

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXXXXX and XXXXXXXXX, Parents on Behalf of  
XXXXXX XXXXX, Student**

**PETITIONERS**

**VS.**

**CASE NOS. H-24-19  
H-24-22**

**Quitman School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

- A. Whether, as alleged in ADE H-24-19, the Quitman School District (hereinafter "District" or "Respondent") denied XXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between February 11, 2023 and November 13, 2023, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter "IDEA"), by failing to provide Student with an IEP that is reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Specifically, Petitioner alleged that the District failed to do the following: (1) address Student's academic deficits; (2) implement the goals and objectives on Student's IEP; (3) provide dyslexia intervention on Student's IEP; (4) provide mental health services; and (5) provide appropriate behavioral supports.
- B. Whether, as alleged in ADE H-24-22, District denied Student a FAPE between February 11, 2023 and November 13, 2023, in violation of certain procedural and

substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter “IDEA”), by: (1) violating IDEA’s stay put provision; and (2) failing to conduct an appropriate manifestation determination review (hereinafter “MDR”) pertaining to Student’s allegedly threatening statement that he would “shoot up the school.”<sup>1</sup>

**PROCEDURAL HISTORY:**

On November 6, 2023, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXX XXXXX and XXXXXX XXXX (hereinafter referred to as “Parents” or “Petitioners”), the parents and legal guardians of Student (ADE H-24-19). Parents asserted in ADE H-24-19 that District failed to comply with the IDEA and the regulations set forth by the Department between February 11, 2023 and November 6, 2023 by failing to provide Student with an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Specifically, Petitioner alleged that the District (1) failed to address Student’s academic deficits; (2) failed to implement the goals and objectives on Student’s IEP; (3) failed to provide dyslexia intervention with fidelity; (4) failed to provide mental health services; and (5) failed to provide appropriate behavioral supports.

Approximately one week later, on November 13, 2023, Parents filed another request to initiate due process hearing procedures (ADE H-24-22). Parents asserted in ADE H-24-22 that District, between February 11, 2023 and November 13, 2023, violated the

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<sup>1</sup> See Due Process Complaints in ADE H-24-19 and ADE H-24-22.

IDEA's stay put provision and failed to conduct an appropriate manifestation determination review prior to suspending Student for an allegedly threatening comment.<sup>2</sup>

The Petitioners filed two due process complaints against the District prior to ADE H-24-19 and ADE H-24-22, however these complaints were dismissed on account of the fact that the parties entered into a private settlement agreement. ADE H-24-19 and ADE H-24-22 represent the only two matters that moved to a formal due process hearing.

In response to Parents' request for hearing in ADE H-24-19 and ADE H-24-22, the Department assigned the cases to an impartial hearing officer. These two cases were consolidated for judicial efficiency and, as such, a single due process hearing was held to address all issues covered in both complaints. Testimony was heard on January 8, 2024, January 9, 2024, January 29, 2024, January 30, 2024, January 31, 2024, May 1, 2024, and May 3, 2024 at meeting locations in Quitman, Arkansas (local library) and in Heber Springs, Arkansas (hotel meeting room) that were convenient to both parties. The following witnesses testified: Audra Alumbaugh, Mandee Love, Misty Atkin, Bailey Hall, Michael Stacks, Brandon Burgener, Bethany Webb, Brooke Noland, Jennifer Rayburn, Dennis Truxler, XXXXXX XXXX, and XXXXXXXX XXXXX.<sup>3</sup>

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, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parents were represented by Theresa Caldwell (Little Rock, Arkansas). District was represented by Jay Bequette (Little Rock, Arkansas) for the first half of the hearing, and Khayyam Eddings (Little Rock, Arkansas) for the

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<sup>2</sup> *Id.*

<sup>3</sup> See Transcripts, Vols. I - VII.

remainder. Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing arguments, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>4</sup>

**FINDINGS OF FACT:**

Student is a fifteen-year-old male (DOB 03/27/2009) who currently attends school in the White County Central School District. At the time that both of the above-referenced cases were filed, Student attended the Quitman School District. Student transferred from the Quitman School District to the White County Central School District on November 13, 2023. During the 2023-2024 school year, Student was in the ninth grade.

Student was diagnosed at nine years of age with Attention Deficit/Hyperactivity Disorder (Combined Presentation) and Unspecified Disruptive, Impulse-Control, and Conduct Disorder. Student was identified as a student in need of special education services in October 2022 pursuant to the IDEA category of Other Health Impairment.

Student experienced a traumatic event on October 18, 2020, when Student and his cousin were racing ATV vehicles.<sup>5</sup> Student's cousin had an accident which resulted in his ATV vehicle being overturned in Student's front yard.<sup>6</sup> Student attempted to rescue his cousin from the accident and ran for help, however, his cousin died at the scene.<sup>7</sup> Parent (mother) testified that Student's cousin was his best friend and that Student had lived with a lot of guilt. She further noted that he withdrew, quit playing sports, and started engaging in behaviors that were problematic.<sup>8</sup>

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<sup>4</sup> See Post-Hearing Briefs.

<sup>5</sup> Transcript, Vol. VI, p. 41-42.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Petitioners filed two due process complaints prior to filing ADE H-24-19 and ADE H-24-22. Those cases resulted in a private settlement agreement that was finalized on February 11, 2023. Pursuant to that agreement, District agreed to comprehensively evaluate Student for the purpose of developing a new IEP.<sup>9</sup>

### **Summary of Evaluations**

On June 19, 2023, a psychoeducational evaluation of Student was conducted by Dr. Susan Jeter.<sup>10</sup> As part of this evaluation, Student was administered the following psychological assessments: (1) Wechsler Intelligence Scale for Children - 5th Edition (hereinafter "WISC-5"); (2) Woodcock-Johnson Tests of Achievement - 4th Editions (hereinafter "WJ-4"); (3) Gray Oral Reading Test - 5th edition (hereinafter "GORT-5"); (4) Comprehensive Test of Phonological Processing - 2nd Edition (hereinafter "CTOPP - 2"); (5) Developmental Test of Visual-Motor Integration - 6th Edition (hereinafter "VMI-6"); (6) DSM-IV ADHD Symptom Checklist; and (7) NICHQ Vanderbilt Assessment Scale.<sup>11</sup> In addition, Student was administered relevant checklists, and a parent interview was conducted.<sup>12</sup>

With regard to the WISC-5, Student's composite full scale IQ, working memory, and processing speed were in the average range, while his fluid reasoning score was in the high average range. Student's visual spatial composite score was in the low average range, placing Student at the 23rd percentile.<sup>13</sup> Student's WJ-4 test scores indicated that Student

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<sup>9</sup> *Id.*

<sup>10</sup> Parent Exhibits, pp. 211-232.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

was within the average range in the areas of reading fluency, broad mathematics, and academic fluency; however, Student's scores were in the low average range in the areas of broad reading, basic reading skills, math calculation skills, broad written language, written expression, and phoneme/grapheme knowledge.<sup>14</sup> Student's basic reading skills and broad reading scores fell at the 12th and 16th percentile, respectively, and his subtests in the area of reading indicated that Student was weakest in the areas of letter-word identification and passage comprehension, with scores at the 8th and 7th percentile, respectively.<sup>15</sup> Student's broad mathematics and math calculation scores fell at the 25th and 28th percentile, respectively, with his lowest scoring subtest being calculation, which was at the 5th percentile.<sup>16</sup> Student's written expression composite score was at the 21st percentile, with Student's writing samples and spelling being his two lowest subtest scores. These scores were at the 16th and 18th percentile, respectively.<sup>17</sup> Similarly, Student's scores on the GORT-5 indicated that Student was in the average range with regard to reading rate, and below average with regard to reading accuracy, reading fluency, and reading comprehension.<sup>18</sup> Student's reading subtests showed scores ranging in grade equivalent from 4.4 (fourth grade, fourth month) to 5.7 (fifth grade, seventh month). On the CTOPP-2, Student scored in the below average range in the areas of phonological awareness (9th percentile) and phonological memory (2nd percentile), and slightly above average in the area of rapid symbolic naming.<sup>19</sup> Student also had below average visual-motor skill development.<sup>20</sup>

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<sup>14</sup> Parent Exhibits, pp. 211-232.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

As a result of Student's performance on the assessments administered by Dr. Jeter, she determined that Student had developmental dyslexia and dysgraphia.<sup>21</sup> Dr. Jeter's recommendations included, but were not limited to, the following: (1) work with a reading specialist trained in a multi-sensory language education intervention; (2) utilize audiobooks for school texts, novels, and recreational reading; (3) utilize the Voice Dream Scanner app to extract, digitize, save and translate printed text using the device camera and OCR scanning capabilities; (4) utilize Snaptyping Pro 2 for the purpose of typing or dictating answers onto paper and worksheets; (5) provide additional reinforcement of math concepts; (6) use online math resources; (7) encourage development and use of keyboarding skills; (8) provide comprehensive occupational therapy evaluation; (9) provide speech-language therapy services; and (10) provide numerous accommodations including, but not limited to, preferential seating, separation of multi-step directions into smaller steps, retention and comprehension checks, physical breaks, extended time for assignments and tests, reduced classroom and homework assignments, content grading, and a basic calculator for math and science work.<sup>22</sup>

Student was evaluated for speech-language deficits on March 31, 2023. As part of this evaluation, Student was administered the following assessments: (1) CELF-5; (2) Test of Adolescent and Adult Language - 4th Edition (hereinafter "TOAL-4"); (3) WORD Test 2; and (4) Listening Comprehension Test - Adolescent.<sup>23</sup> The CELF-5 measured meta-pragmatics and meta-semantics, the higher level of social language and the higher level aspects of word meanings in sentences. Student's scores indicated a mild impairment

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<sup>21</sup> Parent Exhibits, pp. 211-232.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at pp. 257-264.

with regard to meta-pragmatics, and a moderate impairment with regard to meta-semantics.<sup>24</sup> Student's scores in these two areas were at the 14th and 3rd percentiles, respectively.<sup>25</sup> Student's scores on the WORD Test 2 showed that Student had a mild impairment level in associations, antonyms, and definitions.<sup>26</sup> Student showed a moderate impairment in the area of synonyms, and he showed a severe impairment in the area of flexible word use.<sup>27</sup> With regard to the Listening Comprehension Test, all of Student's scores were within normal limits with the exception of the subtest pertaining to details, which showed a mild impairment level.<sup>28</sup> Finally, Student's scores on the TOAL-4 showed that Student had a mild impairment with regard to spoken language, falling at the 9th percentile, and moderate impairment with regard to written and general language, both falling at the 3rd percentile.<sup>29</sup> Based on the results of this evaluation, it was recommended that Student receive 120 minutes per month of speech therapy to address his deficits.<sup>30</sup>

Student was assessed for occupational therapy needs on August 24, 2023. As part of this evaluation, which was conducted by Tracy Morrison, Student was administered the following assessments: (1) Adaptive Behavior Assessment System-3 (hereinafter "ABAS-3"); (2) Bruininks-Oseretsky Test of Motor Proficiency 2 (hereinafter "BOT-2"); (3) Child Sensory Profile; and (4) Motor-Free Visual Perception Test (hereinafter "MVPT").<sup>31</sup> Student's ABAS-3 scores indicated that Student's adaptive behavior was in the extremely low range, placing him at the 1st percentile.<sup>32</sup> It was also noted that Student's scores

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<sup>24</sup> Parent Exhibits, pp. 257-264.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at pp. 273-295.

<sup>32</sup> *Id.*



pertaining to his ability to independently attend to self-care activities was in the low range.<sup>33</sup> Student's scores on the BOT-2, which assesses stability, mobility, strength, coordination, and object manipulation, were in the below average range and were at the 7th percentile.<sup>34</sup> Student's Child Sensory Profile suggested that he was highly sensitive to external environmental stimuli and that he responded to such stimuli through avoidance methods. Finally, Student's MVPT scores indicated that Student had deficits in the areas of visual memory, visual closure, and figure-ground. It was noted that these visual memory skills are important for reading, writing, and executive skill planning.<sup>35</sup> In summary, Student was found to have significant negative impacts in the areas of fine motor precision, fine motor integration, manual dexterity, upper limb coordination, balance, agility, conceptual adaptive behavior, social adaptive behavior, practical adaptive behavior, sensory processing, visual memory skills, figure ground visual skills, and visual closure.<sup>36</sup> It was recommended that Student be provided 120 minutes per week of occupational therapy to address these deficits.<sup>37</sup>

Student was assessed for physical therapy needs on October 3, 2023. Student was assessed in the areas of posture, gait, transition movements, strength, balance, and coordination.<sup>38</sup> The evaluation indicated that Student had difficulty with running speed, agility, and strength. It was recommended that Student receive physical therapy one time per week, for a duration of 30 minutes.<sup>39</sup>

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<sup>33</sup> Parent Exhibits, pp. 273-295.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

### **Student's IEPs**

Between February 11, 2023 and November 13, 2023, Student received special education services pursuant to the Other Health Impairment category of the IDEA. At the start of this relevant time period, Student was receiving services pursuant to an IEP developed on October 18, 2022 (duration of services through October 16, 2023).<sup>40</sup> The Present Levels of Academic Achievement and Functional Performance page of the IEP indicated that Student had transitioned from the District's alternative learning environment to the Quitman School Campus.<sup>41</sup> It was noted that Student had deficits in the areas of math computation and written expression based on evaluation data. It was also noted that Student's scores on the Behavior Assessment System for Children - Third Edition indicated that Student was at risk for the following: aggression, conduct problems, attention problems, atypicality, leadership, functional communication, and activities of daily living.<sup>42</sup> Pursuant to this IEP, Student was scheduled to receive 100 minutes of special education instruction, specifically co-taught services, in the academic area of language arts.<sup>43</sup> Supplementary aids, services, and accommodations were listed, including, but not limited to, the following: (1) extra time for completing assignments; (2) extra time for written response; (3) frequent feedback; (4) use of calculator; (5) redirection to tasks; (6) understanding checks; (7) use of a graphic organizer; (8) extra time and text-to-speech technology for state assessments; and (9) audio version for reading novels and short stories.<sup>44</sup>

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<sup>40</sup> Parent Exhibits, pp. 28-37.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Student's October 18, 2022 IEP contained five annual goals. Four of these goals were specific to the academic area of English language arts. These goals were as follows: (1) when given instruction in a co-taught setting and provided with a graphic organizer for writing, Student "will write arguments to support claims with clear reason and relevant evidence on 2 out of 3 trials with 70% accuracy"; (2) when given instruction in a co-taught setting and provided with a graphic organizer for writing, Student "will write informative/explanatory texts to examine a topic and convey ideas, concepts, and information through the selection, organization, and analysis of relevant content on 2 out of 3 trials with 70% accuracy"; (3) when given instruction in a co-taught setting, and using the time available for responses, Student "will determine the meaning of words and phrases as they are used in a text, including figurative and connotative meanings, and analyze the impact of specific word choices on meaning and/or tone, including analogies or allusions to other texts when applicable 2 out of 3 trials with 70% accuracy"; and (4) when given instruction in a co-taught setting and using the time available for composing responses, Student "will cite the textual evidence that most strongly supports an analysis of what the text says explicitly as well as inferences drawn from the text on 2 out of 3 trials with 70% accuracy."<sup>45</sup> There was one additional goal for "All General Education Classes." This goal provided that Student, when provided with assignments in the general education setting, "will ask teachers for assistance on tasks that are difficult."<sup>46</sup>

On February 15, 2023, approximately four days after the parties reached a private settlement regarding prior due process complaints, District sent a Notice of Conference to Parents setting a meeting for February 22, 2023. The purpose of the meeting was to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

conduct an existing data review and discuss the evaluation requirements pursuant to the settlement.<sup>47</sup> On February 22, 2023, a Notice of Action was sent to Parents following the scheduled meeting. The Notice of Action indicated that a functional behavior assessment (hereinafter “FBA”) would be conducted for Student.<sup>48</sup>

On April 14, 2023, Student’s FBA was completed. The FBA specified that Student’s problem behaviors included “disruptive behaviors” and “work refusal,” specifically “blurting out while teacher is talking, laughing excessively at small events, making loud noises, arguing with teacher, throwing objects, talking with peers during lessons, [and] putting his head down during work time.”<sup>49</sup> It was further noted that Student engaged in these behaviors one to five times per class period on a daily basis, with instances lasting anywhere from two minutes to a half hour. For the antecedent analysis, District noted that Student’s behaviors occurred “most in the morning and afternoon, during times when [Student] is asked to work independently or on challenging tasks.”<sup>50</sup> District further noted that teachers had attempted to verbally reprimand, verbally redirect, remove privileges, substitute other activities, remove Student from location, and ignore the negative conduct.<sup>51</sup> District noted that Student’s behaviors occurred primarily for the purpose of escaping demands of school staff.<sup>52</sup> Finally, the FBA provided a summary of proposed interventions, which included giving Student small chunks of work, checking in with him regarding work, and verbally praising Student for completion of tasks. The summary of interventions also

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<sup>47</sup> Parent Exhibits, p. 151.

<sup>48</sup> *Id.* at p. 157.

<sup>49</sup> *Id.* at p. 160.

<sup>50</sup> *Id.* at p. 161.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

noted that “redirecting to task, moving [Student’s] seats, and doing tickets to reward for on task behaviors” were “reported to have no significant change in behavior.”<sup>53</sup>

On May 8, 2023, District sent a Notice of Conference to Parents, scheduling an IEP meeting for May 15, 2023 for the purpose of discussing Student’s FBA and revising his IEP.<sup>54</sup> Pursuant to a Notice of Action dated May 15, 2023, Student’s IEP committee worked to create a behavior plan for XXXXX during this meeting.<sup>55</sup> The IEP team revised Student’s October 18, 2022 IEP to include the need for behavioral supports and incorporate a behavior intervention plan (hereinafter “BIP”).<sup>56</sup> No other changes were made to Student’s October 18, 2022 IEP.

On August 29, 2023, District sent Parents a Notice of Conference, scheduling an IEP meeting for September 12, 2023.<sup>57</sup> The Notice indicated that the purpose of the meeting was to conduct Student’s annual review, determine continued eligibility for special education services, and revise Student’s IEP, assuming necessary, based on the results of his recent evaluations.<sup>58</sup> Student’s IEP team did, in fact, meet on September 12, 2023 and revise Student’s IEP. Student’s IEP team was initially scheduled to meet on September 1, 2023, but the meeting was canceled after Parents and their attorney arrived on account of the fact that District’s attorney could not be present.

Student’s September 12, 2023 IEP (duration of services through September 12, 2024) indicated that Student remained eligible for special education services pursuant to the Other Health Impairment category.<sup>59</sup> The Present Levels of Academic Achievement and

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<sup>53</sup> Parent Exhibits, p. 161.

<sup>54</sup> *Id.* at p. 164.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at p. 57.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at pp. 1-13.

Functional Performance page of the IEP indicated that Student required accommodations during his 8th grade year to maintain success, and that Student's "ongoing disruptive behavior and work refusal behaviors" had resulted in his IEP team developing a BIP in May 2023.<sup>60</sup> It was noted that Student had needs in the areas of letter word identification, passage comprehension, and calculation, as he was below average in these areas. It was also noted that Student was at risk for many behaviors, including "aggression, conduct problems, attention problems, atypicality, leadership, functional communication, and activities of daily living."<sup>61</sup> District specifically stated that Student had made little growth based on his ACT Aspire scores.<sup>62</sup> With regard to Student's goals for the prior school year, District stated that he had mastered his writing goals and was working at mastery level on his vocabulary goals; however, he had not mastered his reading comprehension goal.<sup>63</sup> Pursuant to this IEP, Student was scheduled to receive 100 minutes of special education instruction, specifically co-taught services, in the academic areas of language arts and math.<sup>64</sup> In addition, Student was scheduled to receive occupational therapy 60 minutes per week and speech-language therapy 30 minutes per week.<sup>65</sup> Supplementary aids, services, and accommodations were listed, including, but not limited to, the following: (1) extra time for completing assignments; (2) extra time for written response; (3) frequent feedback; (4) use of calculator; (5) redirection to tasks; (6) understanding checks; (7) use of a graphic organizer; (8) extra time and text-to-speech technology for state assessments; and (9)

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<sup>60</sup> Parent Exhibits, pp. 1-13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

audio version for reading novels and short stories.<sup>66</sup> These accommodations were essentially the same as those listed on Student's prior IEP.

Student's September 12, 2023 IEP contained 11 annual goals. Four of these goals were specific to the academic area of English language arts. These goals were as follows: (1) when provided with grade level instruction in a co-taught setting . . . Student will describe how a complex character . . . develops over the course of a text, interacts with other characters, advances the plot, and/or develops the theme with 70% accuracy on assignments and tests by his annual review date"; (2) "when provided with grade level instruction in a co-taught setting . . . Student will explain how the overall structure and sequencing of a text enhances the mood, suspense, and tension with 70% accuracy on assignments and tests by his annual review date"; (3) "when provided with grade level instruction in a co-taught setting . . . Student will describe how a character's point of view (POV) and/or perspective is shaped through experiences with 70% accuracy on assignments and tests by his annual review date"; and (4) "when provided with grade level instruction in a co-taught setting . . . Student will use general academic and content-specific words and phrases accurately, gathering vocabulary knowledge when encountering unfamiliar words or phrases with 70% accuracy on assignments and tests by his annual review date."<sup>67</sup>

Five of the stated goals were specific to the academic area of math. These goals were as follows: (1) "when provided with grade level instruction in a co-taught setting, Student will solve linear formulas for a specified variable with 70% accuracy on assignments and tests by his annual review date"; (2) "when provided with grade level instruction in a

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

co-taught setting, Student will flexibly use different representations of a linear function, including graphs, tables, and equations with 70% accuracy on assignments and tests by his annual review date”; (3) “when provided with grade level instruction in a co-taught setting, Student will simplify algebraic expressions using the laws of exponents with 70% accuracy on assignments and tests by his annual review date”; (4) “when provided with grade level instruction in a co-taught setting, Student will interpret the parts of expressions such as terms, factors, and coefficients in terms of a real-world context with 70% accuracy on assignments and tests by his annual review date”; and (5) “when provided with grade level instruction in a co-taught setting, Student will graph function notation, understanding that the graph contains the points  $(x, f(x))$  with 70% accuracy on assignments and tests by his annual review date.”<sup>68</sup>

The remaining two goals on Student’s September 12, 2023 IEP are listed as “EC-Frameworks 3-5” goals. Each of these goals provides that Student’s overall language skills will improve to the extent that he completes a series of objectives. The objectives across both goals include, but are not limited to, the following: (1) defining affixes and root words in multisyllabic words with 90% accuracy; (2) giving two or more definitions of multiple meaning words with 85% accuracy over 3 consecutive sessions; (3) combining two or more sentences to make one precise sentences with 85% accuracy; (4) giving two or more definitions of multiple meaning words with 85% accuracy; and (5) providing a synonym/antonym for each highlighted word in a story with 85% accuracy in 4 out of 5 trials.<sup>69</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*



Finally, as part of the September 12, 2023 IEP, Student's behavior plan was updated to reflect a new "check in" person for Student.<sup>70</sup> It was also determined that Student would begin receiving dyslexia intervention.<sup>71</sup> This information was reflected in the Notice of Action provided to Parents on September 13, 2023. Student's IEP team discussed the possibility of adding mental health services to Student's IEP, but declined to do so.<sup>72</sup>

Student's ACT Aspire test scores from Spring 2023 indicated that Student was "ready" in English, "close" in reading, and "in need of support" in science and math.<sup>73</sup> Student's scores were at the 35th, 32nd, 17th, and 25th percentiles, respectively.<sup>74</sup> In addition, Student's most recent STAR scores were provided by District. For the academic area of reading, Student was last assessed by District in September 2023.<sup>75</sup> Student's STAR reading score indicated that Student's instructional reading level at that time was 8.4 (8th grade, 4th month) and was at the 41st percentile.<sup>76</sup> This was higher than Student's STAR reading scores during the two previous test administrations, in February and May 2023, which placed Student at the 2nd percentile in the academic area of reading.<sup>77</sup> Student's most recent STAR math score, dated February 2023, indicated that Student was at the 33rd percentile. This score was lower than Student's previous STAR math score from December 2022.<sup>78</sup> Student's grades for the first reporting period of the 2023-2024 school year included three Bs, three Cs, one D, and one F.<sup>79</sup>

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<sup>70</sup> Parent Exhibits, pp. 1-13.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at p. 386.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at pp. 388-391.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at p. 390.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at p. 508.

Student transferred to the White County Central School District on November 13, 2023. Parents provided no additional data to indicate how Student had progressed since leaving District, and there was no evidence presented to show Student's current academic levels. Parents testified during the due process hearing of this matter that Student was doing very well in his new school district. Parent (father) testified that Student was doing well academically and had no behavior or academic problems at his new school.<sup>80</sup> He also stated that Student was doing well with his dyslexia interventions.<sup>81</sup> Parent (father) testified that, at the time that Parents filed ADE H-24-19 and ADE H-24-22, they had been seeking compensatory services, but now Student was receiving what he needed.<sup>82</sup>

**Student's Behavioral Issues, Behavioral Intervention Plan (BIP), and Suspension**

Based on the February 11, 2023 private settlement agreement between the parties in this matter, District conducted an FBA for Student on April 19, 2023. Student's IEP team discussed this FBA at the IEP meeting that occurred on May 15, 2023 (referenced in the previous section) and created a BIP. Student's BIP outlined the behaviors addressed in Student's FBA and stated strategies to modify consequences.<sup>83</sup> These strategies included attempting to redirect Student, remaining calm and assertive while providing direction, attempting to return Student to the appropriate task, providing positive verbal reinforcement and attention, and working with Student to determine reinforcements and rewards that were motivating to him. On September 12, 2023, Student's BIP was amended

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<sup>80</sup> Transcript, Vol. VI, p. 106.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at p. 136.

<sup>83</sup> Parent Exhibits, pp. 328-329.

to reflect a different person responsible for de-escalating Student if necessary. There were no other changes to the BIP.<sup>84</sup>

Between February 11, 2023 and November 13, 2023, Student engaged in numerous behaviors that were documented by District. District classified these behaviors as requiring either a “minor referral” or a “major referral” depending on the severity of the action. Between February 11, 2023 and the end of Student’s 8th grade school year, specifically May 2023, Student had nine documented behavioral incidents.<sup>85</sup> Student was also given in-school suspension on April 10, 2023 and April 19, 2023 for disruption, disrespect, sleeping in class, refusing to do assigned work, excessive defiance, eating in class and refusing to throw away food, and exceeding 10 detentions.<sup>86</sup> The documentation provided does not specify whether these are major or minor referrals, but each of the infractions was for disruptive behavior in class, distracting other students, and refusing to do assigned work.<sup>87</sup> There are no additional details with regard to these infractions. Only one of these infractions occurred following the creation of a BIP for Student on May 15, 2023.<sup>88</sup>

For the 2023-2024 school year, Student’s 9th grade year, there were numerous minor and major referrals between the start of school in August 2023 and the date that Student transferred to another school district, specifically November 13, 2023. Student’s combined referrals for the time that Student attended the 9th grade included: (1) August 17, 2023 referral for engaging in disruptive behavior; (2) August 18, 2023 referral for engaging in disruptive behavior (movement of Student away from peers in classroom) and

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<sup>84</sup> Parent Exhibit, pp. 328-329.

<sup>85</sup> *Id.* at p. 349.

<sup>86</sup> *Id.* at p. 347.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

misusing an electronic device (Student was looking at cars on the internet instead of doing assigned work); (3) August 29, 2023 referral for failing to follow directions (eating chips in class and refused to follow directions when told to stop); (4) September 6, 2023 referral for engaging in disruptive behavior (Student popped the bag that held teacher supplies and also commented that he thought the class was stupid); (5) September 8, 2023 referral for engaging in disruptive behavior (Student would not “settle down” and work on assignment given by teacher); (6) September 9, 2023 referral for engaging in disruptive behavior, refusing to follow directions, being off task, and refusing to work; (7) September 12, 2023 referral for engaging in disruptive behavior, being disrespectful, failing to follow directions, being off task, and making inappropriate comments (stating that it was awesome that a woman was being stoned to death) about a video story in class; (8) September 13, 2023 referral for engaging in disruptive and disrespectful behavior (talking out in class, distracting other students, threatening to cut down the landscape plants that class was studying, and talking loudly about dropping out of school and how much class sucks); (9) September 13, 2023 referral for engaging in disruptive behavior, being disrespect, failing to follow directions, and being off task; (10) September 20, 2023 referral for failing to follow directions and utilizing cell phone during class; (11) September 25, 2023 referral for refusing to complete work, playing games on computer instead of completing lab work; (12) September 26, 2023 referral for engaging in disruptive behavior, being disrespectful, failing to follow directions, being off task, refusing to work, and damaging school property (wrote on the wall with a pencil and “persisted at making ‘mooing’ noises”); (13) October 3, 2023 referral for engaging in disruptive behavior, violating dress code, being disrespectful, failing to follow directions, being off task, and refusing to work (had to redirect Student

repeatedly to raise head, stop talking, and pay attention to lesson); (14) October 4, 2023 referral for failing to follow directions (refusing to stop drinking prohibited beverage in class and chugging entire beverage when directed to dispose of beverage); (15) October 6, 2023 referral for being off task (wandering around the room and disrupting class); (16) October 16, 2023 referral for passing gas in a teacher's face as Student was exiting the bus; and (17) October 31, 2023 referral for making a threat and being defiant and disrespectful (Student stated that he would "shoot up the school").<sup>89</sup>

The incident on October 31, 2023 ultimately led to Student being suspended for 10 days. On that day, Student's speech therapist, Bailey Hall, wrote the following in an email to administrators about what occurred:

Upon arrival, [Student] stated he was in trouble again and he didn't care about his classwork. I offered to help him with his classwork and he stated he didn't care and he didn't want to do it even if I helped him. I asked him what his future plans were and if he had any goals in mind. Again, he stated that he did not care about a job, etc. I reminded him of the importance of a job and goals and again, he said he did not care. I then said "well, do you just want to be homeless?" (in a joking way). He said "well, then I will just shoot up the school." He then realized what he said and continually stated "I didn't mean that" or "that came out wrong." I changed the subject after that and did not pry any longer and we started with our therapy activity.<sup>90</sup>

This incident was reported to the Dean of Students, Brandon Burgener, via telephone at 3:00 p.m. on October 31, 2023. Thereafter, Hall sent a follow up email to the dean of students and the principal, Michael Stacks, at 3:20 p.m..<sup>91</sup> Dean Burgener immediately contacted Officer Mande Love, the assigned law enforcement officer for District, and asked her to meet with Principal Stacks and review the camera footage of the incident.<sup>92</sup> Principal

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<sup>89</sup> Parent Exhibits, pp. 336-343.

<sup>90</sup> *Id.* at pp. 332, 344.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at p. 351.

Stacks and Officer Love initially went to Student's home to speak with his Parent (mother), but only Student was home. Principal Stacks was then able to contact Parent (mother) via telephone and she agreed to come to the District's high school office for a meeting.<sup>93</sup> Upon arrival, Parent (mother), Student, Principal Stacks, and Officer Love had a meeting.<sup>94</sup> Principal Stacks advised Parent (mother) that Student was being suspended for 10 days upon further investigation, and that he was not allowed on school property until further notice.<sup>95</sup> Principal Stacks also inquired about whether Student had access to weapons at home, to which Parent (mother) replied that he did, but that all weapons were safely locked away. Officer Love then advised Parent (mother) that Student was being issued a juvenile citation for Terroristic Threatening with a court date of November 2, 2023.<sup>96</sup>

#### **Manifestation Determination Review (MDR)**

On November 3, 2023, three days following the start of Student's suspension for threatening conduct, District sent a Notice of Conference to Parents indicating that an IEP meeting would be conducted on November 7, 2023 for the purpose of conducting a MDR.<sup>97</sup> The Notice of Conference did not indicate that the speech therapist who had witnessed the event would be present.

The day prior to the MDR conference, specifically November 6, 2023, District completed an FBA form.<sup>98</sup> The information included in the form is a description of the incident, including what conversation occurred just prior to the incident, as well as the

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<sup>93</sup> Parent Exhibits, p. 351.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at pp. 351-355

<sup>97</sup> *Id.* at pp. 182-183.

<sup>98</sup> *Id.* at pp. 72-76.

consequence that was given to Student as a result of his threatening comment. The form was written as an incident report, as opposed to an FBA.

On this same date, specifically November 6, 2023, Parents' attorney sent a letter to District informing District that ADE H-24-19 had been filed and that the stay put provisions of the IDEA should take effect when Student returned to school on November 13, 2023, at the conclusion of his suspension.<sup>99</sup> This same letter addressed the MDR conference scheduled for November 7, 2023 and stated the following:

Additionally, the Parents will not be attending the MDR Conference tomorrow, November 7, 2023, as the Speech Therapist who is a member of XXXXX's IEP Team was not included on the Notice; the Parents requested but have not been provided the video the District says exists of [Student's] ST session; and the Parents cannot consider any change of placement without these things being provided and the Speech therapists participation in the conference. . . . I trust you will follow your statutory obligations and let the appropriate High School and Special Education personnel know that the Parents request no MDR meeting be held without them and that [Student] will be returning to classes November 13, 2023.<sup>100</sup>

On November 7, 2023, District moved forward with the MDR conference without Parents. The Notice of Action dated November 7, 2023 indicated that Parent (father) was called because he was not present for the meeting, and that he indicated that he would not be attending. The Notice further states that "because multiple attempts were made to have the parents present, the meeting continued as scheduled."<sup>101</sup> At the MDR conference, which was attended by Student's counselor, KTI Director, special education teacher, general education teacher, and the principal, the IEP team completed a "Manifestation Determination Review" form.<sup>102</sup> This form indicated that Student's qualifying disability was

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<sup>99</sup> Parent Exhibits, p. 67.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at pp. 78-79.

<sup>102</sup> *Id.* at pp 70-71.

a specific learning disability in the areas of math and literacy.<sup>103</sup> The form also noted that Student has ADHD.<sup>104</sup> District identified the impacts of Student's disability by stating the following: "Refusal to participate in class, however when he chooses to work he shows great strengths in math as shown in work samples. He also is on an 8.3 reading level in STAR."<sup>105</sup> It was further noted that Student had not engaged in a pattern of aggressive behavior, but instead had engaged in "minor disruptive behavior such as not following directions and refusal to work."<sup>106</sup> Student's IEP team determined that Student's threatening statement was not a manifestation of Student's disability.

On November 7, 2023, the same day as the MDR conference, a Notice of Action was provided to Parents.<sup>107</sup> The Notice of Action states that Parent (father) was called when he did not appear at the MDR conference, and that he stated to the meeting members that he would not be attending the meeting.<sup>108</sup> The Notice of Action stated that "[b]ecause multiple attempts were made to have the parents present, the meeting continued as scheduled."<sup>109</sup> The Notice of Action indicated that Student's current disability placement, current discipline records, witness statement, current IEP, and teacher input were considered.<sup>110</sup> The meeting members were not permitted to question the speech therapist for specific details, and they had not been provided the video clip of the incident prior to the meeting. Testimony indicated that the meeting members could access the video if they wanted to see

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<sup>103</sup> Parent Exhibits, pp. 70-71.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at pp. 78-79.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*



it, but they had not been provided with the video clip and the video clip was not shown during the MDR conference.

### **CONCLUSIONS OF 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 forth 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). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Id.*

#### **Procedural Violations**

Regarding the first inquiry, that of whether District complied with the procedures set forth in the IDEA, Petitioners did not raise any specific procedural violations in ADE H-24-19. Petitioners did, however, allege procedural violations in ADE H-24-22 regarding IDEA's stay put provision and Student's November 7, 2024 MDR conference. These procedural allegations are addressed below.

**Stay Put (H-24-22).** In ADE H-24-22, Parents alleged that District violated the "stay put" provision of the IDEA when it held a MDR conference on November 7, 2023, the day after Parents filed ADE H-24-19. Violations of the IDEA's stay put provision are procedural

in nature. Regarding maintenance of current educational placement during a due process proceeding, the IDEA states as follows:

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until such proceedings have been completed.

20 U.S.C.S. § 1415(j). As a threshold matter, there are no proceedings pending, pursuant to this provision, until a request for a due process hearing is filed. *Monahan v. Nebraska*, 491 F. Supp. 1074, 1089 (D. Neb. 1980) (affirmed in part and vacated in part), *Monahan v. Nebraska*, 645 F.2d 592 (8th Cir. 1981). Other circuits agree with this interpretation as well. *See generally K.D. v. Dept. of Educ.*, 665 F.3d 1110, 1117 (9th Cir. 2011) (finding that the IDEA's stay put provision does not apply until a request for a due process hearing is filed); *Sammons v. Polk Cnty. Sch. Bd.*, 165 F. Appx. 750, 753 (11th Cir. 2006) (finding that only the filing of a request for a due process hearing invokes the stay-put injunction as referenced in 34 C.F.R. § 300.514).

Once this requirement has been met, *i.e.* a due process complaint has been filed, the question then becomes that of what constitutes the "then-current educational placement" of Student. The IDEA does not provide a definition for the term "then-current educational placement." *Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002). Therefore, based on case law, what is deemed to be the then-current placement of Student is determined at the time that a due process complaint is filed. Some circuits have determined a student's "then-current educational placement" by focusing on the "operative placement that is actually functioning at the time the dispute first [arose]." *Drinker v. Colonial Sch, Dist.*, 78 F.3d 859 (3d. Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990).

The operative placement is defined as the placement in which Student actually received instruction at the time that the dispute arose, *i.e.* a due process hearing was filed. *Id.*

It is the opinion of this Hearing Officer that District did not violate the stay put provision of the IDEA when it held a MDR conference on November 7, 2023, or at any point thereafter. First, Parents' argument in ADE H-24-22 is somewhat confusing considering that the mere filing of a due process complaint does not relieve a district of its other obligations pursuant to the IDEA, *i.e.* conducting a MDR conference. Second, the November 6, 2023 letter sent by Parents' attorney to District negates Parents' argument. In that letter, Parents' attorney stated that the stay put provisions of the IDEA should take effect *when Student returned to school on November 13, 2023, at the conclusion of the suspension.* Essentially, Parents' attorney was stating that there had been no stay put violation as of the date of the letter, but that one would occur on November 13, 2023 if Student was not returned to the placement addressed in his current IEP. It is likely that Parents' attorney conflated the issues pertaining to stay put and the MDR conference when she filed her complaint in ADE H-24-22. In addition to addressing stay put, the November 6, 2023 letter also requested that District refrain from holding a MDR conference until Parents could be present. This request, however, had nothing to do with the portion of the letter that addressed stay put.

Here, had Student returned to school following suspension, specifically on November 13, 2023 and District failed to return him to his pre-suspension placement despite the November 6, 2023 due process filing, the outcome would be different. That did not happen, however, because Student did not return to school and was instead enrolled in a different school district. Stay put was not triggered in this case. As such, District did not procedurally violate the stay put provision of the IDEA.

**Manifestation Determination Review (H-24-22).** Parents allege that District procedurally violated the IDEA when it conducted a MDR conference without Parents. It is the opinion of this Hearing Officer that District did, indeed, procedurally violate the IDEA in this regard.

The IDEA protects children with disabilities from being removed from the classroom because of their disability. 34 C.F.R. § 300.530(e), 300.536(a). If a child suffers a change of placement for a disciplinary reason, then the District shall conduct a manifestation determination so as to determine if the behavior resulted from the child's disability. *Id.*

Pursuant to regulation, the threshold issue in deciding whether a manifestation determination review is required is whether the disabled child has suffered a change of placement. A change of placement occurs (1) when the removal is for greater than ten consecutive school days or qualifies as a pattern of removals, and (2) constitutes a foundational change in Student's education program. *M.N. v. Rolla Public Sch. Dist. 31*, 2012 WL 2049818. A pattern of removals exists when the removals (1) total more than ten school days in a school year, (2) the child's behavior is substantially similar to child's behavior in previous incidents that resulted in removal, and (3) other factors, such as length of each removal, total amount of time child has been removed, and proximity of removals to one another indicate a pattern. 34 C.F.R. § 300.536.

Once Petitioner has established that a removal constituted a change in educational placement, it is necessary to then determine whether the removal in question was for disciplinary reasons. The IDEA clearly provides that a manifestation determination must take place if there is a decision to change the placement of a child with a disability because of a violation of a code of student conduct. 34 C.F.R. § 300.530(e). "Within 10 school days of

any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the *parent*, and relevant members of the child's IEP team (as determined by the *parent* and the LEA) must review all relevant information in the student's file." *Id.* (emphasis added). If a student's conduct is caused by, or had a "direct and substantial relationship" to his or her disability or, alternatively, was found to be the result of the LEA's failure to implement the IEP, then the conduct must be determined to be a manifestation of a student's disability. *Id.* at § 300.530(e)(1)-(2). In that instance, the IEP team must either conduct an FBA or, where a BIP is already in place, make amendments to the BIP. *Id.* at § 300.530(f).

In the present case, Parents allege that the District's decision to hold a MDR conference without them constituted a procedural violation of the IDEA. This Hearing Officer agrees. Here, District clearly made the determination that Student's suspension constituted a removal greater than 10 consecutive school days and was, as a result, a change in placement that triggered the need for a MDR conference. This is evidenced by the fact that, immediately following Student's suspension on October 31, 2023, District scheduled a MDR conference for November 7, 2023 and provided a Notice of Conference to Parents. In addition, it is undisputed that Student's suspension was on account of an alleged violation of District's code of student conduct. When a MDR conference is required under these circumstances, the law is very clear that the LEA, *parent*, and relevant members of the child's IEP team must review all relevant information during the MDR conference. Unfortunately, that did not happen here. Despite repeated references to parent involvement in the relevant sections of the regulations, District moved forward without Parents.

Evidence at the hearing of this matter indicated that Parents were upset that the only witness to Student's comment that he would "shoot up the school," specifically his speech therapist, was not listed on the November 3, 2023 Notice of Conference. Parents' attorney expressed this on November 6, 2023 in a letter, and noted in the letter that Parents would not attend the conference without the speech therapist present. Nonetheless, District ignored this request and pushed forward with the MDR conference on November 7, 2023, as scheduled. There was no attempt by District to reschedule the meeting to a time that the speech therapist could be present, or to visit with Parents' attorney about options. Certainly, considering that the MDR conference had to be scheduled within 10 school days, there was still significant time to work with Parents to ensure their participation.

In addition, District noted in the November 7, 2023 Notice of Action that it had repeatedly attempted to contact Parent (father) during the MDR conference, and that when finally reached, Parent (father) stated that he would not be present for the conference. This statement in the Notice of Action is misleading. Clearly, the day prior to the conference, Parents' attorney sent a letter stating that Parents would not attend the MDR conference without the presence of the speech therapist. District knew that Parents would not be there and it knew exactly why. The Notice of Action is written in such a way that it appears that District made continuous efforts to accommodate Parent (father) and went forward without him when Parent (father) refused to participate. The evidence, however, does not support this conclusion. District could have easily chosen a day that was amenable to Parents and the schedule of the speech therapist. There was simply no attempt to do so. Of course, if a parent refuses to participate in a MDR conference, a district may move forward so as to meet its statutory obligations. Here, however, Parents were not refusing to

participate. Instead, they were exercising their right to request that certain parties that were relevant to the matter be present, namely Student's speech therapist. District's decision to move forward under these circumstances, without Parents' participation, was a procedural violation of the IDEA.

**Conclusion.** As such, it is the conclusion of this Hearing Officer that District did not procedurally violate the IDEA's stay put provision, as alleged by Petitioners in ADE H-24-22; however, District did procedurally violate the IDEA when it failed make every attempt to have the Parents participate in the MDR conference.

### **Substantive Violations**

Having considered the first prong of the FAPE analysis, it is now necessary to analyze whether the District substantively denied FAPE to Student, *i.e.* whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances, and also whether District failed to properly conduct a MDR conference for Student. Because this Hearing Officer found that District did not procedurally violate the stay put provision of the IDEA, as explained *supra*, analysis as to whether District substantively violated the IDEA on this basis is not required.

**IEPs for 2022-2023 and 2023-2024 School Years (H-24-19).** In the present case, Parent alleged that District failed to provide FAPE to Student between February 11, 2023 and November 13, 2023 by creating and implementing IEPs that failed to address Student's academic deficits, failed to implement goals and objectives, failed to provide dyslexia intervention on Student's IEP, failed to provide mental health services, and failed to provide appropriate behavioral supports. It is noted that Petitioners only raised substantive

violations in ADE H-24-19 with regard to their allegation that Student had an inappropriate IEP and was, therefore, denied FAPE.

Prior to March 22, 2017, Eighth Circuit law provided that if a student received “slight” or “de minimis” progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court “rejected the ‘merely more than *de minimis*’ standard that had previously been the law of the Eighth Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. \_\_\_ (2017), 137 S.Ct. 988 (2017)).

In *Andrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Andrew F.*, 137 S. Ct. at 1000.

The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

*Andrew F.*, 137 S.Ct. at 1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a



FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at \*5 (citing *Andrew F.*, 2017 WL 1066260, at \*1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at \*1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to 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).

In the present case, and for purposes of determining whether Student’s IEPs were appropriate between February 11, 2023 and November 13, 2023, it is necessary to look at Student’s October 18, 2022 IEP, which was in effect during the end of Student’s 8th grade year (2022-2023 school year) and the beginning of his 9th grade year (2023-2024 school year), as well as his September 12, 2023 IEP which covered the final two months that Student attended school at District.

Student's October 18, 2022 IEP included a statement of Student's present levels of academic achievement and functional performance, as well as a description of how Student's disability affected his involvement and progress in the general education curriculum. In addition, the IEP had five annual goals that appeared measurable, with four of these being specific to Student's deficit area of English language arts. The document also contained a description of special education and related services to be provided by District. Specifically, Student was scheduled to receive 100 minutes of special education instruction (co-taught) in the academic area of English language arts. Finally, Student's IEP provided that Student would receive numerous accommodations, including, but not limited to, extra time for completing assignments, extra time for written responses, frequent feedback, redirection, and use of audio versions of novels and short stories.

Similarly, Student's September 12, 2023 IEP included a statement of Student's present levels of academic achievement and functional performance, as well as a description of how Student's disability affected his involvement and progress in the general education curriculum. The IEP also included annual goals that appeared measurable, with six goals specific to English language arts and overall language development, and five goals addressing Student's deficit areas in the academic area of math. Pursuant to the document, Student was scheduled to receive 100 minutes of special education instruction (co-taught), in each of the academic areas of language arts and math, as well as 60 minutes per week of occupational therapy and 30 minutes per week of speech therapy. Finally, Student's IEP provided that Student would receive numerous accommodations, which were nearly identical to those on Student's October 18, 2022 IEP.

Regarding behavioral issues, District conducted a FBA on April 19, 2023, and subsequently amended Student's October 18, 2022 IEP on May 15, 2023 by adding a BIP and notation of behavioral supports. This BIP remained in place until Student transferred to a new school district on November 13, 2023. In addition, the BIP was incorporated into Student's September 12, 2023 IEP. The only change that was made to Student's BIP after its development on May 15, 2023 happened on September 12, 2023 when Student's 9th grade IEP was developed. This change simply noted a different person responsible for de-escalating Student if that was necessary. Student's BIP included a list of strategies to modify consequences, including providing redirection, remaining calm and assertive when giving directions, returning Student to appropriate tasks, providing positive verbal reinforcement and attention, and working with Student to determine reinforcements and rewards that were motivating to him.

Finally, neither Student's October 18, 2022 IEP nor his September 12, 2023 IEP provided for mental health services. Student's September 12, 2023 IEP referenced dyslexia interventions, but those interventions were provided in the general education setting as opposed to during his special education minutes each week.

At first glance, and based on the facts outlined above, it appears that all technical requirements were satisfied with regard to Student's October 18, 2022 and September 12, 2023 IEPs. All of the required parts of an IEP are present in both documents, i.e. present levels of academic performance, statement regarding how Student's disability affects his ability to function in the general education environment, measurable goals, and description of services to be provided. In addition, both IEPs outline behavioral issues of Student and provide a BIP. Student's goals in the October 18, 2022 IEP were appropriate based on

information known to District at the time of IEP creation, and the goals were clearly written. At the end of Student's 8th grade year, specifically the 2022-2023 school year, it was noted that Student's ACT Aspire scores showed no real progress. In addition, District had significantly more info about Student's academic deficits on account of the various evaluations that were conducted for Student as a result of the February 11, 2023 private settlement. As a result, Student's goals were significantly overhauled for Student's 9th grade year, specifically the 2023-2024 school year. In fact, Student's IEP team doubled the number of goals for Student when they met for Student's annual conference. The goals were even more specific than those in the October 18, 2022 IEP, and covered Student's deficits in both language arts and math. Finally, as a result of Student's evaluations, his special education minutes increased from 100 minutes of English language arts instruction (co-taught) on the October 18, 2022 IEP to 100 minutes of English language arts, 100 minutes of math, 60 minutes of occupational therapy, and 30 minutes of speech therapy per week. It appears that District, at least from a curriculum standpoint, was taking recommendations of evaluators and making adjustments accordingly.

Upon closer inspection, however, and despite the fact that Student's stated goals appeared to be in line with evaluation results, there were significant issues with the BIP that Student's IEP team created on May 15, 2023 and which remained unchanged throughout the remainder of time that Student attended District. Student's April 19, 2023 FBA specified that Student's problem behaviors included "disruptive behaviors" and "work refusal," specifically "blurting out while teacher is talking, laughing excessively at small events, making loud noises, arguing with teacher, throwing objects, talking with peers during lessons, [and] putting his head down during work time." It was further noted that

Student engaged in these behaviors one to five times per class period on a daily basis, with instances lasting anywhere from two minutes to a half hour. District noted that Student's behaviors occurred most frequently in the morning and afternoon, and that the antecedent to the behaviors was assignment of independent work or challenging tasks. The FBA provided a summary of proposed interventions, which included giving Student small chunks of work, checking in with him regarding work, and verbally praising Student for completion of tasks. The summary of interventions specifically noted, however, that "redirecting to task, moving [Student's] seats, and doing tickets to reward for on task behaviors" were "reported to have no significant change in behavior. Despite this information, Student's IEP team created a BIP that lacked replacement behaviors and, further, listed as behavioral strategies the very interventions that it had stated on the FBA as being ineffective, namely redirection, seat movement, and positive rewards for on-task behavior.

Following the implementation of Student's BIP on May 15, 2023, Student was essentially at the end of his 8th grade year. He had a couple of behavioral incidents prior to the end of that school year, but nothing of significance. When Student returned to school the following school year, his 9th grade year, it should have become immediately obvious to District that the BIP in place for Student was not effective. Between the start of school in August 2023 and the date of his annual conference on September 12, 2023, Student had a total of seven referrals for a variety of problematic behaviors, including disruptive behavior, misusing electronic devices in class, eating chips in class and failing to follow directions when told to stop, commenting that his classes were student, refusing to work on assignments given by his teachers, being disrespectful, and making disruptive comments

during class in an attempt to distract or make peers laugh. Despite this history, Student's IEP team made no changes to his BIP during the September 12, 2023 meeting, with the exception of changing the person responsible for de-escalating Student in the event that was necessary. There was no change to the strategies section of the BIP. In the first three weeks of school, Student averaged two behavioral incidents a week that were seriously disruptive to Student's ability to learn, as well as his classmates. Still, no change was made.

Following Student's September 12, 2023 IEP meeting, Student's behaviors continued to escalate. Between September 12, 2023 and October 31, 2023 when Student was suspended for stating he would "shoot up the school," Student had nine more behavioral incidents. These included behaviors such as disruptive talking in class, distracting other students, threatening to destroy school property, making negative comments about his classes, failing to follow directions, utilizing his cell phone during class, refusing to complete work, playing games on the school computer instead of focusing on assigned work, laying head on desk during class, refusing to stop drinking prohibited beverages during class, wandering around the classroom and distracting peers, and passing gas in a teacher's face as he exited the bus. At no time between September 12, 2023 and November 12, 2023 did District find Student's behavior to warrant reevaluation or convene an IEP team meeting to address the ongoing behavioral issues. To the extent that Student's IEPs contained appropriate curricular content, Student's behavior, which was not properly addressed by District, was preventing him from accessing his curriculum. For these reasons, it is the Opinion of this Hearing Officer that Student's IEPs between May 15, 2023 and November 13, 2023 were inappropriate.

It is noted that Parents also alleged that Student's October 18, 2022 and September 12, 2023 IEPs were inappropriate on account of the fact that they lacked mental health counseling as a related service. This Hearing Officer finds that Parents failed to meet their burden with regard to this allegation. Certainly, Student had significant trauma in his past, specifically his cousin's death. This could have contributed to Student needing mental health services. However, for Student to qualify for school-based mental health services, there must have been some evidence that Student's mental health was impacting his ability to access his curriculum. Here, Student was engaging in negative behaviors at school, and these behaviors were preventing Student from accessing his curriculum. While it is possible that these behaviors were the result of Student not receiving regular counseling sessions, Parents failed to provide sufficient evidence to substantiate this fact.

Finally, Parents alleged that Student's IEP failed to provide special education services or intervention to address Student's dyslexia and, therefore, rendered Student's IEP inappropriate. This Hearing Officer disagrees with this contention. Regarding dyslexia specifically, pursuant to the Arkansas Dyslexia Resource Guide, if a student with a disability exhibits the characteristics of dyslexia, the IEP committee can determine "whether the student needs special education services in this area, if the student's needs can be met through the district's general education dyslexia intervention program, or if a combination of the two are needed." Ark. Dyslexia Res. Guide, p. 39. Essentially, District has the option of providing dyslexia services through the schedule of services, *i.e.* providing special education instruction in this regard, or providing these services in the general education and referencing them on the IEP. The fact that there are no special education minutes

specifically devoted to dyslexia intervention instruction does not, standing alone, result in Student's IEP being inappropriate.

This Hearing Officer notes that, despite finding Student's IEPs between May 15, 2023 and November 13, 2023 to be inappropriate and a denial of FAPE, Parents have failed to meet their burden with regard to establishing that Student still has academic deficits as a result thereof. Student transferred to the White County Central School District on November 13, 2023. Based on the evaluations of Student after the February 11, 2023 private settlement between the parties, there was copious information about Student's academic performance leading up to Student's 9th grade year, specifically the 2023-2024 school year. However, Parents presented no other documentary data demonstrating how Student has progressed since moving to a new school district on November 13, 2023. Essentially, there was no current data to support the assertion that Student still had academic deficits as a result of his IEPs between February 11, 2023 and November 13, 2023. In addition, Parents testified during the due process hearing of this matter that Student was doing very well in his new school district. Parent (father) testified that Student was doing well academically and had no behavior or academic problems at his new school. He also stated that Student was doing well with his dyslexia interventions. Parent (father) testified that, at the time that Parents filed ADE H-24-19 and ADE H-24-22, they had been seeking compensatory services, but now Student was receiving what he needed. This, coupled with the fact that there was no data to show Student's current academic performance, resulted in Parents failing to meet their burden with regard to compensatory education. Essentially, compensatory education exists to make a child whole when a district's violations of the IDEA have resulted in a deficit. Here, the evidence, specifically



Parents' testimony, suggests that Student no longer has any deficits that warrant a remedy, and there was no documentation provided by Parents to establish otherwise.

**Manifestation Determination Review (H-24-22).** Having found that District procedurally violated the IDEA when it held an MDR conference without Parents, this Hearing Officer must now determine whether this procedural violation also constituted a substantive violation of the IDEA. In addition, this Hearing Officer must consider additional allegations made by Parents, allegations of a purely substantive nature, with regard to Student's MDR conference. Specifically, Parents allege that District failed to have appropriate members of Student's IEP present at the MDR conference and failed to provide the video showing the incident in question to all members attending the MDR conference.

It is the opinion of this Hearing Officer that District procedurally violated the IDEA by failing to include Parents in the MDR conference, and that this procedural violation substantively impacted Student as well. As stated previously in this decision, parent participation is expressly required for a MDR conference. The regulations refer to Parents not only attending the MDR conference, but also having some rights with regard to input on who should be at the conference. Parents are in a unique position to talk about Student's history and disability, and their input is critical to the process. Here, Parents wanted to participate. This was not an issue of refusal. Parents simply wanted to ensure that a key witness, the speech therapist, was present at the meeting as well. That was not an unreasonable request, and there was certainly time remaining to schedule the MDR conference for a later date.

In addition, District's failure to schedule the MDR conference at a time that the key witness could be present to answer questions, and also its failure to provide a copy of the

incident video to all members of the conference, constituted substantive violations of the IDEA. Certainly, Student's comment should have been taken seriously, particularly given the number of school shootings each year in the United States. However, the members of Student's MDR conference were tasked with determining if Student's comment to "shoot up the school" was based on his disability. In order to make this determination, the committee needed information about Student's disability, and they needed to physically see the context in which Student made the allegedly threatening comment. Without viewing the video, members of Student's MDR conference were making a manifestation determination on the basis of what they were told, as opposed to watching the incident and gathering all necessary facts. This defeats the purpose of a MDR conference.

This Hearing Officer cannot predict whether the outcome of the MDR conference would have been different in the absence of procedural and substantive violations of the IDEA. Certainly, Student had no history of making threatening comments as a result of his ADHD diagnosis, so it is possible that Student's MDR committee would have ultimately come to the same conclusion following a full review of all evidence. The process matters though, and District did not properly handle Student's MDR conference so as to ensure that Student's rights were protected under the IDEA.

**Conclusion.** Having considered Parent's allegations of procedural and substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was denied FAPE between February 11, 2023 and November 13, 2023 as a result of procedural and substantive violations of the IDEA.

**ORDER:**

The results of the testimony and evidence warrant a finding for Parents. Specifically, Parents introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between February 11, 2023 and November 13, 2023 by failing to provide Student with an IEP that was reasonably calculated to provide educational benefits, failing to create an appropriate BIP for Student, and failing to follow IDEA regulations pertaining to conducting Student's MDR conference. However, despite this conclusion, it is the opinion of this Hearing Officer that Parents have failed to meet their burden with regard to establishing that compensatory education is warranted. Based on testimony, Parents no longer feel that compensatory education is warranted because Student has been and continues to receive appropriate services at his current school district and, as a result, is thriving academically. In addition, Parents' counsel did not present current data from updated evaluations or Student's new school district to show Student's present levels of performance; therefore, there is no data to support that Student still has deficits as a result of District's procedural and substantive violations of the IDEA.

**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 the hearing.

**IT IS SO ORDERED.**

/s/ Danna J. Young

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**HEARING OFFICER**

06/20/2024

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**DATE**