Arkansas Department of Education

Special Education Unit

IN RE:

XXXXXXXXXXXX
as Parent in behalf of
XXXXXXXXXXXX, Student **PETITIONER**

VS. NO. H-14-31

XXXXXXXXX School District **RESPONDENT**

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Petitioner alleges that the Respondent denied the Student with a free and appropriate public education (FAPE) during school year 2013-14 by:

1. Failing to identify all of his disabilities;
2. Failing to develop an appropriate IEP to address his disabilities; and
3. Failing to "reevaluate" the child for all of his disabilities.

Issues raised by the Petitioner in the initial request for a hearing that were ordered by the hearing officer as non-judicable under IDEA included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973 including retaliation and harassment of the Student and Parent.

Procedural History:

On March 31, 2014, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from Xxxxxx Xxxxxx (hereinafter referred to as "Parent"), the parent and legal guardian of Xxxxx Xxxxxx, Petitioner) (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the Xxxxxxxxx School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate special

education services as noted above in the issues as stated.

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of May 5, 2014, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order was issued on April 2, 2014. The District responded to the Parent's complaints as ordered on April 8, 2014. The District notified the hearing officer on April 30, 2014, that a resolution conference was conducted as ordered, but without resolving the issues contained in the Petitioner's complaint. On April 17, 2014, the Respondent submitted a motion for continuance due to the non-availability of key witnesses in the case. The continuance was granted on April 18, 2014, establishing May 15, 2014, as the date on which the case would go forward for hearing.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The District was represented by Sharon Carden Streett of Little Rock, Arkansas. The Parent elected not to attend the hearing with the decision made to proceed in the absence of any testimony or evidence presented by the Petitioner. Rationale for the decision was based on the information provided in the District's pre-hearing brief and Parent's lack of response to the hearing officer's request for compliance with preliminary timelines and orders.

At the time the hearing was requested the Student was a nineteen year-old, twelfth grade, male enrolled in the District. According to the District's records the Student initially became their educational responsibility on his transfer from Missouri where he had been identified as a child with a disability as defined in 20 U.S.C. §1401(3). The Student's disability as noted in the record was a child with an emotional disturbance. In the Parent's complaint it was alleged that the Student had been removed from special education services for his emotional disturbance without having been reevaluated and that the District failed to reevaluate him for all of his disabilities. Prior to the current school year (2013-14) the Student was provided educational accommodation services as a Section 504 student.

The District complied with the ADE regulations in providing the hearing officer with a binder of exhibits and a list of potential witnesses prior to the hearing; however, neither was

provided by the Parent. As noted above the Parent did not appear at the hearing.

It was explained to the District who was allowed to present their case that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing. Considering the age of the Student at the time of the hearing the District was permitted to provide the hearing officer with a brief on the Parent's standing to have requested a due process hearing as well as a post hearing brief. It is included as an exhibit in the Hearing Officer Binder of Orders and Pleadings. As a consequence of this finding this order will address the standing question raised by the District, but first it will address the issues raised by the Parent and the District's response in the hearing.

Findings of Fact:

Did the District deny the Student with FAPE by during school year 2013-14 by:

a. Failing to identify all of his disabilities;

b. Failing to develop an appropriate IEP to address his disabilities; and

c. Failing to "reevaluate" the child for all of his disabilities.

1. The Student was in the District's tenth grade on March 18, 2011, when the Parent completed a social-development medical history for the Student following her initial request for special education services. She reported that the Student was born Mach 1, 1995 (age 16). Her concern listed at that time was that "his grades dropping due to neglect by certain schools."[1]

2. The District's LEA supervisor testified that the Student entered the District in 2009 having been served under an IEP for special education in a school district in Missouri under the diagnosis of emotional disturbance and that the District continued to implement the Missouri IEP.[2]

3. On receiving information from the person in Missouri who provided the evaluation and diagnosis of emotional disturbance the LEA supervisor testified that "the doctor indicated that he had no diagnosis of any disability."[3]

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[1] District Binder, Tab 19, Page 16-18

[2] Transcript, Page 19

[3] Ibid

4. As a result the District, with the Parent present at a referral conference on April 14, 2011, the decision was made to conduct an initial evaluation to determine if he qualified as a child in need of special education services. Based on the information at that time the conference decision was that he did not qualify for special education services and that he would be attending school in a regular education classroom. [4]

5. On May 4, 2011, the Parent elected to have the Student evaluated at the University of Arkansas for Medical Sciences (UAMS) in Little Rock rather than permitting the District to conduct the evaluation. Although no diagnosis was given by the evaluator at UAMS the diagnostic impression was "attention deficit disorder, inattentive type."[5] The report also included the statement that "the patient has the ability to weigh the risks and benefits associated with giving and withholding information."[6]

6. At the Parent's request the District scheduled and held a referral conference at the on June 10, 2011; however, the Parent elected to not attend, nor did she provide the committee with any additional evaluation information other than the UAMS report. The committee decision was to contact the Parent to obtain the additional information as well as offering her the District's services in completing the evaluation.[7]

7. The Parent subsequently obtained an independent evaluation; however, the LEA supervisor testified that there was only a diagnostic impression and not a diagnosis for an attention deficit disorder and that further assessment was needed in order for the District to conduct another referral conference.[8] However, according to her testimony the Parent refused and "revoked consent for us to complete the rest of the testing, because her deal was the emotional diagnosis."[9]

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[4] District Binder, Tab 9, Page 10

[5] District Binder, Tab 8, Page 7

[6] Ibid

[7] Ibid, Tab 7, Page 12

[8] Transcript, Page 19

[9] Transcript, Page 20

8. In lieu of being able to complete an initial evaluation of the Student for possible special education services according to the District's assistant superintendent, a Section 504 plan for his tenth grade of high school was developed on May 11, 2011.[10] The Parent attended the Section 504 committee meeting which noted that the impairment for which the committee concluded that affected his major life activity of learning was "emotionally disturbed."[11]

9. The District's Section 504 coordinator testified that for school year 2012-13 the District served the Student under a 504 plan for the disability of "emotionally disturbed" which was based on the records "from the school where he came from...the information from his parent, input from the teachers that were involved, and we looked at his attendance records...at his school assessment, and so forth."[12]

10. On August 21, 2013, although the Student, now eighteen years of age and in the eleventh grade, the Parent requested a referral conference due to academic concerns and with the referral form noting that the Student was currently provided a Section 504 accommodation plan.[13] Due to his having reached the age of majority the District also provided the notice of conference to the Student.[14]

11. The referral conference was conducted in the absence of the Parent on September 9, 2013. The committee concluded after reviewing the available information that due to the excessive absences during the past school year (2012-13) that it was "very difficult to determine if there is an educational deficit that would require an initial evaluation to determine whether [the Student] would qualify for special education services."[15] The committee recorded that the Student had missed 76 to 91 days of school depending on certain classes on his schedule and that

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[10] Transcript, Page 34

[11] District Binder, Tab 1, Page 9

[12] Ibid, Page 34-35

[13] Ibid, Tab 5, Page 23

[14] Ibid, Page 19

[15] Ibid, Page 4

for the current school year (2013-14) he had missed 8 to 15 days.

12. On October 2, 2013, the Department received a request from the Parent to initiate a due process hearing which was scheduled for November 21 and 22, 2013; however, on January 3, 2014, the hearing officer dismissed the case without prejudice for lack of parental cooperation in his attempt to obtain information from the Parent.[16]

13. As noted in paragraph eleven above the Student's excessive absences from school presented the referral conference committee with the difficulty of determining the need for special education services. The District's high school counselor testified that she discussed the absences with the Student at which time the Student told her that he had to depend on other people to bring him to school and that even though the District provided him with a bus to ride that he did not want to ride a bus.[17] Neither the Student nor Parent were present at the hearing to refute this statement.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.[18] The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.[19] The term "special education" means specially designed instruction.[20] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this

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[16] Ibid, Tab 4, Page 4-6

[17] Transcript, Page 44-45

[18] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[19] 20 U.S.C. § 1401(3)(A)

[20] 20 U.S.C. § 1402(29)

part, the content, methodology, or delivery of instruction.[21]

In the current case the question involved whether or not the Student's disability or disabilities were having an adverse effect on his education. Given the Parent's refusal to permit the District to conduct the initial evaluation it was not possible to determine if his failing grades were the consequence of a qualifying disability. The Parent in this case apparently believed that the Student should have qualified as disabled due to an emotional disturbance; however, without parental consent to conduct a definitive evaluation they were at a loss as to how best serve the Student's educational needs.

The Department has outlined the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008. Hereto, however, a district's hands are tied to parental consent in order to make determinations as to educational needs for a student.

In addressing the issue of whether or not a student was denied not only a free, but an appropriate educational opportunity the Supreme Court addressed the issue in 1982. By responding to the question the Supreme Court provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education" or FAPE. Given that this is the crux of the Parent's contention in this case it is critical to understand in making a decision about her allegations as to whether or not the District failed to provide the Student with FAPE. The Court noted that the following twofold analysis must be made by a court or hearing officer with regard to FAPE:

> (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
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> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[22]

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[21] 34 CFR § 300.26(b)(3)

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

In 1988 the Supreme Court once again addressed the issue of FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[23] Under the IDEA, an IEP committee must "evaluate" a child with a disability before determining that the child is a child with a disability that qualifies him or her for special education services.[24] In this case the Parent has alleged that the District failed to evaluate the Student for all of his disabilities; however, their ability to evaluate was conditioned on the Parent providing consent to conduct a comprehensive evaluation. For which she refused leaving the District with no other option but to pursue other means of attempting to provide an educational benefit to the Student. The evidence in this case indicates that the District did in fact consider the available evaluation data obtained by the independent evaluation obtained by the Parent; however, the information was incomplete and was not the required comprehensive evaluation needed to assess educational needs.

The District's decision to insist on conducting a comprehensive evaluation before developing an appropriate educational plan is also consistent with the intent of the IDEA. Congress established and the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability as the Parent apparently focused on in this case.[25] As is true in this case, too often this hearing officer has found that not only parents, but also school administrators and even legal counselors representing them, typically want to focus only on a diagnosed condition. The charge to education professionals is to concentrate on the unique needs of the child rather than on a specific disability such as the Parent has in this case. The District correctly attempted to address the Student's academic difficulties, but were not only hampered by the Parent's refusal to permit them to conduct an evaluation, but also the Student's numerous absences from school. At the time the complaint was registered with the ADE the Student at reached the age where he was no longer required to attend school.

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

[24] 34 CFR 30.304-311

[25] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

In reviewing the elicited testimony and the evidence in this case it is quite clear that the District attempted to focus on the unique needs of the Student. They implemented the IEP from the previous school district when he entered their educational responsibility and subsequently attempted to evaluate him for continued special education services, being unable to do so due to the Parent's refusal to allow them to do so. In attempting to assist the Student the District developed and implemented a Section 504 plan based solely on the previous diagnostic impression of an emotional disturbance.

It is necessary for this hearing officer to look only at the facts in this case as to whether or not the District, even in the absence of the Parent's, concentrated on the unique needs of the Student and not any specific disability. The testimony by District personnel elicited in the course of the hearing suggests that they truly believed that they attempted to address the unique needs of the Student.

The issues addressed in this case were presented by the Parent her complaint as being such egregious violations of procedural requirements of the Act that they have denied the Student with FAPE. By not attending the hearing the Parent elected to make a decision as to the validity of her complaints difficult. The Student, at an age of majority when the complaints were filed with the ADE, also elected not to participate in the hearing. Consequently, in addressing the issue of FAPE the question boils down to: (1) looking at each individual issue alleged by the Parent and to determine whether or not the District has been in compliance with the definition of FAPE, and (2) whether or not any single violation, or the accumulation of violations as alleged in the Parent's complaint, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[26] agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.[27] Further, Rowley recognized that FAPE must be tailored to the individual

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

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

child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

> "Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)."[28]

By electing to forego the process of participating in the hearing the Parent, and in this case the Student, have reneged on their rights as well as responsibilities.

A major question with regard to the current case, and whether or not FAPE was denied, is whether or not the Parent was permitted to participate in the educational decisions for her child and whether or not her input was given due consideration in the decision making process. Most importantly was her claim that the District did not accept the evaluation she obtained as the determining factor for the Student's need for special education services.

It was the intent of the IDEA to encourage parental participation in the development of a disabled student's education program. The value of parental participation in the development of an IEP has been consistently emphasized in the IDEA.[29] As the Supreme Court stated in the previously cited Rowley case "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard."[30] The previously cited Eighth Circuit case regarding the necessity of there needing to be serious procedural violations in order to declare a violation of FAPE, on the other hand, takes a strong opinion in the other direction when it comes to the requirement of parental participation: "An IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously

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

[29] 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

[30] *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*,458 U.S. 176, 189, 205 (1982)

hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."[31] In this case there is no doubt that the Parent was afforded the opportunity to participate in the evaluation process of the Student's possible eligibility for special education; however, her elected absence in the decision making process hampered the District in pursuing a definitive course of action. There is a preponderance of evidence in the record showing that she was provided with sufficient notices and opportunity to participate. The degree of frustration she believes she has experienced most likely led to the filing for not just one, but two due process hearings. There is little doubt that the Parent and the Student were provided ample opportunity to participate in the evaluation process, thus there the record does not support the allegation that the District is in violation of procedural compliance of parental participation.

The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the court when the alleged violation has been based solely on procedural violations.[32] Case law attempting to interpret both Congress and comply with the findings of the Supreme Court have stated that procedural errors are sufficient to deny FAPE if such errors "[1] compromise the pupil's right to an appropriate education, [2] seriously hampered the parents' opportunity to participate in the formulation process, or [3] caused a deprivation of educational benefits."[33] The alleged violations of not following the IDEA's due process procedures such as

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[31] *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996) and *J.P. v. Enid Public School*, No. CIV-08-0937-HE (W.D. Okla. 9-23-2009)

[32] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-207 (1982). See also *Evans v. District No. 17 of Douglas Cou*nty, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996). More recently see: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson Country Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *School Board of Collier County v. K.C.*., 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79,* 35 IDELR 159 (8th Cir. 2001).

[33] Roland M. V. Concord Sch. Comm. 910 F.2d 994 (1st Cir 1990); accord Amanda J. ex rel. Annette J. V. Clark Cnty. Sch. Dist., 267 F.3d 877,892 (9th Cir. 2001).

not considering the Parent's independent evaluation or failing to reevaluate the Student or her absence from the decision making meetings was not shown by the evidence or testimony to warrant a judgement that the District failed to follow due process procedures in regard to these allegations.

Issue of Standing

Under Arkansas law as put forth by the Department the age of majority with respect ot education is eighteen.[34] The Department's rules and regulations mirror the provisions of the IDEA where at age eighteen the rights under the IDEA belong to the student unless the student has been declared no so by a court of competent jurisdiction. The only parental rights accorded by the IDEA beyond a student's having reached the age of majority is if there exists a question as to whether or not a parent is entitled to monetary recourse in the education of child when a minor.[35] In the current case the Parent does not allege expenditure of funds, nor did she request reimbursement for any funds.

Order

1. The results of the testimony and evidence warrant a finding for the District. All issues as noted above and as alleged by the Parent as a denial of FAPE are hereby dismissed with prejudice.

2. The Parent is also found to not have standing as to the allegations raised in the initial complaints with the Department.

Finality of Order and Right to Appeal

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall 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.

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[34] *Arkansas Department of Education Regulations, Special Education and Related Services, Procedural Requirements and Program Standards*, ADE (2008), § 9.07.1.1

[35] 20 U.S.C. §1415(m)

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.

Robert B. Doyle, Ph.D.
Hearing Officer

June 9, 2014
Date