

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**IN RE: XXXXXXXXXX, STUDENT
XXXXXXXXXXXXXXXXXXXXXX,
AS PARENTS OF XXXXXXXXXX,
Petitioners/Parents**

VS.

**NOS. H-23-29 and H-24-04,
CONSOLIDATED**

**LITTLE ROCK SCHOOL DISTRICT,
Respondent/District**

HEARING OFFICER’S FINAL DECISION AND ORDER

XXXXXXXX (“Student”) is a child with a learning disability who is eligible for special education services from the Little Rock School District (“District”). On January 24, 2023, and on July 18, 2023, Student’s parents XXXXXXXXXX (“Parents” or, if mother, “Parent”), filed a request for a due process hearing pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. (“IDEA”) alleging that District failed to comply with the IDEA, its implementing regulations, and regulations of the Arkansas Department of Education, Special Education Division (“Department”), thereby denying Student a free and appropriate education (FAPE) under the IDEA.

ISSUES PRESENTED

A. Whether the District failed to follow due process procedures relating to the referral, evaluation, and identification of Student as a child with a disability and in need of special education services in the 2021-2022 school year and whether that failure was a denial of a Free Appropriate Public Education (FAPE) under the IDEA; and

B. Whether the District denied Student a FAPE during the 2022-2023 school year when it failed to develop an appropriate IEP, and failed to provide services in conformity with the IEP.

NON-JUSTICIABLE ISSUES

Parents allege that District's conduct constitutes disability discrimination in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims. *See* Ark. Dept. of Ed., Spec. Ed. Rules §10.01.22.1.

Accordingly, to the extent Parents' due process complaint raises disability discrimination claims, those claims are DISMISSED without prejudice.

PROCEDURAL HISTORY

On January 24, 2023, Parents filed a request for a due process hearing pursuant to the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. The assigned case number for that case is H-23-29. In response to the Parents' request for a due process hearing, the Department assigned the case to an impartial hearing officer. On July 18, 2023, Petitioner filed a second Due Process Complaint with a request to consolidate the two cases. The second request for a due process hearing is assigned case number H-24-04. On July 19, 2023, case number H-23-29 was continued and the two cases were consolidated. The timeline for the consolidated cases was extended for good cause eight times, several due to serious medical conditions of the participants and death of a family member.

Having been given jurisdiction and authority to conduct the hearing pursuant to the IDEA, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Cheryl L. Reinhart, J.D., Hearing Officer for the Department, conducted a closed impartial hearing. Parties present for the hearing were XXXXXXXX ("Parent"), represented by Ms. Theresa L. Caldwell, Caldwell Law Office, Little Rock, Arkansas, and Malinda Smith ("Smith"), the District's Special Education

Supervisor, represented by Mr. Khayyam M. Eddings, Friday, Eldredge & Clark, LLP, of Little Rock, Arkansas. Audra Alumbaugh was present as an advocate for Parents.

Testimony was heard on September 19 through September 21, 2023, and on March 13 and 14, 2024. *See* Transcript, generally, Vols. I-VI. Parent and the following witnesses testified in this matter: Tim Guest, 504 Coordinator for District at Central High School; Myra Jarmon, Special Education Teacher, Central High School; DeShannon McAllister, Speech/Language Pathologist, Central High School; Tarsha Parker, Teacher, Advanced Biology (Ninth Grade), Central High School; Kimberly Lawrence, Psychological Examiner, Central High School, Christopher Dorer, Teacher, AP World History (Tenth Grade), Central High School; Dr. M. Tracy Morrison, Engage of Jonesboro, expert witness for Parents; RaDiah Reynolds, Speech/Language Pathologist and Certified Academic Language Therapist, expert witness for Parents; Erin Fulenwider, Teacher, Algebra II (Tenth Grade), Central High School; Annalee Jackson, School Nurse, Central High School; and Jennifer Choate, Teacher, Advanced English II (Tenth Grade), Central High School.

FINDINGS OF FACT

A. Background

At the time of the filing of these cases, Student was a sixteen-year old female (born 2/8/2006) and enrolled in the tenth grade at District's Central High School. Complaint, p. 2. Parents, who are Student's biological grandparents, adopted Student at infancy. Student tested positive for drugs at birth, was diagnosed with autism, attention deficit hyperactivity disorder, and severe language delay at age three, and was nonverbal for until kindergarten. Tr. Vol. IV, pp. 7-8; Parent Exh., p. 65. Student also has a medical condition that causes a partial hearing loss in both ears. Tr. Vol. IV., p. 9. She has an observable speech impediment and language delay. Tr.

Vol. IV., pp. 15, 43; Tr. Vol. V, pp. 16-17. Student is prescribed Focalin for depression, Methylphenidate for anxiety, and Buspirone for premenstrual dysphoric disorder (PMDD). Tr. Vol. IV, pp. 21-22.

Student received private tutoring, speech/language therapy, and occupational therapy until her eighth-grade year. Tr. Vol. IV, p. 22. She attended private schools and a public charter school before enrolling in Central High School in the ninth grade. Tr. Vol. IV, pp. 9-12. District evaluated Student for special education in April and May of 2011, when Student considered enrolling in kindergarten at the District. Tr. Vol. V, p. 9; Parent Exh., pp. 75-86. This is interesting because Central High School employees deny having knowledge of Student's diagnoses or disabilities before the ninth-grade referral (discussed below). Throughout her school years before coming to Central High School, Student endured bullying due to her speech impediment and being pulled out of classes for special education instruction. Tr. Vol. IV, pp. 10-11.

The due process timeline in these consolidated cases begins July 1, 2021, the first school year that Student enrolled at the District (Tr. Vol. V, p. 11), and runs through July 18, 2023, the date of the filing of case number H-24-04.

B. 2021-2022 School Year (7/1/21 to 6/30/22) – Ninth Grade

Student enrolled for the first time at Central High School in the ninth grade (Parent Exh., p. 218), as a transfer student from a private school where she was not on an IEP. Tr. Vol. IV, p. 14; Tr. Vol. V, p. 20. She made As and Bs in most of her ninth grade classes. Parent Exh., p. 220. She began the school year on the volleyball team. Tr. Vol. V, p. 12. Despite Student being autistic, having severe language delay, and experiencing social awkwardness with an inability to detect sarcasm (Tr. Vol. V, p. 20), Parent thought she was doing well academically making

friends, and enjoying volleyball. Tr. Vol. IV, p. 15.

Student did not enter ninth grade with an IEP. At enrollment, Parent discussed Student's previous IEP at eSTEM charter school with the school counselor, but stated that she (Parent) did not want Student to be pulled for special education instruction. Tr. Vol. V, pp. 11-12. The volleyball coach made accommodations for her in volleyball due to her hearing loss. Tr. Vol. V, p. 12.

i. Referral and 504-Plan

Student was first referred for special education in February of ninth-grade year by her English teacher, Ms. Vanness. Tr. Vol. V. p. 13, 23; Parent Exh., p. 36. Student had a disciplinary issue in English class, that resulted in her telling Ms. Vanness that she was autistic. Tr. Vol. V, p. 23; Parent Exh., p. 36. On March 10, 2022, Ms. Vanness emailed Parent about the disciplinary issue, and her concern that she would need to refer Student for special education or 504 due to her autism. Parent Exh., p. 36. Parent advised Ms. Vanness about Student's K-5 IEP, "autism, severe language delay ... PMDD, ADHD, moderate hearing loss, and depression/social anxiety." Parent Exh., p. 37. District responded to the referral as follows:

- 1) Barbara Deloney, special education supervisor, contacted Tim Guest, 504 Coordinator for Central High School, by email, stating that she had spoken with Parent, that "she did not want an IEP; however, she is interested in a possible 504 plan." Parent Exh., p. 37.
- 2) On March 14, 2022, Guest contacted Parent to discuss a 504 Plan. Parent Exh., p. 38.
- 3) On March 30, 2022, Guest conducted a 504 referral conference by Zoom. Parent Exh., p. 69; Tr. Vol. I, p. 35.

Guest testified that he and one other District employee, a school counselor, attended the conference and reviewed documents provided by Parent: a medical management letter from Dr.

Bagley referencing Student's diagnoses of autism and ADHD. Parent Exh., p. 65. Guest further testified that: he did not know about Student's speech and language issues (Tr. Vol. I, pp. 39-40); did not have the IEP or records from eSTEM (Tr. Vol. I, p. 40); and did not request or have a social history from Parent (Tr. Vol. I, p. 41). Guest's handwritten notes indicated that, during the phone conference, he received information from Parent about ADHD, social anxiety, PMDD, inability to detect sarcasm, Student's medications, hearing loss (37% right ear, 49% left ear). Parent Exh., p. 68; Tr. Vol. I, p. 39. Guest's notes also referenced "input" from Student's referring English teacher, her business teacher (Student "puts head down" when not understanding instructions), and volleyball coach ("cool down"). Parent Exh., p. 68.

District developed a 504 plan with accommodations for Student's ADHD and anxiety (later Guest crossed out "anxiety" and replaced it with "autism" (Tr. Vol. I, pp. 37-38)). Parent Exh., pp. 62-63. The resulting 504 Plan included the following accommodations:

- Preferential seating close to instruction
- Extra day for assignments
- Copy teacher notes, by request
- Copy study guide for tests
- Extended time for classroom and standardized assessments
- When making a request or redirection, phrase as "[Student], it would really help me out if you could ..."
- Cool down to see counselor/AP

Parent's recollection of the "Zoom call" was that the participants were only herself, Guest, and one other person who she did not know (later identified as Ms. Brown, the counselor). Tr. Vol. IV, p. 35. Parent told Guest that she did not want Student to be pulled out of class for special education. Tr. Vol. IV, p. 35. Parent stated that, "it was talked about an IEP, and it was said that Student would have to be pulled from class for an IEP, and that he thought -- Mr. Guest thought that a 504 would be the best option." Tr. Vol. V, p. 25. Guest stated that a "504 does the

same thing as an IEP ... [and] gives her protections.” Tr. Vol. IV, p. 35-37. Parent testified that she did not know what a “504 Plan” was. Tr. Vol. IV, p. 37. Guest typed in Parent’s name at the end of the “Parent/Student Rights in Identification, Evaluation, and Placement” (Section 504 of the Rehabilitation Act). Guest testified as follows:

My recollection is that when I was discussing this with [Parent], I alluded to this paragraph here at the bottom, these two boxes and said, "Now, you have already talked to Ms. DeLoney, so I guess from what I'm hearing, you don't want a Special Ed referral," and I think her response was, "No," and that's why I checked the box.

Tr. Vol. I, p. 49. Parent testified that she did not recall receiving the two-page rights document.

Tr. Vol. IV, p. 51; Parent Exh., pp. 71-72. Parent also did not recall being told in the conference that District may want to make a referral for Student to be tested for special education. Tr. Vol.

IV, p. 51. Parent stated that she would have “readily” consented to an evaluation at that time. Tr.

Vol. IV, p. 52.

Student’s teachers testified that Student received the stated accommodations under the 504 Plan for the remainder of the ninth grade. District did not refer Student for testing or further evaluation. Tr. Vol. I, p. 44.

As a result of her speech impediment, Student was bullied in the ninth grade. Tr. Vol. IV, pp. 15-18. The bullying and name-calling continued to the point that Student dropped volleyball, stopped seeing her friends on the team, and joined the wrestling team. Tr. Vol. IV, p. 26.

C. 2022-2023 School Year (7/1/22 to 6/30/23) – Tenth Grade

Student continued with her 504 Plan in the tenth grade at Central High School. Parent met with Student’s tenth grade teachers, as she had in the ninth grade, to “[go] over everything, what her diagnoses were and what she struggled with.” Tr. Vol. V, p. 19. Parent testified that this was the first year that she (Parent) was not involved with Student’s choice of classes because the

counselor took over that role. Tr. Vol. V, pp. 33-34. Student enrolled in AP Science, AP World History, Advanced English, Chinese, and two study halls. Tr. Vol. V, p. 33.

i. Academics

Parent testified that she thought Student was “doing fine” academically. Tr. Vol. V, p. 38. However, Parent relied on the Schoology software program that was inconsistently completed by teachers. Tr. Vol. V, p. 38. She was not fully aware of Student’s lack of academic progress until she saw the reports of the ACT Aspire testing in the hearing exhibit book (p. 229), which saddened her. Tr. Vol. V, p. 32. According to the ACT Aspire testing, Student was “in need of support” in math, reading, science, and writing. Parent Exh., p. 229-230.

ii. Disciplinary Issues

In the tenth grade, Student was subjected to a series of disciplinary incidents.

(a) Wrestling Bus Incident. Due to the bullying in ninth grade, Student dropped volleyball and joined the wrestling team and Chess Club. Tr. Vol. V, p. 34. However, the bullying and name-calling continued in the tenth grade (Tr. Vol. V, p. 34-36), which ultimately resulted in Student getting into an altercation on the wrestling team bus. Student was removed from the bus and banned from riding the bus for wrestling practice. Tr. Vol. V, pp. 65-66.

Student did not return to wrestling after it ended in December. Tr. Vol. V, p. 37.

(b) Security Guard Incident #1. In November of the tenth grade, Student had left the classroom for a bathroom break, and a security guard came from behind her and touched her on the shoulder. Student did not hear him, and was startled. She filed a complaint against the security guard. Tr. Vol. V, pp. 35-36.

(c) Security Guard Incident #2 – MDR. In January of the tenth grade, Student had another encounter with the security guard during an incident in the school cafeteria,¹ that resulted in Student being handcuffed and arrested. Tr. Vol. IV, p. 66; Parent Exh., pp. 176-180, 200-201. District conducted a manifestation determination review (MDR) on January 24, 2023, and recommended Student for expulsion. Tr. Vol. V. p. 44; Parent Exh., pp. 39-42. Also, on January 25, 2023, the District revised Student’s 504-Plan to include, “Has about 50% hearing loss in both ears. If approaching/talking to her from behind, she can’t understand. Please do not touch [Student] to get her attention.” Parent Exh., p. 47.

iii. Special Education Referral and Temporary IEP

On February 6, 2023, Myra Jarmon, special education teacher, documented a referral of Student by Parent for special education. Parent Exh., p. 49. Jarmon testified that Guest prepared the referral form because he had knowledge of Student that Jarmon did not have. Tr. Vol. II, pp. 11-12. Parent confirmed that she (Parent) did not complete the referral. Tr. Vol. IV, p. 83. Parent received a Notice of Conference for a special education referral conference and a temporary IEP. Parent Exh., p. 48. At the conference, which took place on February 13, 2023 (Parent Exh., pp. 50-51), Parent provided her backpack of documents containing Student’s medical history, audiology reports, and speech therapy files. Tr. Vol. IV, pp. 85-86.

After consideration of Student’s medical records, grades, attendance, teacher input, parent input, and previous evaluation, the IEP team recommended Student for an initial comprehensive evaluation and developed a Temporary IEP covering the period of February 13, 2023, to April 13, 2023. Parent Exh., p. 13. The Temporary IEP referenced Student’s ninth-grade

¹ A video was produced at the hearing that, in this hearing officer’s opinion, was inconclusive as to the extent of Student’s involvement and the security guard’s actions. See generally, Tr. Vol. V, pp. 68-71.

504 Plan, stating, “[Student’s] Mother opted for a 504-plan instead of a special education referral,” (Parent Exh., p. 14) and included Student’s existing 504 accommodations (Parent Exh., p. 16). It also provided speech therapy services for 30 minutes per week (120 minutes per month) to assist with pragmatic language under one goal, as follows:

Given various written and verbal activities, [Student] will demonstrate improved social abilities by increasing pragmatic language skills with 90% accuracy in 4/5 sessions consecutively by completing various tasks in therapy by the end of the 23/24 IEP cycle. Parent Exh., pp. 13-19.

District speech/language pathologist, DeShannon McAllister, testified that she did not provide any of the services set out in the Temporary IEP. Tr. Vol. II, pp. 149, 151, 153.

iv. Initial Evaluation

In March 2023, Kim Lawrence, speech/language pathologist for the District, conducted an initial evaluation of Student pursuant to the referral conference. *See Confidential Psycho-Educational Evaluation Report*, Parent Exh., pp. 88-101 (hereafter, the “Lawrence Report”). The Lawrence Report cites to: an eSTEM social history; review of medical records; current vision and hearing screenings (passed); review of educational records, grades, and academic assessments; a 2016 Psychoeducational Evaluation by Jason Bell; and her personal observations. Lawrence reports the following results from assessments she administered:

- Reynolds Intelligence Assessment Scales – Second Edition (RIAS-2) – Student scored 81 on Verbal Intelligence (moderately below average), 99 on Nonverbal Intelligence (average), with a 83 Composite Score (below average). Parent Exh., p. 93. Lawrence testified that the 28-point discrepancy between verbal and nonverbal scores was significant, but that Student had been off of some of her medications, which may have contributed to her focus on the tests. Tr. Vol. III, pp. 38-41.
- Wechsler Individual Achievement Test – Fourth Edition (WIAT-4) – Student scored below average in Total Reading, Math Composite, and Written Expression Composite. She scored Average on DeCoding Composite. Parent Exh., p. 93. Lawrence testified that it was her opinion

that Student was achieving at her ability level, and that there was no “severe” or statistically significant discrepancy between her IQ and her performance. Tr. Vol. III, p. 43. Lawrence did state, however, that Student’s weakness in verbal reasoning “may impact [her] listening and comprehension skills.” Tr. Vol. III, p. 49.

- Behavior Assessment System for Children – Third Edition (BASC-3) – This is a rating by Parent and teachers as to Student’s adaptive behavior skills. Student scored in the clinically significant range on Learning Problems, indicating a maladjustment. Parent Exh., p. 95. Student scored in the at-risk range on “a number of scales across all ratings,” indicating “a significant problem that may not be severe enough to require a formal treatment or may identify the potential of a developing problem that needs careful monitoring.” Parent Exh., p. 95.
- Behavior Assessment System for Children, Self-Report of Personality – Third Edition (BASC-3 SRP) – Student’s scores indicated “at-risk” in Internalizing Problems, Inattention/Hyperactivity, and the Emotional Symptoms Index. Lawrence noted that her “Consistency Index score fell within the caution range, which indicates that she experienced some difficulty when completing the rating form.” Parent Exh., p. 98.
- Connors 3rd Edition (Connors 3) – Parent and three teachers rated Student on ADHD problems. Parent and one teacher appear to agree that Student is “very elevated” in Learning Problems/Executive Functioning and in Peer Relations, indicating that they reported “many more concerns than are typically reported.” Parent Exh., p. 98. Dr. Morrison, expert witness for the Parent, testified that Student’s ratings were “clinically significant,” and that she was “struggling with peer relationships.” Tr. Vol. III, p 156.
- Autism Spectrum Rating Scales (ASRS) – Student was rated by Parent and three teachers on their observations of Student. The areas in which Student was rated “slightly elevated” to “very elevated” by at least two of the raters were: Social Communication, Peer Socialization, Social/Emotional Reciprocity, and Behavior Rigidity. Parent Exh., p. 98. Morrison testified that Student’s ratings on sensory sensitivity and peer socialization were “clinically significant,” and “basically off the charts” on social/communication. Tr. Vol. III, p.157. Morrison further testified that “[these are] instrumental activities of daily living, which are absolutely addressed throughout high school and junior high. Sadly, she hasn't really gotten intervention, and she really does need it...” Tr. Vol. III, p.157.

The Lawrence Report concludes with the following recommendations:

- Medical – need to obtain a physician’s statement concerning “the type of health impairment posed by her ADHD, any school limitations, and the effects of medication.”
- Verbal reasoning - relate information to prior knowledge and “chunk” information;
- Achievement levels – review her being in advanced placement classes;
- Behaviors – consider the need for “behavior supports and interventions to address behaviors likely to impede her learning;”
- Socialization – teacher social skills and rules; model appropriate responses; model rules behind social exchanges; target perspective-taking skills. Parent Exh., pp. 100-101.

v. **Tenth Grade IEP**

On April 12, 2023, the District IEP team developed an initial IEP for Student. Parent Exh., p. 1. The IEP describes her current assessment as follows:

“Current assessment results indicate that [Student] is functioning within the below average range in intelligence with a relative strength in nonverbal intelligence. Academic assessments indicate average performance on reading fluency and math calculation measures of achievement. All other achievement skills measured below average. [Student]’s BASC-3 Self-Report revealed she is having significant problems with her mood and interacting with others. Adaptive behavior ratings ... indicates [sic] learning problems, executive functioning, and peer socialization to be of significant concern ... [as well as] elevated scores on several areas across multiple ratings relating to socialization, communication, behavior, and ADHD.” Parent Exh., p. 3.

The IEP also references the March 2023 speech/language pathology evaluation (Parent Exh. pp. 119-131), and summarizes Student’s speech/language deficit as, “an overall Moderate Language and pragmatic language deficit.” Parent Exh., p. 3.

Jarmon, the special education “folder-holder” for Student, agreed that Student’s autism impacted writing skills and reading comprehension. Tr. Vol. II, pp. 71-72. Jarmon acknowledged that her ACT Aspire scores indicated that Student was “in need of support” in math, reading, and science. Tr. Vol. II, p. 72. Student tested in the 19th percentile in reading on ninth grade ACT

Aspire testing, and Jarmon testified that the District provides support to students who are below the 25th percentile. Tr. Vol. II., p. 72.

Yet, the IEP team included only speech therapy services for Student. Jarmon testified that it was the team's intent to keep Student's 504 accommodations, but they were omitted. Tr. Vol. II, pp. 94-97. The recommended speech therapy services are for 30 minutes per week (120 minutes per month). Parent Exh., pp. 3 and 8. The IEP provides three speech therapy goals to address (1) pragmatic language skills; (2) capitalization, punctuation, spelling, grammar, and word usage; and (3) for locating details, making inferences, and giving main ideas from grade level text when given auditory/visual stimuli. Parent Exh., p. 9.

McAllister testified that she did not provide any of the services set out in the IEP, but instead spent the remaining month of the school year observing Student. Tr. Vol. II, pp. 150-151. These observations were in addition to, not a part of, the observations conducted for the initial evaluation. Tr. Vol. II, pp. 152-153.

There are no individual goals or programming in the IEP to address Student's writing, reading comprehension, "below average" achievement skills, problems interacting with others, socialization, executive functioning, and behavior. Jarmon stated that the speech therapy targeting pragmatic language skills would address those areas. Tr. Vol. II, p. 60. The psychological examiner, Lawrence, also stated that Parent emphasized that she was primarily concerned about Student's pragmatic language deficits, not academics. Tr. Vol. III, pp. 90-91.

LAW AND DISCUSSION

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §

300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set out a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982).

The first part of the analysis determines whether the district complied with IDEA procedural requirements. Procedural inadequacies are violations only if they (a) impede the child's right to a FAPE; (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (c) cause a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

In the second part of the *Rowley* analysis, a court or hearing officer must determine whether the district met the IDEA's substantive requirements. A district must develop an IEP that is "tailored to the unique needs of a particular child" (*Rowley*, 458 U.S., at 181, 102 S. Ct. 3034), and is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197, L. Ed. 2d 335 (2017).

A. Procedural Violations

The IDEA requires that once a child is identified as potentially having a disability, the District **must** conduct "a full and individual evaluation to determine whether the child has a disability." To accomplish this, the District is required to "make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. 34 C.F.R. § 300.300(a)(1).

District sidestepped this process in the ninth grade when it steered Parent to a 504 Plan in

the ninth grade to appease Parent's and Student's concerns about special education stigmatization. It can hardly be said that District made "**reasonable** efforts to obtain **informed** consent" from Parent. Guest "checked the box" for Parents' election "not to pursue a referral" for special education and typed in Parent's name on the rights form. For Parent to say that she did not want Student to be pulled from class for special education services is not the same as refusing a special education referral. District determined before the referral conference that Parent preferred 504 over special education. Checking the box over the phone does not constitute a reasonable effort to either inform Parent of her rights to an evaluation for Student or to provide informed consent to an evaluation. Therefore, District violated the IDEA's procedural requirement for evaluating Student – and obtaining Parents' informed consent to that evaluation – in the ninth grade to determine if she was a child with a disability who needed special education services. In so doing, District impeded Student's right to a FAPE for the ninth grade, which it determined later would include speech therapy for addressing Student's pragmatic language deficits. District also impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student with its "check the box" mentality toward Parents' informed consent.

B. Substantive Violations

Every IEP, pursuant to the IDEA, in order to be "tailored to the unique needs of the child," must include the following: (1) a statement of a student's present levels of academic achievement and functional performance; (2) a description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. §

1414(d)(1)(A)(i)(I)-(IV). The failure to implement those services identified in the IEP may constitute a substantive violation of the IDEA. The Eighth Circuit held in 2003 that "we cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit." *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

In this case, District failed in two respects in developing Student's tenth-grade IEP: (1) the IEP team intended for the IEP to carry over Student's accommodations from her 504-Plan, but failed to include them in the IEP; and (2) District did not provide the speech therapy services identified in the IEP. Both of these are material failures in that they are the **only** services and accommodations provided under the IEP. Their omission or lack of implementation denied Student her right to a FAPE and deprived her of educational benefit.

ORDER

This Hearing Officer, therefore, determines that District denied a FAPE to Student, and Parents are entitled to compensatory education. Student is entitled to the speech therapy services identified in the tenth-grade IEP of 30 minutes per week, implemented under the goals set out in the IEP. Student should have received those minutes for seven weeks in the ninth grade (from the date of the referral for special education services to the end of the school year), or 210 minutes, and for 37 weeks of the tenth grade (entire school year), or 1,110 minutes, for a total of 1,320 minutes.

IT IS, THEREFORE, ORDERED that District pay for Student to receive 1,320 minutes of speech therapy for pragmatic language skills as outlined in the Student's tenth-grade IEP to be provided by a third-party provider of Parents' choosing, who is reasonably near Student's current

home. District shall either provide Student transportation to and from compensatory speech-language therapy or, if Parents agree, pay Parents the current Arkansas state employee mileage reimbursement rate to transport Student to and from compensatory speech-language therapy.

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 Arkansas Department of Education, Special Education and Related Services (2024), Section 10.20.9, the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Cheryl L. Reinhart

Cheryl L. Reinhart
HEARING OFFICER

DATE: April 14, 2024