Arkansas Department of Education
Special Education Unit

RE: Xxxxx and Xxxxxx Sxxxxx **PETITIONERS**
as Parents and legal guardians of Student
Xxxxxx Xxxxxxx

VS. H-18-22

Vilonia School District **RESPONDENT**

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioners requested a due process hearing alleging that the Respondent violated the procedural and substantive obligations of the Individuals with Disabilities Education Act (IDEA) from February 6, 2018, to the present time by:

1. Failing to adhere to IDEA due process procedures by changing the Student's educational placement through suspensions of more than twenty (20) days; and

2. Failing to develop an appropriate Individualized Education Program (IEP) reasonably calculated for the Student to make meaningful progress to include:

    a. Addressing the Student's emotional and behavioral deficits related to his disabilities;

    b. Providing appropriate related services;

    c. Providing needed supports, services, and appropriate interventions to address the Student's behavior issues; and by

3. Failing to implement the services on the Student's existing IEP.

Relief being requested by the Petitioners includes:

1. The Parents be entitled to place the Student in a private school placement at District expense or compensatory special education and related services for the denial of a free and appropriate education (FAPE).

2. The development of an appropriate IEP to be implemented in the least restrictive environment (LRE), specifically to include a functional behavior assessment (FBA), behavioral intervention plan (BIP), individualized instructional program to address the Student's traumatic brain injury (TBI) deficits and depression and their impact on his academic achievement and social skills training.

3. For the District to provide teaching strategies to address the Student's behavioral and emotional dysfunction and to provide opportunities for rehabilitation and interaction with the Student's non-disabled peers; and

4. For the Parents be declared to have exhausted their administrative remedies as to their Section 504 claims.

Procedural History:

On March 13, 2018, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from Xxxx and Xxxxx Xxxxx (Petitioners) (hereinafter referred to as "Parents"), the parents and legal guardians of Xxxxx Xxxxx (hereinafter referred to as "Student"). At that time the Parents believed that the Vilonia School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department

by not providing the Student with appropriate special education services as noted in the complaint as stated above.

The Department responded to the Petitioner's request for the hearing by assigning the case to an impartial hearing officer and establishing the date of April 12, 2018, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims was issued on March 14, 2018. The District reported that the required resolution conference was held on March 26, 2018; however, no agreement was reached by the parties.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parents were represented by Theresa L. Caldwell, attorney of Little Rock, Arkansas and the District was represented by Jay Bequette, Attorney of Little Rock, Arkansas.

The District responded as directed in the pre-hearing order by providing a response to the Parents' complaints on March 23, 2018. On that same day the District submitted a motion to limit the length of the hearing. The District's response to the Parent's complaints also included a request for the hearing officer to conduct an expedited hearing on the issue of placement. Counsel for the District was advised by the hearing officer on the procedures to follow in requesting an expedited hearing. On March 26, 2018, following the inability to reach a resolution, the Parents requested and were granted a Stay Put Order directing the District to allow the Student to return to school and implement his most recently agreed to individualized education plan (IEP). The stay put order was issued on March 27, 2018; however, the District elected to ignore the hearing officer's order and

refused to allow the Student to return to school.

Also on March 27, 2018, the District filed for a temporary restraining order and preliminary and permanent injunction in the Circuit Court of Faulkner County, Arkansas. The Parents asked for and were granted for the case to be heard in the United States District Court for the Eastern District of Arkansas. On April 11, 2018, the Court decided to treat the District's request only as a preliminary injunction as opposed to their request for an injunction and a temporary restraining order.[1] On April 11, 2018, the Court granted the District a modified injunction. The Court ordered that the District continue to provide the Student with educational services in a home-bound setting until a long term placement is finalized through the current IDEA administrative review process. The Court also allowed the Parents to elect that the District provide the Student's educational services in a day treatment facility until a long term placement could be finalized through the administrative review process.[2] The Parents elected to not have the District provide home-bound services due to employment obligations of both parents and refused to allow the Student to attend a day treatment facility.

Following the failure of the resolution conference on March 26, 2018, as noted above, the District requested an expedited hearing in accordance with 20 U.S.C. § 1415(k)(3) seeking an order to permit them to change the placement for special education services for the Student to an alternative educational setting (ALE) for not more than 45 school days because the District believed that maintaining the current placement of the Student was substantially likely to result in injury to the Student or to others. The case (EH-18-23) was assigned by the Department to the current hearing

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[1] Parent Binder, Page 100 and District Binder, Page 544

[2] Ibid, Page 145 and 581 respectively

officer. The decision was made to hear the issue of the expedited hearing on the same date (April 12, 2018) on which the current case was scheduled to begin. Each party was permitted two hours to address the expedited issue and a final decision and order was issued on April 25, 2018.

In that decision the District was ordered to immediately upon receipt of the order to notify the Parents and the Student that he would be receiving his special education services at the previously agreed upon location as contained in his amended IEP of October 25, 2017.

The District was also ordered to immediately upon receipt of the order, but no later than April 30, 2018, to schedule an IEP conference to be held at a time and place agreeable to the Parents and the Department's Brain Injury Specialist. The purpose of the conference was to determine the most appropriate and least restrictive environment in which to provide the Student's special educational needs, including any necessary supports and related services as dictated by his agreed to qualifying disability of Traumatic Brain Injury.

The remaining complaints as alleged by the Parents in their request for the current due process hearing were heard following the conclusion of the expedited hearing on April 12, 2016 as well as the following day of April 13, 2018. At the close of the hearing on April 13, 2018, the Petitioners requested and were granted on the record a continuance in order to complete the presentation of their case. The case was continued for hearing on April 26, 2018, at which time both parties completed their presentations and rested.

The discussion of the facts presented in this case will be presented in the context of the time in which the events occurred and the decisions made by the District in deciding the provision of special education services and their subsequent decision regarding placement for those services. As noted above the complaints alleged by the Parents for the instant case are confined to those that have

occurred between February 6, 2018 and the date on which they filed their request for a hearing (March 13, 2018). In the course of the hearing both parties were permitted to present evidence and testimony with regard to events and actions that occurred prior to February 6, 2018, but only within the context of establishing patterns of events and actions rather than the facts of each event or action.

Factual Discussion Prior to February 6, 2018:

Although the decision of this case must be based on the decisions, procedures, and events on and after February 6, 2018, the continuous nature presented by both parties in this case requires a factual discussion of events and decisions made prior to the filing of the current complaints. The factual discussion of evidence presented needs to be divided into events and procedures for:

(1) The Student's second semester of his eighth grade year (January through May 2017).

(2) The Student's first semester of his ninth grade year (July 2017 through December 2017).

(3) The first request by the Parents for a due process hearing (January 5, 2018) through its settlement (February 5, 2018).

The Student's Second Semester of His Eighth Grade Year (January through May 2017):

On December 20, 2016, the District developed a Section 504 Behavior Intervention Plan (BIP) to address the Student's maladaptive behaviors which were interfering with his education.[3] The BIP developed to address maladaptive behaviors addressed talking back to staff and work avoidance. With the exception of his band class the BIP indicated that he exhibited those two

[3] District Binder, Page 149-150 and Parent Binder, Page 12-13

behaviors in all other classes.[4] A list of the Student's discipline activity for his eight grade school year was previously introduced as evidence in Federal District Court in which the District was seeking a temporary placement for the Student. It revealed eighteen events occurring between September 16, 2016 and May 8, 2017. The listing included six "bus violations," two "language," three "D-Halls," one "Disorder Conduct," one "Terroristic Threats," four "Disruptive Behavior," and one "other" violations. Comments of each incident was provided with the exception of three of the "D-Halls," one of the "Disruptive Behavior," and the "Terroristic Threats."[5] The District also introduced evidence in the Federal Court case regarding the local police department's intervention in an incident which occurred on April 23, 2017. The incident did not occur on District property, nor during school hours, but rather at the residence of the Student. The police incident report was apparently related to the Student's relationship with a female and possible self-harm. The report indicated that the Student was receiving counseling and that the Parents would discuss the event with his private mental health counselor the next day.[6]

The Student's First Semester of his Ninth Grade Year (July 2017 through December 2017):

Prior to enrollment in the District's ninth grade Freshman Academy the Parents on April, 4, 19, & 25, 2017, referred the Student to Arkansas Families First for a neuropsychological evaluation. The diagnostic impressions provided by the neuropsychologist included "Unspecified Symptoms and Signs involving Cognitive Functions and Awareness - with memory deficits, Psychomotor deficit, Frontal Lobe and Executive Function Deficit, Other Specified Depressive Episodes - recurrent brief

[4] Ibid

[5] District Binder, Page 185

[6] District Binder, Page 22-23

depression, and Oppositional Defiant Disorder." The neuropsychologist noted that he did not display any ADHD symptoms or oppositional behaviors during the process of testing. The neuropsychologist noted that he thrived off of positive reinforcement, praise, and encouragement. The summary of the report was that overall the Student was showing dysfunction with systems controlled and mediated by the frontal and prefrontal lobe areas of the brain; and that the deficits were negatively affecting behavioral, emotional and cognitive regulation skills. A cookbook of recommendations was provided with the report for suggested consideration by the District as well as for implementation in the home environment. Additionally, although not an educator, the neuropsychologist suggested the District consider providing the Student with special education services, under the category of "Other Health Impaired." The neuropsychologist also recommended that the Parents seek out an occupational therapist to provide the Student with therapy due to "sensory issues reported by mother."[7]

On July 12, 2017, the District's assistant special education supervisor, who is also a school psychology specialist, conducted a psychoeducational evaluation. The only test used for the evaluation was the Wechsler Individual Achievement Test, Third Edition (WIAT-III). The evaluator had available to him not only the neuropsychological evaluation, but also other test results conducted a year earlier in April and May of 2016. The evaluation was conducted in a twenty-minute session in which the evaluator noted that the Student was cooperative and not easily distracted. He further noted that the Student's attention span and concentration level was generally appropriate, as well as his activity level. Even though he testified that he used the previous test results by the

[7] Parent Binder, Page 37-50 and District Binder, Page 159-172 (Although the testing took place in April 2017, the report is dated July7, 2017.)

neuropsychologist, he concluded that the Student's suspected primary disabling condition was "Other Health Impairment due to his diagnosis of ADHD."[8] Although the evaluator left the final decision as to what the primary disabling condition was for the Student's IEP team, it is quite obvious from the report that the conclusions reached by the neuropsychologist with regard to cognitive dysfunction was not considered. When asked on direct examination the witness acknowledged that the neuropsychologist listed diagnostic impressions of "unspecified symptoms and signs involving cognitive functions and awareness with memory deficits, psychomotor deficit, frontal lobe and executive function deficit, other specified depressive episodes and ODD" and that there was no mention in the neuropsychology report that the Student exhibited ADHD behaviors.[9]

Also on July 12, 2017, the Parents, as recommended by the neuropsychologist, referred the Student for an Occupational Therapy (OT) evaluation at Pediatrics Plus. The evaluation was conducted with the Student's mother present. The examiner recommended that "due to delays and difficulties in sensory processing, executive skills, and manual coordination, it is recommended [the Student] receive direct occupational therapy for 60 minutes (4 units) twice monthly." The evaluator also recommended "age-appropriate sensory integration activities, executive skills strategies, activities to improve speed and dexterity, and development/implementation of home and school programming to facilitate success in both environments."[10] On August 8,2017, the OT evaluator recommended that the Student transition without direct OT services and that his IEP team develop strategies for self-regulation and executive skills deficits, if needed at school. He was scheduled to

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[8] District Binder, Page 152-157 and Parent Binder, Page 51-56

[9] Transcript, Vol II, Page 95-96

[10] Parent Binder, Page 57-62

continue to receive direct OT services on an outpatient basis.[11]

On July 28, 2017, the District notified the Parents of an IEP team conference to be held on August 11, 2017, for the purpose of determining the Student's eligibility for special education and related services as well as to develop the Student's initial IEP.[12] Based on the District's psychoeducational evaluation as noted above, the IEP agreed to the Student's eligibility category for special education services to be OHI due to his ADHD, rather than his traumatic brain injury (TBI). When questioned on direct examination as to the justification for the District using the OHI category and the Student's previously suspected ADHD, as opposed to the more recent diagnosis of a TBI and memory deficits, the examiner stated that he didn't know that he would be qualified to make the separation between ADHD and the neuropsych report of memory problems.[13] The least restrictive environment (LRE) for placement of services was determined to be 80% or more in a regular education classroom, with accommodations to include small group and extended time.[14] The witness was also asked on direct examination as to the results of tests designed to rule in or rule out ADHD completed by the District's occupational therapist and the Student's mother where the results indicated "that there were no major ADHD symptoms noted during testing" and that the Student's teacher's impression was only that "the child was at risk."[15]

The Parents agreed with the initial placement for services and agreed to the absence of a

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[11] District Binder, Page 173

[12] Ibid, Page 77-78

[13] Transcript, Vol II, Page 98

[14] Parent Binder, Page 14-15 and District Binder, Page 79-80

[15] Transcript, Vol II, Page 101-102

regular education teacher being present at the IEP conference.[16] The IEP that was developed indicated that he was to receive algebra and English in co-taught classes in the regular education setting.[17] The IEP included supplementary aids and services, program modifications, and supports by reducing assignments, providing study guides, allowing extra time for completing assignments, preferential seating, short instructions, opportunity to repeat and explain instructions, frequent feedback, extra writing time, clearly defined rules, frequent reminder of rules, encourage participation, and modeling of proper behavior. These supplementary aids and services, program modifications, and supports according to the Brain Injury Specialist would be appropriate for a student with ADHD symptoms; however, no so for students with a traumatic brain injury.[18] The IEP proposed by the team contained a Behavior Intervention Plan (BIP); however, it was the identical plan as used the previous school year when the Student was receiving educational services under a Section 504 plan.[19] The behavior being addressed by the BIP remained the same as used when he was served under Section 504 which included the Student's talking back to staff and work avoidance.

According to additional documentation provided as evidence by the District, school personnel were provided with strategies to work with students with oppositional defiant disorder (ODD) on September 6, 2017 and on September 21, 2017.[20] The District also participated in a strategy meeting

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[16] Parent Binder, Page 17-18

[17] District Binder, Page 35-41

[18] Transcript, Vol II, Page 77

[19] Parent Binder, Page 12-13

[20] District Binder, Page 151 and Parent Binder, Page 13a-13b

on September 25, 2017, to discuss the Student's behaviors in the classroom. It would appear the District decided that the Student needed to "self-monitor his behavior."[21] The results of these intervention strategies and meetings would indicate the District was more concerned with the Student's ODD type of behaviors as opposed to those associated with ADHD with no consideration of a student with a brain injury involving deficits in executive functioning. For example, on September28, 2017, a substitute teacher noted that she had been mocked with defiant behavior during her encounter in class with the Student.[22]

On September 25, 2017, the Parents were notified of another IEP team meeting to be held on October 3, 2017, for the purpose of reviewing and revising the Student's IEP. A notice of action was provided to the Parents following the meeting on October 3, 2017. Again the concentration was on how the Student's maladaptive behaviors interfered with classroom behavior and completion of assignments. The Student attended the conference and again the Parents agreed to excusing a regular education teacher from being present. In addition to including the Parents in assisting the Student with his assignments at home the Parents agreed that the District could receive information from the Student's therapist at Families First.[23] The revised IEP included the same supplementary aids and services along with the use of a Chromebook for assignment completion. Positive behavioral intervention and supports were discussed for the use of the Behavior Plan and the need for an occupational therapy consultation. The LRE remained the same as the previous IEP with 80% of

[21] Parent Binder, Page 13c

[22] District Binder, Page 192

[23] District Binder, Page 85-86

his educational instruction to be in a regular class setting.[24] Following the meeting on October 5, 2017, the Parents gave the District consent to share personally identifiable information with the Student's medical and psychological treatment professionals.[25]

On October 10, 2017, the Parents asked for the local police department to intervene in the home. According to the police report the Student had been upset over being disciplined and was threatening to run away from home. The police report indicated that after discussing the issue with the Student he stated that he had no intention of running away, but was just upset over being disciplined.[26]

On October 19, 2017, the District responded to the Parent's request for an IEP meeting and were subsequently provided with a notice of conference to be held on October 25, 2017, for the purpose of reviewing and/or revising the Student's IEP.[27] Data used in the revision of the IEP included the results of testing (ACT Aspire) in which the Student's proficiency was 31% in English, 33% in Reading, 19% in Science, and 20% in Math.[28] The decision reached by the IEP team was to move the Student to a resource room for math instruction in lieu of the co-taught math class. It was also decided that the Student would be receiving science and health classes in an alternate location. The consequences section of his Behavior Intervention Plan was modified to include the use of "restorative justice" and "talking circle" as methods to deal with the identified target

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[24] Ibid, Page 35-41

[25] District Binder, Page 87 and Parent Binder, Page 16

[26] District Binder, Page 24-25

[27] District Binder, Page 88-89; 55-67; and Parent Binder, Page 1-11

[28] District Binder, Page 413-414

behaviors. He was also scheduled to be provided specialized transportation.[29] A notice of action was issued by the District on October 25, 2017, to implement the revised IEP.[30]

On November 2, 2017, the Parents admitted the Student to Methodist Behavioral Hospital (acute stay) for five days. The Parents indicated that the reason he was admitted was due to his having been given a science project beyond his ability resulting in a "meltdown" and being "distraught over his inability to perform at the level required in his Science class."[31]

On December 4, 2017, the District called the local police department to address the issue of the Student "acting up." Upon arrival the police were informed that the Student refused to go to class and was going to be suspended. The acting up was apparently in reference to the Student destroying another student's school project.[32] Between August 24, 2017 and December 13, 2017, the Student had received disciplinary actions for twenty-six (26) incidents. They included seven incidences of "disruptive behavior," four incidences of "language," one incident for "not following directions," one incident for "D-Halls," two incidents of "disorder conduct," one incident for "public display of affection," one incident for "talking," one incident for "cell phone/Electronic device," one incident for "dress code," one incident for "failure to comply," and five incidents listed as "other." For the offenses he received three out of school suspension, three in school suspensions, nine detentions, three Saturday school penalties, four consequences listed as "conferences," one involved "corrected attire," one incident resulted in cell phone suspension, and on event resulted in a

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[29] Parent Binder, Page 19-20; District Binder Page 90-91; and Page 147-148

[30] Ibid

[31] Parent Binder, Page 85

[32] District Binder, Page 26-27 and 217-218

consequence of "other."[33] By looking at the District's block allocation of classes his out of school suspension between August 24, 2017 and December 15, 2017 totaled 5.6 days.[34]

Additional police incident reports submitted to the Federal Court and as evidence in the previous expedited hearing included the April 2017, event, as previously discussed, as well as events on October 10, 2017, December 4, 2017, and December 15, 2017.[35] As with the April incident the October incident occurred at the Student's residence when his Parents asked for their assistance because the Student was being "unruly at the time." The December 4, 2017, incident occurred at the Student's school when he "refused to go to class and was going to be suspended." The December 15, 2017, police report also involved the Student refusing to go to class, becoming belligerent, cursing, and throwing a chair. He was transported to the police department where he was cited and released.[36] Between this event which resulted in the local police coming and arresting the Student and the events of March 1 and 2, 2018, there is no record of any behaviors for which the Student received any disciplinary actions.[37] The Student's special education teacher testified that during this time period "there were not many, I mean, that warrant an infraction, didn't see any severe [infractions]."[38]

The existing BIP, as noted above, only addressed class work avoidance and talking back.

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[33] District Binder, Page 183-184

[34] District Binder, Page 234-235

[35] District Binder, Page 24-25 and Page 217-220

[36] District Binder, Page 217-220

[37] Ibid, Page 188

[38] Transcript, Vol III, Page 52

The District notified the Parents on December 19, 2017, for an IEP meeting to be conducted the following day on December 20, 2017.[39] A notice of action was issued by the District on December 22, 2017. The Student's mother participated by telephone at which time the team discussed changing the Student's placement for services from the general education setting to a more restrictive environment. Three options were discussed: (1) The Student would go to Resource Literacy (4th block) and Advisory (3rd period); with his remaining classes taken in the District's Credit Recovery Lab; (2) The Student would continue to remain in the regular education classroom as he requested; and (3) The Student would go to the Arch Ford Alternative Learning Environment (ALE) for all of his academic classes.[40] The Student's mother did not agree with the District's decision for placement in the ALE, noting that she would have to discuss the option with her husband.[41] The District decided to delay making a decision on placement and issued the Parents with another notice of conference on December 22, 2017, for the meeting to held on January 8, 2018.[42]

The First Request by the Parents for a Due Process Hearing (January 5, 2018) through a Settlement Agreement (February 5, 2018):

On January 5, 2018, the Parents filed a request with the Department for a due process hearing. The ADE responded by assigning the case to an impartial hearing officer to hear case H-18-15.[43] The Parents alleged both procedural and substantive violations of the IDEA resulting in the

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[39] District Binder, Page 92-93

[40] Parent Binder, Page 87

[41] District Binder, Page 94-95

[42] Ibid, Page 96-97

[43] District Binder, Page 98-119 and Parent Binder, Page 71-93

denial of a free and appropriate education (FAPE). In lieu of a hearing both parties participated in and reached a formal agreement. The District agreed to (1) evaluate the Student for occupational therapy services including an assessment of sensory needs; (2) perform additional evaluations as deemed appropriate by consultants; (3) to use the Department's Brain Injury Consultant in developing the Student's IEP, to train District staff, to provide technical assistance to the staff, and to advise responsible individuals regarding compensatory educational services; and (4) to use the services of a Board Certified Behavior Consultant to assist in (a) performing a functional behavior assessment; (b) developing a BIP; and (c) monitor and adjust the BIP as needed. The District also agreed to use the Department's CIRCUIT referral services as needed for the remainder of the 2018-19 and 2019-20 school years.[44]

Of particular note in the settlement agreement is the statement that "if either party reaches a point in disagreement with the other at which filing for due process under IDEA is considered, the party will seek first to resolve the disagreement with the other party, prior to filing for due process."[45]

Factual Discussion After February 5, 2018:

The record reflects that some behavior data regarding the Student's work avoidance, verbal outbursts, and non-compliant behavior was recorded on three days (January 24, February 5, and February 7, 2018). However minimal the information may be, such is consistent with the BIP contained in the Student's IEP. On February 8, 2018, the District conducted an evaluation/programming conference in accordance with the settlement agreement.[46] On that same

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[44] Parent Binder, Page 94-99 and District Binder, Page 123-128

[45] Ibid

[46] District Binder, Page 129-133

day the District issued a notice of action in which the IEP team decided to obtain a Functional Behavior Assessment (FBA); to obtain an Occupational Therapy evaluation; and to change the Student's educational disability from Other Health Impaired (OHI) to Traumatic Brain Injury (TBI).[47] On that same date the District obtained parental consent to receive health information from the Student's health care providers as well as consent to release personally identifiable information about the Student to his health care providers.[48] The decision was that the Student would remain in the general education setting for all of his education classes as previously agreed to in the previous IEP.[49] The District did not pursue placement at the ALE.

The Student's regular education literacy/English teacher kept a behavioral observation log between January 9, 2018 and February 28, 2018. She included both the Student's behaviors as well as her responses to those behaviors. Her journal indicated that her use of positive reinforcement and redirection worked in being able to assist the student with classroom outbursts (talking, laughing) and not completing class work.[50] Such is consistent with her testimony.[51] What appeared to be important to the current issues were the teachers observations and testimony as to how the Student got along with the other students in her class. She testified that they would often laugh with him when he would say or do something funny and that he never exhibited any actions to which she

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[47] Ibid

[48] Ibid, Page 134-135

[49] Ibid, Page 232

[50] Ibid, Page 388-394

[51] Transcript, Vol III, Page 70

would be scared for her own safety or the safety of her students.[52] The Student's social studies teacher testified that in his class the Student did not present him with any behavior issues, that he got along well with the other students, and that "he was a normal student for me."[53] He stated that one of the topics he teaches is the stock market and that the Student "really, really, really likes the stock market...he would come to me and ask me questions all the time about what stock to purchase ... whether or not to buy, sell."[54] The Student's family consumer science teacher testified that even though the Student was the only ninth grader in a class with of upper grade classmates that he did great with a grade of 86%.[55] She testified that the only maladaptive behaviors for which she used the BIP was work avoidance.

The Student's classroom teachers appear to have followed the suggested methods contained in the BIP with regard to responding to the Student's work avoidance behaviors. On the other hand the Principal used other methods in an attempt to assist him in dealing with issues to which he responded in maladaptive ways. He testified that he and the two special education administrators would sit "down together and [have] conversations with [the Student] that were not disciplinary, they were working on problem behaviors that [the Student] was having, like not doing work." He further testified that there were times when he "would leave the office and simply walk around campus with [the Student] because he processed things better when he walked....so, we walked and we did that and we had conversations, and [the Student] opened up and he would tell me what was

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[52] Ibid, Page 73-74

[53] Transcript, Vol III, Page 124

[54] Ibid, Page 126

[55] Ibid, Page 134

going on, and I would try to help him understand what was going on in those situations so that he didn't end up in trouble over them with disciplinary consequences."[56] His testimony in this regard was consistent with the testimony given by the Department's Brain Injury Specialist. She was a consultant to the District as a consequence of the previous discussed settlement agreement. She stated that after reviewing the Student's neuropsychological evaluation and discussing the Student's behavior with the Student's mother and the District's special education supervisor "it became apparent that although [the Student] has basically a normal IQ, that he has what is known as executive function areas of difficulty..... and so, executive functions are things like planning, metacognition, self-control, self-monitoring, some of those kinds of things."[57] She was unable to observe the Student in the classroom due to the current suspension of the Student and consequently was an has been unable to assist the District in developing an appropriate IEP to address the Student's TBI educational and behavioral issues. She testified that she would need to observe the Student in his current educational placement in order to provide her recommendations for an IEP and BIP. She further offered her critique on the Student's current BIP and IEP accommodations:

> "I sent [the special education supervisor] information about the accommodations page, because I was worried that some of them, to me, weren't quite as tight as they should be...so, for example, they said 'extra time'...to me, that needed to be better defined about how much extra time, for which classes..if you allow extra time for every class and you have five classes, and let's say you add time and a half,

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[56] Transcript, Vol I, Page 71-72

[57] Ibid, Vol II, Page 14-15

you can wind up at the end of the week with amount of extra time that is not possible to do.

"I also asked about preferential seating....a lot of people think that means sit in the front of the room..to me, it needs to be – 'preferential seating' means where I have the best access to the information that's being provided..so, it may be in the front of the room, it may be on the side of the room, it may be even at the back of the room, depending on how the classroom is arranged and what I need.

"An opportunity to repeat instructions..when I read the neuropsych, one of the things that stood out to me was that [the Student] actually did better on the memory information when the memory was delayed...that means that if I give you a list of catfish and dog and I ask you right now and you would say catfish and dog, if I wait five, ten minutes, and I'm not sure what the protocol for that particular test uses, then he did better at remembering the information that was presented.... so, to me, that meant [the Student] might actually need that process time to know and to let it – actually let him absorb the information."[58]

It became obvious from her testimony that the current IEP, if implemented as designed to address a disability of OHI (ADHD and Oppositional Defiant Disorder), and as reported by District personnel, was not adequate enough to address the Student's disability of TBI. Although she had not yet reviewed the occupational therapy evaluation conducted in July 2017, she was concerned about the neuropsychologist's comment about the Student's sensory deficits. The Student allegedly

[58] Transcript, Vol II, Page 15-17

received a concussion the previous school year after being placed in the District's alternative learning environment (ALE). The Brain Injury Specialist testified that:

> "In the neuropsych, I felt it was important that she talked about the second concussion. I was later able to, with the information from Mom, to determine when that was, because I thought that was important...I also thought it was important in the paragraph two, under Medical History, where the neuropsychologist talks about some of his issues with sensory information...to me, it's important that he likes certain textures, he likes certain types of clothing...that speaks to the parietal lobe...[of] our brain that takes sensory input and decides what to do with it."[59]

> "If you give him information and you wait, you get a little bit better results than if you just give him the information and ask for it right back...that may be due to processing time, and more than likely it probably is due to processing time, just that it literally takes him a bit longer..and that's really common for kids who have head injury, that it takes them longer to process information...that's the reason he comes up with an average IQ overall, is that, that IQ test, except for one or two subtests, aren't timed."[60]

The Principal testified on cross examination that following the settlement agreement the District began working "on all of those things that we had discussed in the settlement...we also worked with [the Brain Injury Specialist] to set up training for our faculty on brain injuries and how

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[59] Ibid, Page 24

[60] Ibid, Page 26-27

that would relate to him in the classroom...but that's as far as that got."[61]

On March 1, 2018, prior to the Brain Injury Specialist being able to observe the Student and assist the District in developing his IEP and BIP, he reportedly posted a snapchat photo of himself with a belt around his neck.[62] This image was one of several presented by the District at the Federal Court hearing on their request for a temporary placement. When asked about a temporary placement for the Student on direct examination the Brain Injury Specialist did not recommend homebound services because so many of the students that she sees "have frontal lobe damage...[and] we are asking parents not to be able to work, to be able to stay home with their student." She continued, that in her opinion the only place in Arkansas that she would suggest for an out of school placement would be the Timber Ridge Neurorestorative Ranch because it would be an "environment that was safe, it was an environment that was 24 hours, where he could — they could make sure that medication was appropriate, and he could stay more on the road to recovery."[63]

On March 2, 2018, the Freshman Academy Principal documented his receipt of information that he obtained from the parent of another student on March 1, 2018, about a social media screen picture which depicted the Student "holding a gun of some type up in front of himself with a hash tag across the bottom that said, "I love it when they run."[64] Prior to confronting the Student or contacting the Parents, the Principal forwarded the information on that same evening to the local police department. When asked about involving the local police in school matters, on direct

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[61] Transcript, Vol I, Page 109

[62] District Binder, Page 4

[63] Transcript, Vol II, Page 56-57

[64] Parent Exhibit, Page 64-66 and District Binder, 179-182

examination the District Superintendent stated that he leaves the decision to their professional judgment if they felt that the student was out of control and beyond their means of getting that student back into control.[65] In this specific case with this specific event the Student was not present and was not presenting the school staff with any out of control behavior.

On receiving the request the local police informed the Principal that they would be at the school building to confront the Student the following day, and that they would have police present at the Student's home "so they could see him when he came out to make sure he didn't have anything."[66] On being confronted on his arrival at school the Student informed the Principal that the picture of him holding a rifle was an Airsoft gun that did not shoot real bullets and the he wasn't really serious about it. In addition to the picture noted above and after the police notification, on the following day (March 2, 2018) the Principal identified the Student's voice on the same social media platform stating that "for all you pussy fucks out there that think you can beat my ass, I wish the fuck you would do so, that I fight to kill, I don't fight to hurt people."[67] Also on the day in which the Principal notified the police he listened to another recording in which the Student is alleged to have said "bitch, I don't - - -(unintelligible) - - - I will send a straight bullet" while holding a handgun.[68] A third image from the same social media source depicted a fellow student with his image circled in red. The student as determined on cross examination of the Principal in the expedited hearing was a friend of the Student.

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[65] Transcript, Vol III, Page 151

[66] Parent Exhibit, Page 64-66 and District Binder, Page 179-182

[67] Ibid

[68] Ibid

On March 2, 2018, the District's Special Education Supervisor testified that she was present when the Student returned to school and engaged him in conversation regarding the social media posts. She testified that "he was just very polite, respectful." In the previous expedited hearing she testified that her primary concern for the Student was about him wanting to take his own life. When asking the Student as to his level of depression at that moment he responded that he was at a level two. It is not certain from the testimony as to whether the two was low depression or high depression.

On March 2, 2018, the District asked the Parents for permission to conduct a mobile assessment.[69] The reason given to the Parents was due to the Student having "posted a snapchat on Wed, Feb 28 a picture of hanging himself with a belt and posted, "I tried to hang myself - Is that funny?" "Depression has never taken you over has it?"....[and] "on Thurs, March 1, a picture of himself with a weapon # I LOVE IT WHEN THEY RUN."[70] The police incident report was amended on March 5, 2018, to include a copy of an additional video of the Student with "a gun and talking about killing."[71] This information was also presented to the Federal Court as well as an exhibit in the previous expedited hearing.

On March 5, 2018, the District provided the Parents with a notice of conference to be held on March 7, 2018 for the purpose of conducting a manifestation determination review (MDR) to be held, not on District property, but at the headquarters of the local police department. Other than

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[69] District Binder, Page 16

[70] Ibid

[71] Ibid, Page 30-31

District personnel the Department's Brain Injury Specialist was listed as an attendee.[72] On the afternoon of March 5, 2018, the District's director of special education notified the Parents via email of the MDR meeting referencing the Student's behavior as recorded by the District's principal on March 1 and 5, 2018. They were advised that they could view a copy of the video at the MDR meeting at the police department or in the Principal's office at the school and that they could also review a copy of the incident report filed by the local police at the police department. On the same day the Student's mother notified the District by return email that she had not received a copy of any due process paper work and that she could not attend an IEP meeting on only a twenty-four notice. She also notified the District that she would need to have additional members added to the team meeting.[73] On the evening of March 5, 2018, the Parents received another email from the District's special education supervisor notifying them that the District had determined that the MDR team required only the relevant members of the Student's IEP team be present and that the District Superintendent would not be present, but would provide written input. No other team members were listed; however, he did note that "outside third party experts can participate but they are not required members of the IEP team." Further noting that the IDEA required an MDR meeting to "be conducted as immediately as possible."[74] When asked on direct examination the Department's Brain Injury Specialist stated that she agreed with the District's conclusion that the Student's behavior as outlined on March 1, 2018, was related to his disability of TBI. When asked to explain she stated: "let's go back to looking at all those frontal lobe executive function things...your frontal lobe is the thing that

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[72] Ibid, Page 136-137

[73] Ibid, Page 304-305

[74] Ibid, Page 306-307

tells you, 'Don't do that, that's dangerous,' 'Don't do that, that's silly.' ' Don't do that, that will get you in trouble.'....your frontal lobe says, 'Don't do it, in the long run that's not a good thing to do.'"[75] Her testimony is consistent with the findings by the neuropsychologist who stated in her report that the Student shows "dysfunction with systems controlled and mediated by the frontal and prefrontal lobe areas of the brain...these deficits are negatively affecting behavioral, emotional and cognitive regulation skills."[76]

On March 5, 2018, the Parents obtained a letter from the Student's treating psychiatrist in which he concluded that the Student did not pose a threat to either himself or others.[77] According to the Student's mother this information was presented to the District.[78] The District Superintendent testified that he had not seen the psychiatrist's letter until it was revealed at the Federal Court hearing.[79]

In lieu of the District's mobile assessment and following a visit with the treating psychiatrist the Parents elected on March 5, 2018, to admit the Student to Unity Health (a psychiatric facility) for observation and treatment with the subsequent result in a change of medications and discharge on March 13, 2018.[80] Again the District Superintendent testified that he was not aware of these

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[75] Transcript, Vol II, Page 49-50

[76] Parent Binder, Page 46

[77] Ibid, Page 35

[78] Transcript, Vol III, Page 270

[79] Ibid, Page 167

[80] Parent Binder, Page 33-34 and District Binder, Page 174-175

documents until they were revealed in Federal Court in April.[81]

Without any knowledge of the Parents decision to address the Student's self-harm ideation, the District notified them on March 5, 2018, that the Student would be suspended from school for ten days beginning on March 2, 2018 through March 15, 2018, for "creating a material disruption at school due to a social media post."[82] The District's Principal testified that he knew that by suspending the Student on March 2, 2018, that the District would be exceeding the ten days maximum allowed by the IDEA for students receiving special education, because he had already been suspended for six days prior to this event.[83] The following day, the Parents were notified by an email attachment that contained the suspension notice.[84] On March 6, 2018, the Parents were notified via email and an attached letter that the Student was being recommended by the District's Superintendent for expulsion.[85] The Superintendent's recommendation was to be considered at the next District Board meeting scheduled for March 12, 2018.

The District introduced as evidence in the form of a note dated March 6, 2018, written by a college intern of an event that took place during the week of February 14, 2018, where the Student reportedly told the intern that he wanted to fight someone, kill them, and then go to prison for the rest of his life. The following day she recorded in her note that "he said he was doing better" and

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[81] Transcript, Vol III, Page 168

[82] District Binder, Page 15 and 18

[83] Transcript, Vol I, Page 63-64

[84] District Binder, Page 17

[85] Ibid, Page 19-21

that "he finished up his work and I did not have to pull him out of advisory anymore."[86] There was apparently no discussion following the event with the Principal or any other District staff in February or later which should have triggered a need to address the Student's depression and thoughts of killing someone as well as himself. However, the District notified the local police department on March 6, 2018, of the February event and an incident report was subsequently developed by the police.[87]

The MDR team meeting scheduled for March 7, 2018, did not take place; however, the District prepared documentation in advance of the conference. The paper work as developed prior to the meeting by the District indicated that they believed the Student's behavior which triggered the conference had a direct and substantial relationship between the Student's traumatic brain injury and his misconduct.[88]

On March 12, 2018, the District again notified the Parents of a conference to be held on March 14, 2018, for the purpose of conducting the MDR as well as reviewing and revising the Student's IEP. However, on March 13, 2018, the Parents filed their request for the current hearing with the Department, which placed the Student's education plan and placement under the IDEA stay put provision.

As previously adjudicated in the expedited hearing and having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence in the current case, I continue to find as fact:

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[86] Ibid, Page 34

[87] Ibid, Page 32-33

[88] Parent Binder, Page 26-27 and District Binder, Page 139-140

1. The Student posted a self-photo on a social media platform along with lyrics from a rap song which read "I love it when they run." This incident was not posted while the Student was in school nor on school property. The photo and information was not addressed to any one person or audience.

2. As a consequence the District determined that the Student would be suspended for ten days, with recommendation to the District School Board that he be expelled. The result has been that the Student has been without access to an education well beyond the maximum of ten days as stipulated by the IDEA.

3. The Student's BIP in place at the time of the incident addressed only the maladaptive behaviors of talking back to staff and avoiding his school work. The only events introduced in testimony by the Principal and the District's Special Education Supervisor that closely relates to the BIP involved the Student being "upset and throwing a chair and hitting the Smartboard, and another time when he punched a door and punched the glass out of it and hurt himself."[89] The BIP does not contain any behaviors related to the issue of dangerousness to self and others which triggered the District's request for an expedited hearing, thus bifurcating the issues of the current hearing.

4. The testimony and evidence presented in the expedited hearing and in the current hearing reflect positive working relationships that existed by District staff with the Student, to the degree that he shared with them his depression and difficulties and thoughts of self-harm, as well as his excitement about school studies such as the stock market. No support services were put in place to assist him with the self-harm thoughts and resultant subsequent behaviors.

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[89] Transcript, Page 131

5. The relationships the Student encountered in school were considered by his teachers as normal. None of the testimony reflected him having made any attempts to threaten or harm another student on school grounds. The previously adjudicated issue of placement also showed that the apparent "love triangle" addressed in testimony was an ongoing dispute between the Student and two other students, being addressed via the social media via pictures and chats, but according to testimony had been resolved.

6. The neuropsychological evaluation introduced in the course of the hearing revealed that the Student was physically abused by his birth parents (not the current Parents), suffering a concussion in early childhood and again while attending the ALE in his eight grade school year.[90] The test results revealed that the Student showed dysfunction with systems controlled and mediated by the frontal and prefrontal lobe areas of the brain. Consequently, these deficits are negatively affecting behavioral, emotional and cognitive regulation skills.[91] These deficits appear to not have been considered when determining the Student's initial IEP and consequently not considered when developing his original BIP. It appears from testimony that the responsible agents in the District were not cognizant enough of how a brain injury impacts a student's education and behavior. Or at least not enough so to develop a more appropriate behavior intervention plan.

7. Even with mental health care documentation the District elected to not only ignore the hearing officer's stay put order, but also to continue to fail to allow the Student to receive any educational opportunities except as those they considered appropriate without consideration of

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[90] No documentation was presented to verify this allegation that the second concussion occurred on school property or during school session hours.

[91] Parent Binder, Page 46

parental input. Consequently the documents entered as evidence reflects a failure by the District to develop an appropriate IEP for the educational services for which the Student is entitled, but also a failure to continue implementation of the existing IEP at the time of being suspended.

8. The District elected to ignore the letter completed by the Student's treating psychiatrist stating that in his professional opinion the Student did not pose a threat to himself or others and instead elected to suspend and recommend expulsion.

9. The District's Superintendent's verbal policy to contact the local police department appears to be appropriate when the staff is unable to control a student's behavior; however, in this case the Student was not present when the police were asked to intervene. Such actions may be less offensive to a non-disabled student or parent; however, such is inconsistent with how a school which receives federal funding for disabled students are obligated to respond.

10. Consistent with the Superintendent's inability to testify in the Federal Court hearing prior to the ignored stay put order as to what mental health professional had recommended the more restrictive school environment of a day treatment center that was being advocated for placement by the District, such continued to hold true in the current case.

11. As noted in the findings of the expedited hearing the current state of school violence in the country may explain some of the knee-jerk reactions instigated by the District in response to the Student's behaviors prior to March 1, 2018. However, such actions do not replace the District's responsibilities of implementing the Student's due process rights under the IDEA.

12. On February 5, 2018, the District correctly accepted the Parent's recommendation for the Department's Brain Injury Specialist to assist the IEP team in developing an IEP consistent with

the Student's TBI disabling condition for which special education services are needed.[92] Had the District not reacted with suspension and expulsion of the Student, the Student might still be receiving an appropriate education from a well developed and appropriate IEP.

Conclusions of Law and Discussion:

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.[93] The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.[94] The term "special education" means specially designed instruction.[95] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[96]

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008. The jurisdiction of a hearing officer in IDEA

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[92] Parent Binder, Page 95

[93] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[94] 20 U.S.C. § 1401(3)(A)

[95] 20 U.S.C. § 1402(29)

[96] 34 CFR § 300.26(b)(3)

due process hearings is confined to ruling on any matter that pertains to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Arkansas Code Annotated 6-41-202, et seq.[97]

One of the allegations in this case is whether or not the District denied the Student FAPE by failing to implement the existing IEP prior to the determination that the disabling condition was a traumatic brain injury as opposed to other health impaired and whether or not the proposed placement for those services was the most appropriate for the Student. It wold appear that following the Parents previously filed complaint on this issue and the resulting settlement agreement that the implementation would have adequately addressed this question. However, while in the process of developing a more appropriate IEP and deciding on the most appropriate placement for services the District chose to suspend and recommend expulsion of the Student for behavior they determined to be related to his disability.

The evidence and testimony reflect that the actions and inactions of the District were a denial of FAPE. The allegation of a denial of FAPE in this case, as in all special education cases, need to be addressed with respect to the intent of the IDEA. In 1982, the Supreme Court was asked, and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." Given that this is the crux of the Parent's contention in this case it is critical to understand in making a decision about the Parent's allegations of the District's failure to provide FAPE. The Court noted that the following twofold

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[97] *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

analysis must be made by a court or hearing officer:

> (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
>
> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[98]

In 1988, the Supreme Court once again addressed FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[99] In this case the evidence and testimony reflects either a disregard for or an ignorance of the impact of the Student's traumatic brain injury on his educational needs as well as his maladaptive behaviors. In either case the IEP previously adapted for students with other health impairments (ADHD) proved to be inappropriate. The behavior intervention plan (BIP) developed from the Student's eighth grade Section 504 plan more likely than not would have been appropriate had the disability related need for services been correctly identified and addressed. However, at the same time, with regard to looking at a child's eligibility for special education services the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability.[100]

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[98] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-207 (1982)

[99] *Honig v. Doe,* 484 U.S. 305 (1988)

[100] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

In this case the Student's unique needs were assumed by the District to have been as a consequence of his OHI (ADHD and ODD) in developing the Student's initial IEP. After obtaining information and training by the Department's Brain Injury Specialist the District was able to see that the maladaptive behaviors exhibited by the Student were not due to his previous eligibility category of OHI. The identification and evaluation process initially implemented by the District failed to take into consideration the assessments obtained by the Parents from either his treating mental health providers, the occupational therapist, or the neuropsychologist. The consequence of their failure to look and take into consideration these findings resulted in the development of an inappropriate IEP as well as an inappropriate BIP.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on the Student's unique needs based on their belief that the Student's maladaptive behaviors were related to either his ADHD or his oppositional defiant disorder. Had the District taken all of the assessment information provided by the Parents into consideration and focused on the Student's unique needs a more appropriate IEP and BIP could have been developed and implemented earlier. Even as maladaptive as were some of his behaviors his academic achievements do not appear to have been jeopardized.

The District asserted that the removal of the Student to an interim placement was warranted based upon the photos and statements that he made and shared with friends on social media. As adjudicated in the expedited hearing there was no evidence or testimony presented that these events were directed to any one student or staff within the District's area of responsibility. The Parents have shown that the Student's maladaptive behaviors as exhibited on social media were the actions of a person who was crying for help and a young man who has suffered the trauma of a brain injury

which impairs his judgement as reflected in the behavior. The Parents responded to this event by admitting the Student into the hospital, resulting in a change in medication. The District had access to the conclusions and recommendations of the neuropsychological evaluation conduced in April 2017, but chose to use the Student's previous diagnoses of ADHD and ODD in developing his IEP and BIP. Had the District more accurately used the assessment and recommendations of the Brain Injury Consultant who attended the resolution conference on March 26, 2018, their response to the events that occurred and actions taken by the District on March 2, 2018, might have played out differently.

The District elected to disregard this Hearing Officer's order for stay put and sought judicial justification for their action in State court. The stay put provision of the IDEA is in effect an automatic "statutory injunction" similar to the automatic stay under the bankruptcy code.[101] The stay put requirement, however, can be overcome at the equitable discretion of a district court.[102] Which was attempted without success by the District.

As adjudicated in the expedited hearing the District did not provide evidence that the Student threatened to commit a crime of violence or injury to anyone in particular other than himself. While it can be argued that the lyrics of the Student's rap song which stated "I like to see them run" while holding a Airsoft rifle could be construed as a threat to commit a crime of violence, it was not directed toward any individual or facility. Further, there was no evidence presented by the District

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[101] *Casey K. Ex rel. Normak K. V. St. Anne Cmty. High School Dist*. No. 302, 400 F.3d 508, 511 (7th Cir. 2005); *Beth B. V. Van Clay*, 126 F. Supp.2d532, 533 (N.D. Ill. 2000) ("Congress has provided a mandatory 'stay put' requirement... which functions, in essence, as an automatic preliminary injunction.")

[102] *Honig*, 484 U.S. at 327-28 (1988) (See also *Lawrence Cty Sch Dist v. Mm McDaniel*, U.S. Dist Ct, E. District AR (71 IDELR 3; 117 LRP, 45394) (October 26, 2017).

that the Student shared or performed the song with anyone so as to cause a victim to believe the immediacy of the threat and the likelihood that it would be carried out. Additionally, the District did not provide evidence of a school policy prohibiting a student to write a statement referencing shooting a gun.

The District elected to involve the local police and to recommend expulsion as opposed to following this Hearing Officer's order resulting from the expedited hearing on placement. The Supreme Court in *Honig*, as referred to above (*Honig v. Doe*, 484 U.S. at 305), found the language of the IDEA with respect to the stay-put provision to be "unequivocal." The Court stated: "We think it clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Therefore, the Supreme Court held that unilateral expulsion of children with disabilities is no longer permitted, for it constitutes a change in placement that cannot be instituted without compliance with the IDEA procedural requirements. Further, the Court held that a suspension in excess of ten days constitutes a change in placement, thus triggering the stay-put provision. In sum, therefore, under the Court's ruling a local education agency, such as this District, may temporarily suspend a student with a disability for no more than ten school days without such a temporary suspension being considered a change in placement.

In ruling as it did in *Honig*, the Supreme Court did not accept the school district's request that the Court read a "dangerousness" exception into the IDEA. Educators were concerned that a literal reading of the stay-put provision would result in the "return [of] violent or dangerous students to school while the often lengthy [administrative] proceedings run their course." The

Court disagreed, but it did not leave school districts defenseless to respond to children who presented a danger to themselves or others. Noting that critical situations could arise in which a parent would not agree with the school district so as to permit a change in placement considered essential by the district, the Supreme Court made it clear that a district may seek court involvement. The Court stated that "[i]n those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under Section 1415(e)(2), which empowers courts to grant any appropriate relief." In the instant case those exceptions were attempted by the District; however, the Federal District Court delayed their decision until the completion of the expedited hearing and this Hearing Officer's order.

The Parents were obviously concerned but apparently not surprised in that they too had previously used the local police in assisting them with the Student's behavior. The rationale for involving the local police in handling student behavior at school as noted above and explained by the Superintendent was he was leaving it to the professional judgment of the school staff. Here to, such actions on the part of the District are hearable under the IDEA as a possible denial of FAPE, but only if they are inconsistent with an appropriate IEP.

Under the IDEA, school districts may summon law enforcement authorities in response to any criminal activity of IDEA-eligible students. The relevant IDEA provision provides, "Nothing in [Part B] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal

and state law to crimes committed by a child with a disability."[103]

The implication of this legislation is that a district does not have to notify the parents or otherwise comply with the IDEA's procedural safeguards prior to reporting a crime.[104] This means that notice to the parents and an IEP team meeting are not required before reporting the criminal activity committed by a student with a disability.[105] It is also possible that state law compels a district to contact law enforcement authorities when the student puts himself or others in danger.[106] In the instant case, however, no identifiable crime was committed by the Student.

A review of relevant cases has shown that using police intervention to control a student's behavior on at least four occasions violated the IDEA where police involvement was not allowed under the IEP and contradicted the IEP's specific instructions to use calm interaction styles.[107] The finding in all cases was that when a student with a disability clearly does not pose a threat of harm to herself or others, school personnel should first implement the behavioral interventions

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[103] 20 USC 1415 (k)(6); 34 CFR 300.535 (a). See, e.g., *Northside Indep. Sch. Dist*., 28 IDELR 1118 (SEA TX 1998) (stating that the IDEA permits districts to report crimes committed by students with disabilities to law enforcement); *Poteet Indep. Sch. Dist*., 29 IDELR 423 (SEA TX 1998) (finding that a district's decision to report a student's truancy without first making a manifestation determination was not a violation of the IDEA); and *Washington Twp. Bd. of Educ.,* 115 LRP 3499 (SEA NJ 12/23/14) (noting that a district appropriately involved law enforcement when school officials learned that a student made "Columbine-like" threats).

[104] 64 Fed. Reg. 12,631 (1999)

[105] *Northside Indep. Sch. Dist*., 28 IDELR 1118 (SEA TX 1998).

[106] See, e.g., *Gateway (CA) Unified Sch. Dist*., 24 IDELR 80 (OCR 1995) (finding that state law required a district to call the < police > when a student with a disability threatened to harm himself); and *Hurst-Euless-Bedford Indep. Sch. Dist*., 114 LRP 25854 (SEA TX 05/13/14), aff'd on other grounds, 65 IDELR 195 (N.D. Tex. 2015) (concluding that the district did not violate the IDEA when it called the < police > pursuant to a state statute after a student allegedly committed a felony on campus)

[107] *Spring Branch Indep. Sch. Dist*., 118 LRP 13118 (S.D. Tex. 03/29/18)

contained in the student's IEP before calling police.[108]

In the instant case the District failed to show that the Student had committed any crime or to have even violated school policy. Thus asking for police intervention would appear to be a violation of the Student's existing IEP and BIP. In so doing the District failed to address the unique behavior deficits by not appropriately considering the needs associated with the Student's brain injury diagnosis and thus not addressing them in his IEP.

The Federal District Court granted the District its request for an injunction and correctly interpreted the IDEA (20 U.S.C.A. §§ 1400-1482) and its implementing regulations, in that a school district "may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability" if the child brings a weapon to school, inflicts serious bodily injury on another person at school, or "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premisses, or at a school function."[109]

In accordance with the IDEA, if a district believes that maintaining a student's placement for special education services is substantially likely to result in injury to the child or others, the district may request an expedited hearing.[110] In such a case, a hearing officer may "return a child with a disability to the placement from which the child was removed, under certain circumstances or "order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer

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[108] *Spring Branch Indep. Sch. Dist.*, 116 LRP 40083 (SEA TX 08/03/16)

[109] Parent Binder, Page 129 and 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2014)

[110] 20 U.S.C.A. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c) (2014)

determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."[111] While the IDEA and its implementing regulations do not include factors for determining whether maintaining a child's current placement is "substantially likely to result in injury," a review of several administrative and judicial decision shows the type of conduct that decision-makers, have found to meet this standard.[112] Following the requested expedited hearing of this case an order was written ordering the District to return the Student to his previously designated placement for special education services. Once again, as with the order of stay put, the District objected and refused to implement the order.

As previously noted this case involves addressing the question of the denial of FAPE because of not only a failure to implement an existing IEP, but also it addresses the question as to whether or not the District failed to evaluate and develop an appropriate IEP and behavior intervention plan to address the Student's unique deficits. The findings of fact do show that the initial IEP provided special education services in the least restrictive environment; however, the IEP failed to adequately address the Student's behavior deficits related to his TBI. The evidence shows that his special education needs included not only his academic deficits, but also his unique behavior deficits. As noted above, the IDEA maintains that the term educational performance and the regulations being implemented by the IDEA is not limited solely to

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[111] 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014) (The child shall remain in the interim alternative educational setting until an administrative law judge (ALJ) renders a decision or until the expiration of the 45 day removal period, which ever occurs first. 20 U.S.C.A. § 1415(k)(4)(A); 34 C.F.R. § 300.533 (2014)

[112] In promulgating rules under the IDEA, the Department of Education explained that "[h]earing officers have the authority under [34 C.F.R.] §300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others." 71 Fed. Reg. 46540, 45722 (August 14, 2006).

academic performance. As the District amply points out that despite his maladaptive behaviors the Student made academic progress. However, the regulations clearly establish that the determination about wether or not a student is a student with a disability is not limited to information about his or her academic performance.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question as to whether or not the Student was denied FAPE by the District for failure to appropriately evaluate and/or take into consideration parentally provided evaluations for his disabilities requires: (1) looking at each individual issue raised by the Parents to determine whether or not the District has been in compliance with the definition of FAPE under the IDEA, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[113] agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.[114] Further, *Rowley* recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

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[113] *Zumwalt v Clynes,* (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

[114] *Board of Education v. Rowley,* (458 U.S. 176-203, 1982)

> "Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)."[115]

The Eighth Circuit Court of Appeals has addressed the issue of the appropriateness of an education in meeting the standards established in IDEA in order to provide FAPE. In *Zumwalt v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible education or superior results. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student.[116]

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

As previously noted, the jurisdiction of a hearing officer in an IDEA due process hearing is confined to ruling on matters that pertain to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Arkansas Code Annotated 6-41-202, et seq.[117]

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[115] *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

[116] *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

[117] *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

Also as previously noted, the rules implementing the IDEA also describe the authority of a hearing officer in an expedited hearing. Specifically, 34 CFR 300.532 (b) states that a hearing officer may "order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines [that] maintaining the current placement of the child is substantially likely to result in injury to the child or others."[118]

While there is no bright-line rule for determining whether a particular student's behavior can be determined as "dangerous" to self or others, the Student's behaviors as presented in the evidence and testified to by the witnesses of both parties, do no meet the criteria of dangerous by the standards as outlined in the above decisions by other hearing officers as referenced to in the final decision and order issued in the expedited hearing of this case..

Order:

The Parent has introduced sufficient evidence in the record to reflect that the District failed to develop and implement an appropriate IEP to address both the educational and behavioral issues presented to them by the Student. Having presented a preponderance of evidence the Parents have shown that the District has violated the FAPE provisions of the IDEA in both procedural and substantive measures.

The decisions made by the District on being approached with the challenge to meet the academic and behavioral needs of the Student failed to comply with the standards set forth by the IDEA and the Department. Those decisions do not appear to have been intentional or malicious, but rather appear to be related to first, the belief that the Student's primary disability was related

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[118] See *White Bear Lake Area Schs*., 113 LRP 28309 (SEA MN 05/13/13)

to an attention deficit disorder as well as an oppositional defiant disorder, and second possibly being influenced by the current state of school violence in this country. Consequently, it is hereby ordered that:

1. The District will immediately upon receipt of this order implement the order as directed in the final decision of the expedited hearing on placement, to wit:

a. The District will immediately upon receipt of this order notify the Parents and the Student that he will be receiving his special education services at the previously agreed upon location as contained in his amended IEP of October 25, 2017; and

b. The District will immediately upon receipt of this order, but no later than April 30, 2018, schedule an IEP conference to be held at a time and place agreeable to the Parents and the Department's Brain Injury Specialist. The purpose of the conference will be to determine the most appropriate and least restrictive environment in which to provide the Student's special educational needs, including any necessary supports and related services as dictated by his qualifying disability of Traumatic Brain Injury.

2. If the above order has not been implemented the date for completion of the action as ordered in item "1.b" will be implemented no later than June 15, 2018.

3. The District will upon receipt of this order make arrangements to provide the Student with sufficient compensatory special education services to provide him with the opportunity to obtain the equivalent credits towards graduation as expected of other ninth grade students in the District.

4. The District will upon receipt of this order, but no later than August 1, 2018, make arrangements to provide teaching strategies to teachers as well as other support staff through the

Department's CIRCUIT process.

5. The District will upon receipt of this order, if not having already done so, will no later than August 1,2018, make arrangements for the Student to receive an occupational therapy evaluation.

6. Finally, the District will within one month of the beginning school year 2019-20 conduct a functional behavior assessment to determine the need for behavior interventions and the development of an appropriate IEP with the assistance and guidance of a behavior expert as agreed to by the Parents.

Finality of Order and Right to Appeal:

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to this expedited hearing.

IT IS SO ORDERED.

Robert B. Doyle, Ph.D.
Hearing Officer

May 25, 2018
Date