent or to the parents of all of the four boys involved.

no particular formal training or background in special education, but strongly believes that Student's behavior is linked to his ADHD. (Testimony of Aunt).

7. During seventh grade (2021-2022), Student earned grades of "F" for all four quarters in Language Arts and Math. In Social Studies and Science, he received grades of D for the first quarter and F for the remaining three quarters. Teacher comments for Language Arts were: "[c]onduct unsatisfactory. Does not work well in class... requires constant supervision. There is a lack of serious approach." The Social Studies teacher commented, "[m]ore effort needed," and the Math teacher stated "[u]nfortunately, [Student] did not complete much work this quarter and his behavior needs improvement." According to the Science teacher, Student was "[d]isruptive in class," and had missing work. Student's Foreign Languages grade was "Unsatisfactory," and the teacher commented, "[l]ack of serious approach... did not complete any assignments for the quarter and did not participate in class at all. Student also received a grade of "Unsatisfactory" in STEM-7. The only classes in which Student received satisfactory grades were Physical Education and Health. (P-A, p. 2)

Student was absent for a total of 39 days and tardy 12 times during the 2021-2022 school year. (P-A, p. 2)

8. Concerned about Student's struggles in seventh grade, Parent referred him for an initial special education evaluation in the spring of 2022. (S-2) In May 2022, Peabody conducted this evaluation, which consisted of formal psychological and academic assessments and a classroom observation. (S-2; P-A, pp. 12-30)
9. On April 14, 2022, a classroom observation was conducted by School Adjustment Counselor (SAC) Ashley Lowe. Ms. Lowe reported that Student engaged in the following behaviors five or more times per day: "Argues with Teacher," "Refuses to follow adult directions," "Slow to comply with directive," "Off task unless supervised," "Fidgets with objects in class," "Work not completed without prompting. The following behaviors occurred fewer than five times per day: "Asks to leave the classroom," "Difficulty waiting his/her turn," "Frequently asks to use the bathroom," "Disorganized, unable to locate things." Lastly, Student engaged weekly in "Minor property destruction," "Argues with peers," and "Difficulty staying seated." (P-A, p. 17.)

Ms. Lowe further reported that during her 38-minute observation of Student in a Biology lecture, he had to be redirected to stop speaking to another student and to take out his supplies and asked a question without raising his hand. Student was not focused on the teacher's presentation; instead, he was listening to music on his headphones, typing on his computer, looking at his phone, rocking in his chair, fidgeting with a pen, and chewing on a pen cap. When the teacher came to check on

Student's work, Student "began banging his computer on the desk loudly, requiring three teacher prompts to stop, before trying to quietly do so again when the teacher started to walk away." (P-A, p. 18) Student also repeatedly tapped his pen on the desk despite multiple requests from the teacher to stop, put his head down on his desk, and occasionally clapped his hands. (P-A, p. 18)

10. On May 5, 2022, Jake Kessler, a special education teacher, conducted an academic evaluation consisting of gathering information about Student's classroom functioning and administration of the Woodcock Johnson Test of Achievement (2014). Mr. Kessler reported that Student "frequently appears disengaged from class and may demonstrate disruptive behavior." Student's general education teachers reported that Student regularly sleeps in class. Student reported that he enjoys connecting with friends in school, but has generally negative feelings about school because he cannot successfully access the curriculum. (P-A, pp. 12-16)

Formal assessment with the Woodcock Johnson yielded "low," "average," and "low average" scores, in Broad Reading, Broad Mathematics, and Broad Written Language, respectively. Student achieved "low" or "very low" scores in multiple subtests, including Passage Comprehension, Letter Word Identification, and Sentence Writing Fluency.

Mr. Kessler recommended accommodations to support Student's reading and writing in the general education setting, including check-ins to ensure reading comprehension, graphic organizers, time for Student to discuss what he has read, extra time for assignments and tests, typing, modified content as needed, study guides, and examples of expected work output. For math, recommended accommodations included reference sheets, models and examples of problem-solving, as well as study guides for tests. (P-A, pp. 12-16)

11. The psychological evaluation was conducted on May 19, 2022 by Timothy Hynick, Psy.D., who reviewed Student's records, interviewed Student, gathered information from teachers, and administered a battery of standardized tests: the Wechsler Intelligence Scales for Children-Fifth Edition (WISC-V), two subtests of the Wide Range Assessment of Memory and Learning-Third Edition (WRAML-3), Behavior Assessment System for Children-Third Edition (BASC-3), Self Report, and Incomplete Sentences Blank.

Dr. Hynick did not administer the Parent or Teacher portions of the BASC, nor did he administer any other parent or teacher questionnaire or rating scale. He did, however, elicit information from teachers on Student's presentation in the classroom. It is unclear from the record whether Dr. Hynick interviewed Parent.

According to Dr. Hynick's report, a review of Student's records for seventh grade revealed the failing grades, disciplinary actions, and more than 30 absences referred to above. When tested, Student was pleasant and cooperative, engaged in testing, and showed appropriate attentional and social pragmatic skills. As such, Dr. Hynick deemed the testing to accurately reflect Student's then-current functioning.

On the WISC-V, Student scored as follows: Verbal Comprehension and Processing Speed, "Average," Visual Spatial, Fluid Reasoning, and Working Memory, "upper end of Low Average," and Full Scale IQ, "Low Average." Student's scores on the WRAML-3 were "Average" for Verbal Learning Total and "Below Average" for Story Memory.

Dr. Hynick assessed Student's social/emotional functioning via the BASC-3 Self Report, the Incomplete Sentences Blank, information from teachers on Student's presentation in the classroom, and an interview with Student. Based on this information, Dr. Hynick found that Student did not present with "an emotional experience that is compromising his ability to access the curriculum." Student reported being happy with his family and social relationships and activities outside of school.

In school, Student felt that he was successful socially, in that he had many friends, and was not being bullied or mistreated. On the other hand, Student reported that he did not like school, and did not complete work because he did not understand the material being taught. Student also "did report that he has had difficulty regulating his behavior in the school setting and has received several suspensions for various infractions." (S-2)

Teachers reported that Student had academic potential but did little work. Their concerns about behavioral regulation related to Student's difficulty with focus and work completion. (Hynick)

Dr. Hynick concluded that Student's achievement was not commensurate with his ability, and that while he did not have an emotional impairment, his reported diagnosis of ADHD was "likely impacting upon his function throughout the school day." Dr. Hynick's main concern was Student's negative attitude towards school and learning. He recommended various accommodations to help Student "become a more active and engaged learner." These accommodations included a behavioral intervention system that provided positive incentives for engagement in learning, structured and organized classes, prompts and cuing to aid focus, support with organization of assignments, multisensory instruction, breaking down of larger assignments into smaller components, home-school communication, extended time on assignments, and other, similar supports. (Testimony of Hynick, S-2)

12. On June 14, 2022, the Team convened to review the evaluations. Parent and Aunt attended the meeting. Among other issues, Parent discussed her concerns about Student's behavior. (Testimony of Parent, Testimony of Aunt). The Team found Student eligible for special education based on a primary disability of Other Health Impaired (based on his diagnosis of ADHD) as well as a specific learning disability (SLD) in reading. (S-4; Testimony of Crompton).
13. On June 22, 2022, Peabody issued an IEP that proposed goals in Executive Functioning, Reading, and Academic Functioning (counseling). The goals and benchmarks targeted such issues as management of assignments, reading skills, ability to focus on academics, perspective-taking and self-regulation as related to schoolwork. The service delivery grid proposed consultation between the special educator and classroom teacher(s) in Grid A, paraprofessional support in the general education science, social studies and math classrooms in Grid B, and, in Grid C, 5 periods per week of substantially-separate, specialized ELA instruction, 3x25 minutes per week of "learning center" support, and 30 minutes per week of counseling. The IEP did not mention "aggressive" behavior as an issue. The Team determined that Student was not at risk of bullying either as an aggressor or a victim. (S-4). Parent agreed with the goals, accommodations, and placement outlined in the IEP. (Parent)
14. The parties dispute whether and when Parent signed the IEP. Peabody mailed the proposed IEP to Parent on June 23, 2022. (Testimony of Crompton). Parent testified that she received the proposed IEP in the mail around this time, accepted it in writing, and mailed the accepted IEP to the special education department. (Testimony of Parent) The District's records indicated that it had not received the accepted IEP at that time, and, on July 22, 2022, sent a second IEP to Parent for signature and notified the BSEA of the existence of the unsigned IEP. (S-23, testimony of Crompton).

Parent received the second copy of the IEP but refused to sign it at that time because she had signed it previously. Testimony of Parent).
15. Student entered eighth grade on the first day of the 2022-2023 school year, August 29, 2022. and attended each of the days that week that school was in session (August 29, 30, 31 and September 1, 2022), as well as on September 6, 2022, when school resumed after the Labor Day weekend. He received the services designated in his IEP on those days. On September 7, 2022, Student was removed from his Grid C special

education services because Peabody did not have Parent's signed IEP in its records.⁵ (Testimony of Crompton) It is not clear from the record if or when Student's special education services were reinstated prior to his long-term suspension.

16. On September 16, 2022, middle school Principal Todd L. Bucey sent a letter to Parent stating that the Peabody Public Schools had been informed that Student had been charged with a felony, that the Principal had made a preliminary determination that Student was, in fact, currently charged with a felony offense, and that, consequently, Student would be removed from school pending further disciplinary proceedings. The letter further informed Parent of Student's right to make up schoolwork during the suspension as well as his right to a hearing with the principal in two days, to present favorable evidence at the hearing, and to appeal an adverse result to the Superintendent.⁶

The letter advised Parent of Student's right, as a special education student, to a Team meeting (a Manifestation Determination Review or MDR) to "consider whether, based on all available relevant information, the conduct for which your child has been charged with a felony was caused by, or directly and substantially related to a disability or whether the conduct was a direct result of any failure to implement your child's IEP," and indicated that Mr. Bucey would defer any decision on long-term suspension of Student until after the MDR was concluded. (S-5)

The hearing before Principal Bucey was held on September 22, 2022, and was attended by Parent and Student.

17. On September 27, 2022, before Principal Bucey issued a decision regarding long-term suspension under §37H ½, Peabody conducted a MDR attended by Parent, Student, Dr. Hynick, Associate Principal Peter Ginolfi, Shannon Crompton (Peabody's special education administrator), Stacie Burke (a special education teacher), Steffan Clarke (a general education teacher), Sean Story (the IEP Team chair) and Vita Chiarenza (a School Adjustment Counselor). None of the Peabody staff who had taught and/or worked with Student during seventh grade attended the

⁵ Parent testified that Associate Principal Ginolfi told her that the District had "found" the signed IEP, and, as such, would resume service delivery. Ms. Crompton maintained that no such IEP had been found. Parent and Ms. Crompton agreed that after refusing two prior requests in September 2022 to sign a copy of the IEP, Parent eventually did so on September 22, 2022. The School resumed treating Student as eligible for special education services prior to receiving this signature because the Team was in agreement as to his eligibility and understood that Parent agreed with the terms of the IEP. (Testimony of Crompton) I credit Parent's testimony that she recalls signing the IEP in June 2022 and mailing it to the District, and also credit the testimony (corroborated by documentation) that the IEP was not received. Ultimately, this issue is immaterial to the outcome of the case, since, as will be discussed infra, the District does not contest Student's eligibility or Parent's consent to services.

⁶ Although Principal Bucey did not cite MGL c. 71, §37H ½ in the body of his letter, this statute was cited in the heading, and there is no dispute that Student's removal was based on this provision.

MDR, including his nine general education teachers, Jake Kessler (a special educator who had conducted Student's Academic Assessment in May 2022), and Ashley Lowe (the SAC who had conducted a classroom observation in April 2022).

The questions before the MDR team were, first, whether the conduct alleged ("Assault and Battery outside of school") was caused by, or had a direct or substantial relationship to Student's disability, and, second, whether the conduct in question was the direct result of the District's failure to implement Student's IEP. (S-Testimony of Crompton)

18. The MDR meeting was facilitated by the Special Education Administrator, Shannon Crompton. Ms. Crompton testified that the MDR team considered the following allegation: that after school on the date in question, Student had followed another student through the school parking lot and off of school property, kicked the second student in the back, and then kicked the student a second time. According to Ms. Crompton, the source of these details about the alleged incident was the Principal and/or Associate Principal of the middle school. (Testimony of Crompton) Neither the Principal nor the Associate Principal was present or testified at the above-entitled hearing.

Ms. Crompton further testified that the MDR team reviewed the alleged conduct as well as Student's IEP and Dr. Hynick's psychological evaluation and concluded that the alleged conduct was neither a manifestation of Student's disability nor the result of non-implementation of Student's IEP, because Student had not demonstrated a pattern of aggressive behavior in the past, and Student's IEP did not identify aggression as a disability related issue. Further, at the time of the alleged incident, Student's IEP was being implemented.

When asked if the MDR Team had considered whether Student had a pattern of impulsive behavior, Ms. Crompton answered in the negative. (Testimony of Crompton)

19. Dr. Hynick testified regarding the report of his May 2022 evaluation of Student and the relationship of his findings to the alleged conduct. Dr. Hynick stated that Student's social/emotional presentation was "benign," that he had no difficulties with social relationships, and was "content" with his social life and friendships. Student had no pattern or history of aggression. Dr. Hynick's evaluation did not give rise to concerns about Student's behavior, as he did not have a pattern of aggressive conduct and his past disciplinary history consisted primarily of infractions such as skipping detention or being "out of bounds." Of 10 or 12 violations, there was only one instance when Student involved himself in an altercation between two other students.

When Student's IEP Team had convened in June 2022, Team members, including Dr. Hynick had discussed Student's difficulty with behavioral regulation, but this "behavior" was part of the "broad category of ADHD," and encompassed items such as difficulty with staying seated, with attentiveness, with calling out in class, executive functioning, and organization. Dr. Hynick and other Team members were concerned with these behaviors only insofar as they interfered with academic engagement. If Dr. Hynick had had any concerns about aggression by Student, he would have reported such concerns in his evaluation.

Regarding the incident of which Student was accused, Dr. Hynick testified that Student's alleged conduct (following another student) "seemed sustained," that Student had "time to consider" his actions, and "did not seem impulsive." Dr. Hynick concluded, and shared with the MDR team, that as such, Student's alleged actions were not a manifestation of either his ADHD or his specific learning disability in reading. Dr. Hynick further concluded that the behavior would not have been caused by non-implementation of the IEP because "aggression" was not part of Student's profile and was not addressed in any of his IEP goals. (Testimony of Hynick)

20. Parent testified that neither she nor Student spoke at the MDR meeting. She described the meeting as "very short;" with each participant answering two questions, and the meeting ending shortly thereafter. While no one from the MDR Team prohibited or stopped her from speaking or asking questions, she felt that she "wasn't involved." (Testimony of Parent) Ms. Crompton testified that she had met with Parent shortly before the MDR to introduce herself and advise Parent that she and Student could speak at the meeting. Ms. Crompton confirmed that other than Parent asking about the length of Student's suspension, neither Parent nor Student spoke at the MDR. (Testimony of Crompton)
21. After the close of the MDR meeting, the School issued a document entitled "Manifestation Determination," which stated that the alleged conduct, framed as "assault and battery outside of school," was not caused by, and did not have a direct and substantial relationship to, Student's disabilities of ADHD and specific learning disability, and was not the direct result of the District's failure to implement Student's IEP. (S-8)
22. In a letter to Parent dated the same date as the MDR (September 27, 2022), Principal Bucey reiterated the MDR Team's findings and stated, "After careful consideration of all the evidence presented [at the Principal's hearing of September 22, 2022] I have determined that your child has been charged with a felony and that your child's continued presence at the school would have a substantial detrimental effect on the general welfare of the school." The letter further informed Parent that Student would be suspended until the felony charge was no longer pending, and that, pursuant to MGL c. 71, §37H ½, further action could be taken if Student is convicted, found

delinquent, pleads guilty, or admits to sufficient facts regarding the alleged felony. Lastly, the letter informed Parent of her right to appeal to the Superintendent, and of Student's right to educational services during his period of removal. (S-9)

23. On September 30, 2022, Parent filed a Statement of Concern with the Problem Resolution System (PRS) of the Department of Elementary and Secondary Education (DESE) in which she made multiple allegations, including that Student had not received educational services since his removal from school on September 19, 2022. (P-C, p. 48).
24. Pending completion of the PRS process, between on or about October 3 and October 16, 2022, Parent made repeated email inquiries to various District administrators about providing Student with tutoring and counseling, as well as about possible alternatives to tutoring, and Parent and the District personnel corresponded in an effort to locate and schedule services. A potential tutor did contact Parent on or about October 10, 2022, but the tutor's availability conflicted with Student's football practice, and the tutor was not available at the times proposed by Parent. (S-10)
25. On October 12, 2022, the Team issued an N-1 Form, in which it reiterated the MDR determination referenced above, stated that the MDR Team had relied on Dr. Hynick's evaluation, Parent input, and Student's conduct report as the basis for its decision. The N-1 form also stated that all Team members, including Parent, were in agreement with this determination.⁷ (S-12)

Ultimately, Student began counseling with an outside provider in mid-October 2022 and had his first tutoring session on November 10, 2022. At that point, Student had been without general or special education academic services for approximately 37 school days since his removal. (P-C, pp. 68-71; S-10, 15; Testimony of Parent; Testimony of Crompton).

26. On November 22, 2022, PRS issued a Letter of Finding in which it determined, among other things,⁸ that Peabody had failed to provide Student with special education services by the eleventh day following his removal from school, as required by pertinent federal regulation, and, as a result, had deprived Student of a free, appropriate public education (FAPE). (P-C, p. 54). Accordingly, PRS directed Peabody to convene Student's IEP Team to develop a mutually acceptable compensatory plan by December 16, 2022. (P-C, p. 54-55).

⁷I give little weight to the representation that Parent agreed with the MDR determination in light of Parent's having requested the instant hearing and the absence of any corroboration of her asserted agreement with the Team.

⁸ PRS also determined that Peabody had failed to fulfill some of its obligations under MGL c. 37H ½ and related statutes. (P-C, p. 54).

27. On December 12, 2022, Student's IEP Team convened to develop a plan for compensatory services. Peabody offered to provide Student with 246 hours of compensatory educational services as well as 14 hours of counseling, to be provided and used either by the end of the 2022-2023 school year or prior to Student's entry into high school, corresponding to missed hours of special education services dating back to September 19, 2022). Parent accepted this offer on December 12, 2022. (S-18, Testimony of Crompton). As of the hearing date, Student was receiving 4 hours per week of tutoring and one hour per week of counseling. He is eligible to receive up to 10 hours per week of tutoring. (Testimony of Crompton)
28. The record does not indicate when Student will next return to Juvenile Court to address the pending delinquency charge.

DISCUSSION

After carefully reviewing the documentary T testimonial evidence in light of the relevant provisions of law, I conclude that Parent has met her burden of proof as to Issue No. 1, but has not met her burden of proof as to Issues Nos. 2 and 3. I also find that the District has failed to conduct a functional behavioral assessment (FBA) following completion of the MDR, contrary to the requirements of applicable law. My reasoning follows.

Legal Background

The instant case involves the relationship between two separate statutory schemes: the Massachusetts statutes pertaining to long term suspension of students who are charged with felonies or felony delinquency complaints, and statutes governing discipline of special education students.

Suspension/expulsion of Students charged with Felonies

Pursuant to MGL c. 71, §37H ½ (1), "upon issuance of a criminal complaint charging a student with a felony, or upon the issuance of a felony delinquency complaint against a student, the principal or headmaster of the school in which the student is enrolled may suspend such student for a period of time determined appropriate...if said principal or headmaster determines that the student's continued presence in school would have a detrimental effect on the general welfare of the school." If the student is convicted or adjudicated as delinquent, pleads guilty or admits to sufficient facts with respect to the felony, the principal or headmaster may expel the student. MGL. c. 71, §37H ½ (2). This statute grants students the right to appeal the principal's determination to the superintendent. The superintendent's decision is final.

Exclusion from school for disciplinary reasons does not deprive students of all rights to education. Another provision, MGL c. 76, §21, requires school districts to provide educational services to such students. Among other things, principals must develop school-wide education service plans for all students who are expelled or suspended for more than 10 days and to ensure that such students have an opportunity to make educational progress. MGL c. 76, §21. This statute applies to all Massachusetts students who have been expelled or suspended, whether or not they have disabilities.

Disciplinary Exclusion of Students with Disabilities

Pursuant to the IDEA at 20 USC §1415(k) and its implementing regulations at 34 CFR §§300.530-536, school districts may not change the placements⁹ of students with disabilities for disciplinary purposes (*i.e.*, via suspension or expulsion) if the conduct triggering the removal is a manifestation of the students' disabilities, that is, was caused by, has a direct and substantial relationship to those disabilities, or was the direct result of the school district's failure to implement the student's IEP. 20 USC §1415(k)(1)(E)(I), (I); 34 CFR §300.530(e)(i), (ii). If the answer to either or both of these questions is affirmative, then the conduct must be deemed to be a manifestation of the child's disabilities, and, except under special circumstances, the child may not be suspended. *Id.*

To determine whether or not the conduct at issue is a manifestation of the child's disabilities, a team consisting of "the LEA, the parent, and relevant members of the child's IEP team (as determined *by the parent and the LEA*) must review *all relevant information* in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question [meets either or both of the criteria for "manifestation" as referenced above.]" 34 CFR 300.530(e)(1). (Emphasis supplied). If so, then the conduct must be determined to be a "manifestation," and the school must either conduct a functional behavioral assessment (FBA) if one has not been previously conducted, develop a behavior intervention plan or, if there is an existing behavior plan, review and possibly revise the existing plan. Except in special circumstances involving weapons, drugs, or infliction of serious bodily injury, in which case the child may be placed in an Interim Alternative Educational Setting for 45 school days, the school must return the child to his or her former placement unless the parent and school district agree on a different placement. 20 USC §1415(k), 34 CFR 300.530(e)

If the manifestation team determines that the child's behavior is not a manifestation of the child's disabilities, then the school may discipline the child in the same manner as it disciplines children without disabilities but must continue to provide

⁹ A change of placement is considered to take place when a student is removed from his or her educational placement for more than 10 consecutive school days or the child has been subject to a series of removals that constitute a pattern because the removals total more than 10 days in a school year. 20 USC §1415(k), 34 CFR 300.536.

educational services to “enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” Further, the school must, if appropriate, conduct a “functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.” 34 CFR §300.530.

Burden of Proof:

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. In the instant case, as the moving party challenging Peabody’s manifestation determination, Parent bears this burden. *Schaffer v. Weast*, 546 US 49 (2005) As such, to prevail, Parent must demonstrate, by a preponderance of the evidence, that Peabody incorrectly determined that Student’s alleged conduct was not a manifestation of his disabilities, or the result of failure to implement his IEP, and that Peabody failed to provide Student with required educational services during his suspension. This means that for each claim, Parent must prove that it is more likely than not that the District acted incorrectly. If the evidence is equally balanced, the School will prevail.

There are three issues to be decided in the instant case. I will examine each of these issues in light of the applicable law, outlined above.

Issue No. 1: Whether the Peabody Public Schools was incorrect when it determined that the alleged conduct leading to Student’s suspension was not caused by, or did not have a direct and substantial relationship to, Student’s disability.

To determine whether Peabody’s determination that Student’s alleged conduct was not a manifestation of his disability, I must examine both the procedures followed at the MRD meeting and the substantive results.

Peabody correctly scheduled a manifestation determination within ten days of Student’s removal from on September 19, 2022 and prior to imposing a long-term suspension as required by the statute and regulations referenced above. The record is not clear as to whether the MDR team was properly composed of persons who were familiar with Student’s profile and IEP. The record does not reveal whether Parent was involved in deciding on appropriate attendees as required by 34 CFR §300.530(e)(1). Based on Parent’s statement that although she attended the MDR, she felt that she was “not involved” in the process, I infer that Parent did not provide input into the composition of the MDR Team.

As stated above, in addition to Parent and Student, the MDR attendees were Associate Principal Ginolfi, Dr. Hynick, special education teacher Stacie Burke, general education teacher Steffan Clarke, IEP Team chair Sean Story, and SAC Vita Chiarenza. Absent from the MDR Team were SAC Ashley Lowe, who had observed Student in April 2022, Jake Kessler, who had conducted the academic evaluation in May 2022, and all of Student's seventh grade teachers. While Ms. Lowe and Mr. Kessler had authored reports that were available for the MDR Team to review, this was not the case for the seventh-grade general education teachers. As such, the MDR Team did not have the benefit of information from these teachers, who had had daily interactions with Student during the 2021-2022 school year, and were familiar with his presentation, or with any other service providers who may have worked with Student in seventh grade.

The three staff who provided services to Student during eighth grade and who did attend the MDR review, (Ms. Burke, Mr. Clark and Ms. Chiarenza) were not present at the hearing. According to Ms. Crompton, when polled, these individuals stated that they did not believe Student's alleged conduct was a manifestation of his disabilities, but because they did not testify at the hearing, they could not be questioned regarding their familiarity with Student and/or the basis for their opinion on the manifestation issue. Given that Student was dropped from special education services during the first full week of eighth grade and then absent from school due to suspension beginning on September 19, 2022, I draw the inference that Ms. Burke, Mr. Clarke, and Ms. Chiarenza would not have had an extensive period of time to learn about Student prior to the MDR;

The record similarly lacks information about whether IEP Team chair Sean Story and Associate Principal Peter Ginolfi were personally familiar with Student. The record suggests that Mr. Ginolfi had communicated with Parent on numerous issues regarding Student, including discipline. Because neither Mr. Ginolfi nor Mr. Story testified, there was no way for the parties or the hearing officer to elicit evidence from them on the issues for hearing. Special Education Administrator Shannon Crompton also was present at the MDR. In her role as an administrator, she derived her knowledge of Student from the IEP, evaluations reports, and other records rather than through direct personal knowledge. (Testimony of Crompton).

To summarize, the MDR Team in the instant case included two special education providers, Ms. Burke and Ms. Chiarenza, who had worked with Student for, at most, five days, one general education teacher, who would have taught Student for thirteen days, at most, a psychologist who evaluated Student in May 2022, and administrators who were not direct service providers and may have had limited knowledge of Student.

As such, because most of the attendees at the MDR would have had limited personal knowledge of Student, the primary source of information (in addition to

Student's records) was Dr. Hynick,¹⁰ who had conducted a psychological evaluation prior to the MDR, in May 2022, but did not provide direct services and did not, according to the record, have contact with Student other than during that evaluation. (Dr. Hynick's testimony will be further analyzed below).

The foregoing scenario raises the question as to whether the MDR was procedurally adequate, *i.e.*, whether the MDR Team comprised individuals who possessed, and considered sufficient relevant information about Student, including information from Parent, as required by 34 CFR §300.530(e)(i). Based on the record before me, I question whether this MDR Team was properly constituted.

This very issue was addressed in a BSEA decision by Hearing Officer Rosa Figueroa in *In Re: Student v. Boston Public Schools and Ivy Street School*, BSEA No. 1604894 (Figueroa, 2016). The student in that case was a 21-year-old young man with significant disabilities¹¹ and a history of assaultive behavior who brandished a knife at peers and staff. *Id.* Hearing Officer Figueroa found that the ensuing MDR process was flawed for several reasons, including because the MDR Team did not consider all available relevant information about the student. "Since it appears that the MDR disregarded critical information, may not have properly discussed valuable information before them, and lacked first-hand information about [the *Boston/Ivy Street* student] and his disabilities (with the exception of [one service provider]), one cannot conclude that the Team reached the correct conclusion." *Id.*

I further note with respect to the procedural discussion, that once the Peabody MDR Team determined that Student's alleged misconduct was not a manifestation of his disability, the School was obligated to conduct a functional behavioral assessment and develop a behavior intervention plan, if appropriate, in an effort to prevent the behavior at issue from recurring. 34 CFR §300.530(d). Peabody neither conducted nor offered to conduct an FBA for Student, contrary to the requirements of this regulation.

Turning now to the substantive issue, the record in the instant case is meager because the pending delinquency charge precludes factual inquiry regarding the alleged infraction. In cases where there is no such charge pending stemming from the conduct leading to discipline, the members of the MDR team, as well as the hearing officer may explore the conduct itself and the surrounding circumstances in order to shed light on the relationship, if any, between the conduct and the disability. In the instant case, no such

¹⁰ Ms. Crompton testified that the MDR team relied on Dr. Hynick's evaluation and opinion that Student's alleged conduct was not a manifestation of his disabilities. (Testimony of Crompton)

¹¹ The student in *Boston/Ivy Street* carried diagnoses of ADHD, Oppositional Defiant Disorder, Mood Disorder NOS, a non-verbal learning disability, Communication Disability, Intellectual Impairment, and a history of auditory hallucinations. After the incident in question, the student was taken by police to a hospital but was neither arrested nor charged with a crime.

inquiry would be possible without potential prejudice to Student in the pending delinquency matter.

Given the evidentiary limitations in this case, I will now analyze the information that is available in order to determine whether Parent has met her burden of proving that Peabody's manifestation determination was incorrect. Regarding Student's profile, there is no dispute that while Student has generally average cognitive ability and good social-emotional functioning, he also has a longstanding diagnosis of ADHD as well as a more recently diagnosed specific learning disability affecting reading. There also is no dispute that as a result of these disabilities, Student struggles to perform academically and reports that he does not understand much of grade level curriculum. Additionally, primarily because of his ADHD, Student has difficulty with focus, organization, and engagement in the classroom and with the educational process in general.

As stated by Dr. Hynick, Student's ADHD has a pervasive impact on his daily functioning in school, and results not only in his challenges in the classroom but also in the impulsive behaviors documented throughout Student's seventh grade year, including wandering the hallways, calling out, refusing to follow teacher directives, tardiness, and horseplay in the cafeteria. Although Student does not show a pattern of aggression with others, he did insert himself into an altercation between two other students on one occasion, in April 2022. Additionally, Parent and Aunt testified persuasively that at home, Student's behavior is impulsive, and that he has difficulty listening, following instructions and "keeping his hands to himself."

What is difficult to discern is whether Student's pattern of impulsive, and sometimes disruptive, behavior gave rise to the alleged conduct; without knowing specifically what took place, any conclusions in this regard are speculative. The record contains no information about the relationship (if any) between Student and the peer at issue or about what, if anything, took place between the two students prior to the incident. While Dr. Hynick testified that by allegedly following the peer, Student demonstrated planning and a lack of ADHD-associated impulsivity, without information as to what preceded the incident, as to whether Student actually did follow the second child as alleged, or what he was doing as he did so, I find that Dr. Hynick's conclusion is somewhat speculative. While it is certainly possible that the alleged actions demonstrated planning and forethought, these actions could also be found to stem from continuation of impulsive behavior similar to Student's repeatedly hitting his computer on his desk and tapping his pen in his class as observed by Peabody's SAC in April 2022, as well as in his persisting in disruptive behavior after repeated requests by his teachers (or Aunt) to stop. Without information about the surrounding circumstances, it is impossible to reach a conclusion.

The persuasiveness of Dr. Hynick's opinion and testimony is further undermined by the fact that the original evaluation, conducted in May 2022, did not formally elicit additional information about Student's behavior from teachers or Parent via rating scales

or questionnaires (such as the Parent and Teacher portion of the BASC), as well as by the fact that Dr. Hynick did not meet with Student after the alleged incident of September 2022 to update his evaluation and/or to assess Student's then-current presentation.

Notwithstanding the flawed MDR process, as outlined above, coupled with the evidentiary difficulties caused by the pending delinquency charge, Parent carries the burden of persuasion on each of her claims; therefore, I must determine whether Parent has demonstrated that it is "more likely than not" that evidence in the record supports her claim. After examining the record as a whole, I find that Parent has met her burden with respect to Issue No. 1.

The record is replete with reports that Student repeatedly engaged in impulsive, often disruptive, misbehavior. The actions for which he was formally disciplined with detentions and in-school suspensions generally took place in common areas of the building such as hallways, bathrooms, and the cafeteria. Within the classroom, Student displayed chronic, persistent, disruptive behaviors such as tapping pencils, leaving his seat, banging his computer on the table, and the like for which he was not subject to formal discipline. What is striking is that Student would persist with such behaviors despite being told repeatedly to stop, as demonstrated in the observation report of Ashley Lowe (who documented multiple such disruptions in a 38-minute observation). This behavior was consistent with that observed by Aunt, who testified that Student would be defiant, and would not listen. The parties agree that this behavior is a manifestation of Student's ADHD.

The record supports a conclusion that Student's alleged assault and battery on another student, if it occurred, was consistent with Student's pattern of behavior as described above. While there is no dispute that Student does not display a pattern of aggression towards others, his difficulty with self-regulation has occasionally led him to acting out physically. The record shows that Student has trouble "keeping his hands to himself," threw small objects at a teacher, and intervened in a fight with two other students in which "punches were thrown." Moreover, a review of Student's disciplinary records and Ashley Rowe's observation report further shows that once Student starts to misbehave, he persists in the misbehavior despite prompting and redirection. All of this information is contained in Student's educational records, and, therefore, was available to the MDR Team.

According to Dr. Hynick, the above-listed behaviors were manifestations of Student's ADHD. Dr. Hynick distinguished the alleged assault and battery by stating that by allegedly following his peer, Student showed "sustained" behavior, that did not seem impulsive because Student had time to "consider" what he was doing. As stated above, I find that Dr. Hynick's conclusion was speculative, and not consistent with Student's demonstrated history of having trouble stopping a pattern of behavior—such as tapping, banging, wrestling, and fooling around in the cafeteria despite reminders that would theoretically prompt him to consider his actions.

I find that the record as a whole supports a conclusion that Student's alleged behavior was a manifestation of his ADHD. As such, Parent prevails on her claim with respect to Issue No. 1. See *Schaffer v. Weast, supra*.

Issue No. 2: Whether the Peabody Public Schools was incorrect when it determined that the conduct in question was *not* the direct result of the District's failure to implement Student's Individual Education Program (IEP)

The record shows that Student began eighth grade on August 29, 2022. The alleged incident leading to suspension took place on September 6, 2022. Student's IEP services were in effect on that date and were not halted until September 7, 2022. Parent has presented no evidence to the contrary. Parent has not met her burden of proving that Student's alleged conduct was a direct result of the District's failure to implement Student's IEP, and, as such, does not prevail on this claim.

Issue No. 3: Whether the District failed to provide Student with required special education services during the period of suspension.

Although a tutor contacted Parent in mid-October 2022, whose schedule conflicted with Student's football practice, Student did not receive post-suspension tutoring until November 10, 2022. Parent duly filed a complaint with the Problem Resolution System (PRS) of DESE, and, on November 22, 2022, PRS directed Peabody to develop a plan to provide compensatory educational services. Subsequently, on December 12, 2022, Peabody offered to provide Student with 246 hours of compensatory tutoring services and 14 hours of compensatory counseling services during the 2022-2023 school year. Parent accepted this offer. Shannon Crompton testified that the number of hours of compensatory services actually exceeded what the District owed Student because it was not required to provide services during the first 10 days of suspension. Parent offered no evidence to the contrary. Parent has not met her burden of proof and does not prevail on this claim.

CONCLUSION AND ORDER

Based on the foregoing, I conclude Parent has met her burden of persuasion on her claim with respect to Issue No.1 and prevails on that claim. As such, the Peabody Public Schools is ORDERED to reverse its finding that Student's alleged misconduct was not manifestation of his disability, to allow his immediate return to his prior middle school placement, and to implement his accepted IEP in full.

I further conclude that Parent has not met her burden of persuasion as to Issues 2 and 3. As such, Student is not entitled to further compensatory services above and

beyond what was offered by Peabody and accepted by Parent on or about December 12, 2022.

Lastly, the District is ORDERED to immediately offer to conduct a functional behavioral assessment (FBA) of Student that includes input from Parent regarding Student's presentation at home, to conduct such assessment upon receipt of Parental consent, to convene a Team meeting to consider the results of the assessment, and, if appropriate, to offer a new or amended IEP that incorporates the results of the FBA.

By the Hearing Officer:

Sara Berman

Sara Berman

Date: January 4, 2023