Arkansas Department of Education
SPECIAL EDUCATION UNIT

IN RE:

[redacted] as Parents in behalf of [redacted], Student

PETITIONERS

VS. NO. H-10-09

[redacted] and

RESPONDENTS

HEARING OFFICER'S FINAL DECISION AND ORDER

Issue and Statement of the Case

Issues:

Did the Respondents deny the Student a free and appropriate public education (FAPE) according to the Individuals with Disabilities Education Act (IDEA) by failing to follow due process procedures by not identifying and evaluating for the Student's disabilities that adversely affected his education and by not developing and implementing an appropriate Individualized Education Plan (IEP) for school years 2006-07, 2007-08, 2008-09 and 2009-10?

Procedural History:

On October 5, 2009, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from [redacted] (hereinafter referred to as "Parents"), the parents of [redacted] (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the [redacted] (hereinafter referred to as "HSS District") and

subsequentl[redacted](hereinafter referred to as "FLS District") failed to comply with the Individuals with Disabilities Education Act (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 according to Arkansas Code Annotated 6-41-202 through 6-41-223 in providing the Student with appropriate special education services as noted above in the issue as stated.

The Department responded to the Parent's request by designating November 5, 2009, as the date on which the hearing would be held and by assigning the case to an impartial hearing officer. The Hearing Officer issued an order setting preliminary timelines on October 9, 2009, which afforded the Districts with the opportunity to challenge the sufficiency of the due process complaint notice. The order setting preliminary timelines included an order for the HSS District and the FLS District to convene resolution sessions with the Parents on or before October 20, 2009. Both Districts notified the hearing Officer that resolution conferences were held; however, no agreements were reached.

On October 15, 2009 the HSS District challenged the sufficiency of the complaint and the Hearing Officer concurred. An order was issued on October 21, 2009 permitting the Petitioner to amend their due process complaint in accordance with §§ (c)(e)(E) of § 615 of Public Law 105-17. The order also dismissed the Petitioner's complaints against the HSS District and FLS District for allegations of violations of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 and the Fourteenth Amendment of the U.S. Constitution, all of which were considered by the Hearing Officer as non-hearable issues under the IDEA. The order further informed the Parents that the alleged complaints against the privately owned and/or the non-profit

agencies listed in the complaint were not under the jurisdiction of the Department and would not be adjudicated by the Hearing Officer.

The Parents responded to the order by submitting an amended complaint on October 30, 2009. On receipt of the amended complaint an amended order setting preliminary timelines was issued on October 31, 2009; which again afforded both districts the opportunity to challenge the sufficiency of the amended complaint. The amended order setting preliminary timelines again included an order for the both districts to convene resolution sessions with the Parents on or before November 14, 2009. The HSS District and the FLS District notified the hearing Officer that resolution conferences were held; but again, no agreements were reached.

The HSS District responded to the amended complaint with a challenge as to its sufficiency on November 9, 2009. Having not been named in the challenge or the response to the challenge the FLS District filed a motion to adopt the responses to the complaint by the HSS District on November 10, 2009. An order was issued by the Hearing Officer on November 10, 2009 denying the challenge of sufficiency by the HSS District and established a pre-hearing conference to be conducted on November 19, 2009. The pre-hearing conference was held as planned with the issue as noted above being agreed to as that which would be adjudicated beginning on November 30, 2009, immediately following the [redacted] Following the admission of testimony and evidence at the hearing of [redacted] the Petitioner requested and was granted multiple continuances in order to complete that case. Thus the current case was continued by written orders to be heard following the completion of [redacted] on [redacted] The final day of hearing [redacted] did not permit time for the parties to prepare the required pre-hearing

disclosure briefs, thus another continuance was requested by all parties with the hearing scheduled to begin on February 19, 2010. The hearing began as scheduled on that date, but in order to permit all parties the opportunity to elicit testimony from witnesses and the evidence it was continued on February 25, 2010, again on March 9, 2010, again on April 15, 2010, with the final day of hearing on April 21, 2010. All parties agreed that testimony from the HSS District LEA and the HSS District superintendent would be duplicitous and consume additional time and resources in that their testimonies elicited in th[redacted] would be no different from that obtained in the current case. Consequently, all parties agreed that testimony elicited from those witnesses in [redacted] would be used by the Hearing Officer as needed in reaching a decision in the current case. The HSS District requested and was granted the opportunity to make note on the record that their cross examination of witnesses did not negate their objection as to the sufficiency or their subsequent jurisdictional objection to the hearing. The same objections were adopted by the FLS District and thus noted on the record as well.

On the initial day of the hearing the HSS District repeated their request that the Hearing Officer accept as part of the record the HSS District's motion to dismiss as was entered in the Student's sibling's case [redacted] in that the same issues applied according to the HSS District, with the exception of the assertion of the Student having reached the age of majority. At the same time the FLS District filed a verbal motion to adopt the motion to dismiss as requested by the HSS District. The basis of the motion to dismiss was threefold: (1) the complaint exceeded the statute of limitations on matters in excess of two years; (2) neither the Student nor the Parents are currently residents of the HSS District; and (3) the Student is being home-schooled. The motions were accepted, but the motions to dismiss were denied.

The opinion of the Hearing Officer on denying the motions to dismiss was as follows:

(1). With regard to the complaints having exceeded the constraints of the statute of limitations as established by the 2004 re-authorization of the IDEA, the HSS District is correct, but only in part. The two year statute of limitations as established by the IDEA states that a parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have know about the alleged action that forms the basis of the complaint. The IDEA provides two exceptions to the statute of limitations. It does not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or if the local educational agency withheld information from the parent as required by the IDEA. Neither of the two exceptions were addressed as issues by the Parents with the filing of their complaint, nor was it defended by the HSS District or the FLS District except in their motions to dismiss and in post hearing briefs by all parties.

At the hearing, [redacted] the Hearing Officer concluded that information for the time exceeding the two year limitation may in fact be important in determining the substantive basis of facts for the subsequent school years which did not exceed the statute of limitations and for which the Petitioners are entitled to be heard. This Hearing Officer did not believe it possible to determine whether or not the Student was denied FAPE for the two years within the statute of limitations without the prior information which led to the various parties' subsequent decisions. To the extent that evidence related to the time period prior to two years before Petitioners knew, or had reason to know of the alleged violations which gave rise to their claim, was considered relevant for background information. In their post hearing brief the Parents contended that the inclusion of

the 2006-07 school year complaint was justified because they believed that the facts presented to them at the time were misrepresentations by the HSS District and that information regarding the lack of academic standing with the Department to the program to which they transferred the Student was withheld. The specific misrepresentations and withholding of information was not a part of the original or amended complaint as such; however, the elicited testimony from the witnesses was focused by the Parents in the direction that would lead the reader of the transcript to believe that the Parents believed they were misled in making decisions by the HSS District, and subsequently by the FLS District, as well as the non-accredited private agency who was involved in the education of their child. Nothing in the evidence or testimony indicated that the HSS District or the FLS District intentionally misrepresented anything to the Parents; however, the failure to adequately inform them, and given the intellectual limits of the Parents, it is relatively easy to conclude from the testimony that such might in fact be the case as they saw it.

As noted below under the findings of fact, the non-existent IEP from the former school, but often referred to in other documents produced by the HSS District and the Parents suggested that the temporary IEP for school year 2006-07 may or may not have been comparable to the special education services he had been receiving from the previous district. Consequently, if such facts as were used to provide special education services by the HSS District were not sufficient to warrant application of the statutory exception, the exception would swallow the rule. In hindsight, the Parents might consider the HSS District's initial assessment and placement of the Student to be inadequate, but that does not in and of itself rise to a specific misrepresentation. However, it is the opinion of this Hearing Officer that due weight should still be given as to the factual findings regarding the HSS District's subsequent decision to remove the Student from special education

services. Regardless of the Parent's or either District's position on this issue, the Courts have agreed that IDEA hearing officers should make a highly factual inquiry when there is the potential presence of any such exception to the statute of limitations

(2). At the time the complaints were alleged to have begun the Student was a resident of the HSS District and as such the responsibility of the HSS District for purposes of providing an appropriate education. Although the District denies responsibility for the subsequent two years the courts have consistently agreed that students who, as in this case, claim a district violated the IDEA, but moves from the district before filing an administrative action, are allowed to proceed if they seek relief, such as compensatory education, which survives the move.

(3). In their post-hearing brief the HSS District is correct in citing regulations which bar parents and students from the benefits of due process concerning special education matters when they have unilaterally removed the student from the public education agency. There is no dispute that the Parents removed the Student from enrollment in the HSS District and subsequently from the FLS District for purposes of "home-schooling," but why and how those decisions were reached, are part and partial of their complaints, thus the testimony and evidence surrounding the complaints were deemed to be hearable.

The hearing began as scheduled on February 19, 2010. As noted above the Parents were not able to complete their desired testimony and requested continuances which were granted without objection for the case to be heard on February, 25, 2010; again on March 9, 2010; again on April 15, 2010; and a final day on April 21, 2010. On the second day of the hearing the FLS District requested and was granted without objection that the case be bifurcated in order to allow them to be absent from issues pertaining only to the HSS District. Although the hearing of testimony was bifurcated this decision and order has not been. Following the final day of the hearing all parties

were offered the opportunity to provide the Hearing Officer with post-hearing briefs to be included with the record. They were instructed that their briefs must be received within ten business days from the final date of the hearing. However, the Respondents requested and were granted without objection that their post-hearing briefs be continued due to personal issues interfering with preparation of the briefs. All post-hearing briefs were received on or before the subsequently established deadline and are included as Hearing Officer exhibits.

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 of Sherwood, Arkansas, conducted a closed impartial hearing. The Parents were represented by Theresa Caldwell, Attorney of Little Rock, Arkansas; the HSS District was represented by Paul Blume, Attorney of Little Rock, Arkansas; and the FLS District was represented by Jay Bequette, Attorney of Little Rock, Arkansas.

At the time of the alleged complaints were purported to have begun (school year 2006-07) the Student was [redacted] who had transferred to the HSS District as an IDEA eligible student from the [redacted] as a student entering hi[redacted] On being notified by the Parents in the enrollment procedures, the HSS District requested and received copies of the Student's special education records from the school district in [redacted] however, the evidence solicited by the Parents and presented by the HSS District was absent a copy of the Student's IEP. In fact the only evidence presented included the Student's grades and his health records. The IEP was referred to in various documents presented as evidence, therefore it would be assumed that it was available to the HSS District prior to having made their initial decision on assessment and placement of the Student even though none of the witnesses

could recall seeing the document.[1] The Student and the Parents remained residents of the HSS District until they moved their residence into the adjoining FLS District in December 2008 and subsequently requested special education services at the FLS District for school year (2009-10).

Findings of Fact:

School Year 2006-07

As pointed out by the HSS District in their motion to dismiss, and the FLS District's motion to adopt, complaints which were alleged to have occurred during school year 2006-07 fall outside the statute of limitations according to the re-authorization of IDEA in 2004 for which complaints can be filed, and thus it is often assumed they are not hearable by a hearing officer. However, neither the provisions of the IDEA as re-authorized in 2004, nor the regulations interpreting the statute, outline precisely how a hearing officer must consider a claim where the exceptions to the statute of limitations may apply; nor how to address the importance of any prior actions on the part of a petitioner or respondent. Consequently, this Hearing Officer has taken the position that prior actions and decisions made by all parties involved in this due process hearing may or may not be relevant to those complaints or issues which do fall within the period of time in which complaints can be filed for adjudication. At the same time it is recognized that the IDEA is clear and subsequent case law has supported the position that no restitution for the prevailing party can be awarded for actions of a defendant which fall outside the statute of limitations.[2] In the case before this Hearing Officer the position taken in allowing information in on issues beyond the statute of limitations was deemed appropriate and necessary in providing a fair judicial decision. Such information was considered necessary in that decisions and actions taken by all parties prior to

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[1] HSS District Binder, Tab 2, Page 37

[2] *Evan H. v. Unionville-Chadds Ford School District,* 51 IDELR 157 (E.D. Pa 2008)

school year 2007-08 were considered relevant in determining how the parties made some, if not all subsequent decisions relevant to the case.

Prior to entering the HSS District the Student's school in [redacted] developed an IEP for school year 2006-07 anticipating [redacted] he would continue to be the responsibility of their district; however, that document as noted above, is missing from the Student's IEP folder as maintained by the HSS District. According to the psychoeducational evaluation conducted by the HSS District on September 18, 2006, he was transferred to the HSS District "with a current IEP, which indicated the exceptionalities of Specific Learning Disability and Language Impairment." [3] Although the previous school's IEP is missing the referral form completed by the HSS District on August 4, 2006, reflects that "records that transferred from (his) previous school indicates a full scale IQ of 85, math 84, listening comprehension 84, and spelling 73." and that "there is a moderate to severe articulation disorder and poor auditory short term memory" and that he was given "special education placement in a resource room." [4] The HSS District psychoeducational examiner noted in her report that the Student "was receiving speech/language therapy."[5] On August 4, 2006 the HSS District developed a temporary IEP for the Student. The previous information as noted above indicated that he was receiving special instruction for his learning disabilities in a resource room setting and speech therapy services as an indirect service. The temporary IEP developed by the HSS District addressed the speech disability by providing for two 30-minute sessions of speech therapy per week, but the only attention given to the Student's specific learning disability was that it would be addressed indirectly from his

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[3] HSS District Binder, Tab 2, Page 37

[4] Ibid, Tab 1, Page 30

[5] Ibid, Tab 2, Page 38

placement in a regular classroom, without resource room involvement.[6] For this to be a comparable IEP to that which was developed for him by his previous school is impossible to say without the document itself; however, based on the evidence available it does not appear that he would be receiving equivalent services for a specific learning disability. Such action on the part of HSS District is in violation of the Department's requirement to provide a comparable IEP until an evaluation is completed by the receiving district.[7]

While serving the Student with the temporary IEP an evaluation was scheduled to be undertaken as noted in the referral conference decision of August 4, 2006.[8] The evaluation was conducted by the HSS District's School Psychology Specialist and completed on September 18, 2006, forty-five days after the referral conference. The evaluator concluded that by using a regression analysis the results of the data did not reveal a severe enough potential/performance discrepancy to warrant the designation of a specific learning disability.[9] On September 20, 2006 the HSS District's speech language pathologist conducted a speech-language evaluation and concluded that he did not meet eligibility criteria for speech therapy.[10]

The school psychology specialist did not include any classroom observations in the determination of the need for any special education services, relying completely on information provided by the Parents. At that point in time the only classroom behavior information available to the Parents was how he behaved in his previous school environment, a resource room, not a

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[6] Ibid, Tab 1, Page 9

[7] Section 8.03.04.1, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2000).

[8] HSS District Binder, Tab 1, Page 19

[9] Ibid, Tab 2, Page 44

[10] Ibid, Page 55

regular classroom. The Student's mother testified that the family at that time had suffered the loss of the Student's grandfather and an uncle, the later of which triggered the family's decision to move to Arkansas. In one of the CCS therapy notes it was recorded that the Student was having difficulties associated with an incident in [redacted] where he observed the drowning of a two-year-old child and was later accused by the child's parents of drowning the child.[11] The impact that these events may or may not have had on the Student's behavior at school was an unknown. It was also unknown from the testimony as to whether or not the HSS District's personnel were aware of these issues in the family and what effect it may or may not have had on the Student's regular classroom behavior. The psychology specialist testified that "we, as a school, didn't have enough experience with him yet to be able to be reliable in reporting" his classroom behavior even though he had been in school for more than six weeks and because "that (six weeks) is what is recommended by the BASC book."[12] She also testified that parents often underestimate as well as overestimate the behavior ratings of their child, which would suggest that such an inventory would be less reliable than one completed by a classroom teacher, even one with only a few weeks of observation.[13] The regulations of the Department at the time the Student entered the district stipulated that in order to rule in or out a specific learning disability, one of the required components included observing the child in their learning environment (including a regular classroom setting) and to document the child's academic performance and behavior in the areas of suspected difficulty.[14] This requirement was established as one method of determining if a child's failure to perform academically was not

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[11] Parent Binder, Page 578

[12] Transcript, Vol I, Page 136-137

[13] Ibid, Page 138

[14] Section 6.07.4.1, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2000).

the result of other factors such as an emotional disorder. In order to determine the existence and/or the possible adverse effect of an emotional disturbance on a student's performance the Department's regulations in force at the time of the evaluation, stipulated that a clinical diagnosis must be made by either a licensed psychologist or psychiatrist, with the child's IEP team subsequently making a determination as to any adverse affect such emotional disturbance may have on educational performance.[15]

The question as to whether or not the Student might be eligible for special education services due to a serious emotional disturbance was never considered according to the exhibits and testimony on his entering the HSS District. This is in spite of the facts presented in evidence that he had been receiving individual and family counseling at his previous school; had recently been moved to a different school in a different state; had experienced the deaths of two close relatives in the past two years; had observed and been accused by the parents in the drowning of a two-year-old child; and would be experiencing the normal difficulty of adapting to development of new friends and teachers. Additionally, both parents are physically disabled and unemployed, with the Student's mother being legally blind, and with both parents having limited intellectual and scholastic abilities.[16] No evidence or testimony was presented to contradict that this information was or was not known to HSS District personnel, but nonetheless there was no evidence that these factors were taken into consideration in determining and developing this Student's educational needs on entering the HSS District in August 2006. The Student's behavior problems which became apparent shortly after entering the HSS District were apparently of severe enough consequence to warrant a referral for school-based counseling. The earliest data entered into

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[15] Ibid, Section 6.08

[16] Transcript, Vol II, Page 10-11 and Vol III, Page 244-245

evidence regarding his emotional issues was in May 2007 by his school-based counselor who noted that the problems she addressed included academic/school issues, anger, anxiety/insecurity/fear, communication skills, decision-making problems, family conflict/instability, legal issues, mood instability, oppositional behaviors, and social/interpersonal skills. [17] The diagnosis given to the Student in May 2007, and for which the counselor provided services, was oppositional defiant disorder.[18] Her risk assessment at the time included a history of physical aggression/destructiveness in that he had been suspended from school for fighting and a history of impulsivity/severe impairment and that he had a history of behavioral problems in school. His emotional problems were apparently severe enough to warrant his continuing to receive counseling services throughout the summer months following his first year in the HSS District.[19]

In conducting her initial evaluation in September 2006 the examiner testified, and as noted above, that his classroom teachers did not have ample opportunity to provide meaningful information with regard to classroom behaviors that might adversely affect his education. However, the information provided by the previous school revealed that he had "difficulty sitting for a length of time" and that "in the class he is generally on task but his attention wonders in physical education class."[20] A later note by the same individual in his previous school reported that his "attendance much improved since starting on asthma meds."[21] Thus the records from the previous school, as scarce as they were, along with information from the Parents, suggested the possibility of other

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[17] Parent Binder, Tab 4, Page 578-581

[18] Ibid, Tab 4, Page 211and Page 594-596

[19] Ibid, Tab 4, Page 564-577

[20] HSS District Binder, Tab 13, Page 140

[21] Ibid, Page 153

health and behavior issues which might have an adverse affect on his educational performance. Other health impaired was never considered by the HSS District in making a determination of eligibility for special education services. The same prior school records also revealed that in his 2004-05 school year under special education services he received final semester letter grades for subjects ranging from "A's" to "C's" and that for the 2005-06 school year under special education services he received final semester letter grades for subjects ranging from "A's" to "F's" with the only "F" being in physical education.[22]

During this his first year in the HSS District the Student received four disciplinary referrals for talking back, being disrespectful to teachers, fighting with other students, use of profanity and failing to report for after school detention. He was also issued a citation by the local police department for disorderly conduct, with he and his parents being ordered to appear in the local juvenile court.[23] By the end of the school year he had received two failing grades, three "D's" and two "A's" (physical education and health).[24] None of these acting out or defiant behaviors, nor the fact that he was receiving counseling, nor the fact that he was failing in his grades triggered a referral for possible assessment as to the Student's emotional disturbance as potentially having an adverse affect on his educational progress. What was offered by the HSS District's IEP team was after-school tutoring and an opportunity to participate in a program referred to as "gear up" a program offered to all students.[25]

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[22] Ibid, Tab 12, Page 129 and Tab 14, Page 176

[23] The Student's father testified that they appeared in court on July 15, 2007 and pled guilty for which the Student was sentenced to twenty-four hours of community service. (District Binder, Tab 7, Page 118)

[24] Parent Binder, Tab 3, Page 75-78; Page 110-111

[25] Ibid, Tap 1, Page 2

Thus the evidence presented would indicate that although required to provide a comparable IEP the HSS District implemented a temporary IEP on the Student's entry into the district that did not meet the special education needs of the Student as was determined needed by the previous school district. Further the evidence presented and the testimony elicited suggested that the subsequent evaluation to determine eligibility for special education services was less than adequate. How, and in what manner, the IEP committee's conclusions impacted subsequent decisions by both HSS District personnel to not proceed during the year with referrals and for additional evaluations concerning the Student's emotional state and behavioral issues, and their impact on his education, and the Parent's subsequent attempts to obtain educational services for the Student, is the focus of the findings of facts which follow.

School Year 2007-08

Although the IEP team for school year 2006-07 decided the Student did not qualify for special education services the record reflects that they provided the Parents with information for him to receive tutoring as well as assistance with a referral for counseling. The record also indicates that his classroom teachers would be provided with the recommended accommodations, none of which were presented as evidence.[26]

On entering his freshman year in of high school the now [redacted] continued to not be considered eligible for special education services according to the HSS District. As noted above he continued to receive psychological and counseling services during the summer months by Community Counseling Services (CCS), a non-profit agency which also employed the counselor for his school-based therapy.

His therapist continued to provide school-based services on his entering high school. Her

[26] Parent Binder, Page 15

first individual therapy note provided as evidence is dated August 27, 2007. Her note recorded their dealing with his anger and family instability. On September 14, 2007 she recorded a session with the Student's mother concerning his having gotten into trouble at school for threatening another student. On September 17, 2007 she confronted the Student with how he received in-school suspension for threatening another student. On October 10, 2007 she addressed his academic difficulties. Her note indicated that she met with his algebra teacher on the same day to see if tutoring could be provided for him. On October 22, 2007 she met with a local policeman about an incident involving the Student and is father at a football game, at which his father was ejected from the school grounds for not removing a "hoody" and how he had attempted to defend his father by cursing one of his teachers. She met with the Student's mother the same day who was reportedly upset and stated that she did not think the school had her children's best interest in mind and that they were not treating her family right. On October 24, 2007 the therapist addressed the Student's anger, oppositional behavior, family conflict and academics and again on November 28, 2007 addressed the same issues.[27]

Following one of the disciplinary incidents in November 2007 the Student's father testified that he and his wife were called to the school to talk with one of the high school coaches and the assistant principal. It was at this time that, contrary to what the HSS District personnel testified to, that it was suggested to the Parents that the Student transfer to the CCS Excel program. The reason according to the Student's father was "because it would be a smaller environment for him and that he would get the help that he needed."[28] He further testified that it was the assistant principal who

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[27] Parent Binder, Tab 4, Page 546-563

[28] Transcript, Vol II, Page 64

called the CCS Excel program and asked how they might transfer the Student to their program.[29] Two of the Student's siblings had been transferred earlier to the CCS Excel program which made it an easier decision for the Parents to agree to at that point in time.[30] The Student's father further testified that no one in the HSS District told them that the CCS Excel program was not an accredited program and that the Student would not be receiving credits towards graduating from high school.[31] The fact that his siblings were in the CCS Excel program and the fact that they were told the Student would be receiving his education in a smaller environment was apparently enough to convince the Parents that the placement would be best for the Student.[32]

In order for a parent to enroll a student into the privately operated CCS Excel program it was required that they withdraw the child from the public school system and designate to the public agency that they were going to home school the child, even though no actual home schooling was to take place. The CCS Director testified that he does not consider the CCS Excel program to be a "home school" even though students who attend their program must inform their respective public school district's that they intend to "home school" their child in order for them to enroll in the CCS Excel program.[33] He stated he did not consider the CCS Excel program a private school or a home-school, but a therapeutic program for at-risk children, contrary to what is advertised to potential students and their parents. A receipt of home school notification along with the notice of intent to home school the Student was received by the HSS District on January 14, 2008, with the notice

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[29] Ibid, Page 65-66

[30] Ibid, Page 68

[31] Ibid, Page 70-71

[32] Ibid, Page 82-83

[33] Transcript, Vol III, Page 169-170

stating that the Student would be starting the CCS Excel program on January 28, 2008. Even a cursive review of the notice to home school reveals that it was not completed by either parent with the exception of the name of the parent on the form and the indication of the highest level of school obtained by the Parent (high school).[34] The curriculum listed on the form that the Student would be following states that it is the "Excel curriculum (which) reflects the AR Frameworks guidelines and includes the following subjects: English, writing skills, reading, social studies, math, science, P.E. and life skills (with) all information (being) presented at the Student's academic functioning level."[35]

The evidence and testimony would suggest that the HSS District allowed and possibly assisted the Parents in making decisions regarding the appropriateness of his being educated by an agency not approved by the Department. To allow a parent of a troubled or difficult student to accept the misleading representation of the CCS Excel program, as was found to be without authorization as an approved program of instruction by the Department, and especially to the Parents of this Student who exhibited limited intellectual skills themselves, is beyond belief and totally unconscionable. Whether this action was deliberate on the part of the HSS District personnel or whether it was manipulative on the part of the CCS Excel program counselor/employee is beyond the scope of this hearing. However, the HSS District was, at the time the Parents made the choice to withdraw the Student from public education to be "home-schooled" at the Excel program, responsible to both the Student and the Parents to inform them in a manner they could understand of the potential consequences of their choice.

The HSS District had a similar alternative learning environment offered to students who

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[34] Parent Binder, Tab 4, Page 161

[35] Ibid, Page 160

need a therapeutic environment the same as what is advertised by the private CCS Excel program. Their program, however, unlike the CCS Excel program does provide credits for high school students towards their graduation. The HSS District also has smaller classes in terms of the number of students in a given class for special education students in their high school; however, in this case they considered the Student as not being eligible for special education services. Such a setting could have been provided on his entry the previous year in the HSS District when he was deemed eligible, but his temporary IEP placed him in a regular classroom setting. Consequently, there was no way to know at this point in time (school year 2007-08) if the Student could have adapted to the smaller class size as was now being proposed by HSS District personnel. The Student's school-based counselor testified that she informed the Parents that the Student would not be receiving credits, but when he was transferred to the CCS Excel school he was assigned to a different counselor.

As noted earlier the Student was receiving school-based counseling during the fall of school year 2007-08. He was also given a psychiatric evaluation in October 2007 by a psychiatrist at the CCS Excel program where he was yet to be attending. The reason given by his counselor was that all of the students she sees in the HSS District' school-based counseling program must be evaluated by a psychiatrist in order for the counseling services to be reimbursed by Medicaid. [36] The psychiatrist's note indicated that the Student met the criteria for being seriously emotionally disturbed (SED).[37] It would make economic sense for Community Counseling to keep the Student in their Excel program once the Parents withdrew him from the HSS District, because to have transferred him to the HSS District's alternative learning program the private program would no longer have him as a patient since the HSS District ALE was supported by another mental health

[36] Transcript, Vol III, Page 69

[37] Parent Binder, Tab 4, Page 213

agency. Additionally, the Community Counseling program was advertised as a therapeutic ALE that followed the Department's requirements for alternative learning environments. They also advertised their program as being qualified to provide special education under the IDEA as well as for Act 504 students.[38] Although all of the HSS District personnel testified that they knew or had knowledge that the CCS Excel program was not an accredited school, none of them testified as to their awareness of how the program was being advertised. Nonetheless, to these Parents, and to any parent being unhappy with a public school environment, such offerings would be an attractive alternative.

The Student's school-based counselor testified that she would have informed the Parents as to the procedures for entering the Student into the CCS Excel program, but in this particular case she testified that she did not assist them in completing the necessary paperwork to withdraw him from the HSS District. It was her understanding that it would have been someone in the HSS District's administration who would have provided the assistance.[39] The only drop notice contained in the record is dated January 15, 2008, which states that the reason for withdrawing the Student from the HSS District was because he was being transferred to Excel. The form being signed by the HSS District's high school librarian, the counselor, the registrar and the assistant principal.[40]

The Student was administered testing for evaluating the possibility of having an attention deficit disorder by a counselor at CCS Excel on December 4, 2007, prior to his being dropped from the HSS District in January 2008. The results of the test were signed as being reviewed by the Student's psychiatrist with those results indicating the Student to be in the extremely impaired range

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[38] Parent Binder, Tab 7, Page 841a-841j

[39] Transcript, Vol III, Page 96-98

[40] Parent Binder, Tab 7, Page 829

on response control, both visual and auditory; as well as extremely impaired in both auditory and visual attention; and extremely impaired on the combined sustained attention scale.[41] On that same date the Parents completed a Behavior Assessment System for Children, Second Edition. Those results were also reviewed by the Student's psychiatrist with scores that suggested the Student was in the at-risk range in adaptive skills. According to the test results the Student demonstrated that it takes him longer to recover from difficult situations; that he possesses sufficient social skills; that he will at times have difficulty performing simple daily tasks in a safe and efficient manner; that he has difficulty making decisions, lacks creativity, and/or has trouble getting others to work together effectively; and that he has significant difficulty seeking out and finding information on his own. The report indicated that the Student has difficulty maintaining self-control when faced with adversity; but that he has social and communication skills that are typical of others his age; that he is able to control his reactions to environmental changes about as well as others his age; that he is able to control and maintain his behavior and mood as capably as others his age; that he reacts to changes in everyday activities or routines in a manner that is typical of others his age; but that he has difficulty overcoming stress and adversity. [42] Even a cursive review of these results would suggest a need for an additional evaluation for both a possible attention deficit disorder as well as emotional stability; however, there is no record that the information was ever provided to the HSS District or used in any manner to provide an educational environment in which the information was taken into consideration. Unfortunately, the counselor who conducted the testing was not qualified to evaluate for disabilities which might qualify the Student for special education services. Nor was the evaluation he conducted in compliance with the standards established by the Department;

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[41] Parent Binder, Tab 4, Page 45-52

[42] Ibid, Page 53-68

however, the data could have been used by the HSS District as part of a more complete battery to evaluate the Student, had they so elected and had the information been provided to the HSS District.

The Student was withdrawn from the HSS District by his Parents in January 2008 with semester grades consisting of four "F's", two "D's" and one "C."[43] In March 2008 at the CCS Excel program his grades were recorded as two "F's", one "C", one "A", and one incomplete because he had not turned in enough work to earn a grade.[44] By the end of the school year (2007-08) his grades recorded at CCS Excel were three "A's", one "B" and one "D." Even though it appears that he was successful in completing course work in language arts, reading, math, social studies, and science, none of the grades provided him any credits towards graduating with a diploma. Whether or not his academic success as indicated by these grades were the result of the CCS Excel program providing him with more individual support in both class work as well as therapy is an unknown. Could he have made the same progress in a small class setting such as a resource room or self-contained classroom in the HSS District is also an unknown because according to the HSS District he did not qualify for special education services for any disability for which they previously assessed. The possibility of having made a referral for psychological testing to include the possibility of a behavioral disorder such as oppositional defiant disorder as well as ADHD, as did the CCS Excel personnel, could have led to the HSS District to provide the same therapeutic services as well as qualifying the Student for special education services under other health impaired.

The psychiatric evaluation conducted in March 2008 reflects [redacted] In May 2008, at the end of the school year he maintained the same diagnoses and was being [redacted]

[43] Parent Binder, Tab 3, Page 84

[44] Ibid, Page 83

[redacted][45] The records provided from CCS Excel also reflected that the Student continued to receive both individual and group therapy during the summer between the 2007-08 and the 2008-09 school year.[46] It was noted in the CCS Excel therapy notes that he "experienced problems after the Adderall XR wears off around 3pm (and that) at that point, he becomes easily agitated and also tends to feel tired (but that) he has not been having any problems while at school (however, the) family has to leave him alone after the meds wear off so he won't start screaming at them, etc."[47] His medication for the ADHD was changed from Adderall XR to Datrana.[48]

School Year 2008- 2009

Documents completed by CCS Excel (now called Turning Points) on August 22, 2008, reflected a receipt of a home school notification from the HSS District signed by the Student's father on the same date.[49] By so doing the Parents were acknowledging that they had received and read the CCS Turning Points Program Policy and Procedures. Those policy and procedures included the same claims when their program was called Excel, stating that their educational program followed the standards established by the Department for alternative learning environments and that their teachers were certified, with at least one being certified in special education. Additionally, it stated that students 15 years or older "may elect to pursue General Education Development (GED) course work."[50] No where in the document does it state that their program is

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[45] Ibid, Page 247

[46] Ibid, Pages 448-481

[47] Ibid, Page 242

[48] Ibid, Page 240

[49] Parent Binder, Tab 4, Page 124-125

[50] Ibid, Tab 7, Page 835

not accredited by the Department to offer credits towards graduating from high school with a diploma, even this was well known to their employees as well as the HSS District. As to when the Parents became aware of this was absent from the testimony elicited in the course of the hearing. The Student's mother was never asked about when she became aware of her child not being able to receive credits towards graduation and his father testified as noted above that they were not told anything by either the HSS District personnel nor the CSS Excel or Turning Points program personnel, including, but contrary to testimony, the Student's school-based counselor.

On August 25, 2008 the Parents notified the HSS District that they intended to continue to "home school" the Student, even though the plan was for him to continue to receive educational services at the CSS Turning Points program rather than actually being home-schooled by either parent.[51] According to the testimony the Parents continued to state that they did not know that the Student, nor his siblings would not be receiving credits in order to receive a high school diploma. Nothing in the records except for the therapy notes and evaluations conducted by CCS Turning Points stated such, but only noted that the Student was enrolled in their GED program.[52] In July 2008 the Turning Points psychiatrist completed the Student's treatment plan and the certification of his being seriously emotionally disturbed (SED). In December 2008 this assessment was repeated, but now the [redacted] was added, along with a prescription for Prozac. In March 2009 the Turning Points psychiatrist added Trazodone to the Student's medications regimen while at the same time noting that he was "making progress" on all of his

[51] Parent Binder, Tab 7, Page 826

[52] Ibid, Tab 4, page 214

treatment goals.[53] This assessment was in contrast to three behavioral incident reports recorded by Turning Points therapists between November 2008 and April 2009.[54]

The improvement in grades as noted at the end of school year 2007-08 above were no longer improved for school year 2008-09 at Turning Points. In October he had two "A's", two "B's" and one incomplete because he had not completed enough work to earn a grade.[55] By January 2009 his grades had slipped to one "A" and one "B" with three incomplete.[56] By March 2009 his grades had declined to three "C's" and two incomplete.[57]

In October 2008 the Student was suspended from the Turning Points program for behavior that, according to the staff, endangered the safety of other children.[58] The psychiatrist at Turning Points completed a discharge summary and an aftercare plan in April 2009 stating his diagnoses as noted above, as well as indicating that the Student had made only minimal progress towards his treatment goals during the past year.[59] A second discharge summary was developed the following November with the reason for the discharge stated as the Student and "his family (having) not been compliant with treatment and (having) pulled out of the program."[60]

The only conclusion that can be reached from the evidence presented is that the Student

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[53] Ibid, Page 162-163 and 219-220

[54] Ibid, Page 120-122

[55] Ibid, Tab 3, Page 106

[56] Ibid, Page 105

[57] Ibid, Page 104

[58] Ibid, Page 119

[59] Ibid, Tab 4, Page 264

[60] Ibid, page 266

failed to improve in the educational and therapeutic environment as provided by CSS Turning Points for school year 2008-09. Whether or not the same trend would have occurred had he been in the HSS District's therapeutic alternative learning environment remains an unknown given that the Parents elected to continue with the CSS program.

School Year 2009-2010

The Parents had changed their residence from the HSS District to the FLS District in the middle of the 2008-09 school year; however, the Student continued to receive his education at the CSS Turning Points as noted above. In July 2009, however, the Parents elected to enroll the Student in the FLS District. One sibling of the Student had already been attending the FLS District and was apparently functioning well as a regular education student. The FLS District LEA Supervisor testified that she received a telephone call from the Parents in July 2009 stating that their children were now living in the FLS District and that the Student had been enrolled in the CCS Excel (now Turning Points) program. Why the Parents contacted the special education supervisor for the FLS District was because they believed that the Student needed special education services for his learning problems. She testified that she was aware that students who attended the programs offered by CCS were students with mental health issues. She further testified that she advised the Parents on how to enroll the Student into the FLS District as well as informed them of the FLS District therapeutic alternative learning center (also operated by CCS and also called Excel), but one which is accredited and does offer credit recovery opportunities for students who need to obtain credits to graduate in addition to a GED preparation program.[61] Her testimony agreed with that of the Parents in that it was agreed that the FLS District's ALE (Excel) would most likely be the best

[61] Transcript, Vol V, Page 73-84

option for the Student rather than a regular classroom. Why this decision was made by the FLS District without first obtaining the previous district's (HSS District) special education information since the Parents were concerned about a learning problem, and without determining if there was a need for a possible referral conference once the Student was officially enrolled, was never testified to as being necessary by any of the FLS District personnel, nor the special education teacher assigned to the FLS District's ALE. The FLS District LEA testified that she did make attempts to obtain the special education documents from the HSS District as well as records from the CCS Turning Points program. The LEA Supervisor was informed by the Parents that the Student was evaluated by HSS District and that he did not qualify for special education services. She further testified that she received the record of the Student's evaluation conducted in September 2006, but not until August 4, 2009. She stated that she tried several times by telephone to obtain the records from the CCS Turning Points program, but her telephone calls were never returned. She notified the educational director of their ALE (Excel) program to inform her of the Parent's registering the Student in the FLS District and their interest in the ALE program. She was aware that the HSS District's evaluation data was coming up on being three years old and she knew the Student had previously been identified with a disability which qualified him to receive special education and she acknowledged that the Parents were now approaching her with their concerns about his having learning problems. Even with this information she did not consider arranging a referral conference once he was enrolled in the FLS District. She testified that:

> "basically, we were trying to do, at that time, that period of time in the first weeks of August, to get (him) in school. You know, when you do a referral, you've got to have a whole staff of people, you've got to have Regular Ed, you've got to have

> every body at the school building. I'm not saying it's not impossible, but it's very difficult. So, normally, we wait until the children are at school and the parent fills out a referral and we go from there, so that we can have meetings with all the parties that need to be there."[62]

She further testified that she was not able to complete any needed referral because the Parents withdrew the Student from their school "before we could get to that process."[63]

Once enrolled in the FLS District, an appointment was arranged for the Student to be referred to the FLS District's ALE Program (Excel) by the high school principal, even though he testified that he did not complete the referral form.[64] He testified that he was aware only that the Parents were not happy with how the Student had been treated at the HSS District and that the Student was in danger of not graduating because he was behind. He stated that a referral to their ALE for credit recovery appeared to be the best alternative because he "didn't know where (he) was in terms of credits."[65] He stated that he defers to the ALE administrator, who is also a special education teacher in the program, to determine what the educational needs are for the students in the ALE program.

The ALE administrator was not present when the Student and his Parents were brought to the ALE campus. She and the only other teacher in the program were out of the state at the time. The intake was conducted on August 18, 2009, not by educators, but by CCS personnel, a social

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[62] Transcript, Vol V, Page 105

[63] Ibid, Page 107

[64] Parent Binder, Tab 8, Page 842 and Transcript, Vol V, Page 10

[65] Transcript, Vol V, Page 13

worker and a licensed associate counselor. They apparently had access to the previous CCS program records in that their progress notes reflected diagnoses of [redacted][66] They also noted in their intake assessment that the referral agency contact was the ALE educational administrator and that the reason for the referral to the ALE was because the Student had "poor academic performance/should be in the 11th grade but classified in the 9th, fighting with peers, oppositional (behavior) towards adults, ADHD symptoms...theft, physical and verbal aggression towards adults/peers, depressed mood/lack of motivation, ..family dysfunction."[67] The ALE educational administrator; however, testified that she was not present, nor was she aware of any of the reasons for the referral and that she was not present for the Student's intake conference and was not aware of the referral until after he was admitted to the program. The actual referral submitted to the ALE by the FLS District high school principal had no markings as to the reasons for the referral; however, the items checked later included disruptive behavior, drop out from school, recurring absenteeism, personal or family problem or situations, transition to or from residential programs, frequent relocation of residency, and mental/physical health problems."[68] None of this information was apparently reviewed by the FLS District personnel assigned to the ALE prior to the Parents withdrawing the Student from the FLS District to be home-schooled.

The ALE educational coordinator testified that she was not present for the Student's intake evaluation for educational purposes, and even if present did not participate in any of the "mental health intake process" even though she also testified that she, the other teacher, and the mental

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[66] Parent Binder, Tab 4, Page 283

[67] Parent Binder, Vol 4, Page 197

[68] Ibid, Tab 8, Page 842-843

health staff worked as a team.[69] She further testified that the only time the mental health staff shared mental health issues, such as a diagnosis, with her was when "it was affecting what was going on with (him) in the classroom."[70] Additionally, according to her testimony, she was not aware that the previous educational program that the Student attended was the CCS Turning Points (previously Excel), operated by the same agency from which her mental health team is employed. Nor was she aware that CCS had diagnosed the Student [redacted] At the same time she testified that if such were true "that's something I would need to know, because I would see – that would be a direct carry-over, could be, into behaviors in the classroom."[71]

Rather than obtaining information as to the Student's previous educational testing she testified that, as with all students entering the ALE program, she administered a Test of Adult Basic Education (TABE) to determine his level of academic achievement; however, the test data was not entered as part of the due process record by the FLS District, nor was a copy provided to the Parents. She testified that she administers the TABE to all students regardless if they are special education students or not because it helps her determine, based on grade equivalents, the type of curriculum that she needs to use with a student.

The ALE program started the last week of August 2009 and the ALE educational administrator made a note on his referral form to her program that he was dropped from FLS District on September 21, 2009 to be home-schooled by his Parents. In those nineteen days of school she stated that she did not see any evidence of [redacted], nor evidence that

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[69] Transcript, Vol V., Page 146

[70] Ibid, Page 147

[71] Ibid

he was [redacted] She stated that she "saw a very diligent young man who worked very hard, he stayed on task, he was very conscientious about his work, he was very committed to his work...he asked me questions of things that he did not understand, he asked for help..I never saw him daydreaming."[72] The only problem she observed was " when [redacted] (who was also in the ALE and at times in the same classroom) wanted him to solve her problems."[73] With the exception of the later observation with solving [redacted] problems, there would appear to be a large discrepancy between what she observed in nineteen days and what was recorded by the HSS District and the previous ALE educators, as well as his therapists over the past two years. She was also not aware that the therapists who conducted the intake for her in August 2009 indicated that he needed special education for a learning disability in reading/English.[74] The reliability of this information is highly questionable given that neither of the mental health staff were educators and that the only other source of information about special education, other than their own company's records, would have come from either the Parents or the Student. Needless to say the intake assessment for a need to be educated in the FLS District's ALE was less than adequate to make an appropriate judgement of educational services that the Student would need in order to succeed.

In spite of the fact that the Student's mother testified that she and her husband both had learning difficulties and could not provide the Student with the necessary educational instruction, they elected to withdraw the Student from the FLS District's ALE program and to educate him themselves in their home. Between the time the Parents contacted the FLS District in July 2009

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[72] Transcript, Vol V, Page 176

[73] Ibid, Page 177

[74] Parent Binder, Tab 4, Page 198

and when the Parents decided to withdraw him from the public agency to be home-schooled the FLS District did have the opportunity to obtain all of the Student's educational and therapy records, to conduct a referral conference at the Parent's request, and develop a temporary IEP in order to allow them time to further investigate the Parent's concerns about the Student.

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.[75] 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.[76]

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities in it's regulations at Section 5.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

In 1982, the Supreme Court was asked and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." The Supreme Court noted that the following twofold analysis must be made by a court or hearing officer:

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[75] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[76] 20 U.S.C. § 1401(3)(A)

(1). Whether the State (or local educational agency) has complied with the procedures set forth in the Act (IDEA)? and

(2). Whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the student to receive educational benefits?[77]

The courts consistently agree that FAPE must be based on the child's unique needs and not on the child's disability.[78] Thus the charge to education professionals is to concentrate on the unique needs of the child rather than a specific disability. It is necessary, therefore to look at the facts in this case as to whether or not the HSS District and the FLS District concentrated on the unique needs of the Student and not specifically at his disabilities as identified by his Parents, his counselors, his case managers, his physicians, or other healthcare professionals.

In more specifically defining what is meant by FAPE the Supreme Court, in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

(1). They are provided at public expense and under public supervision and without charge;

(2). They meet the State's educational standards;

(3). They approximate the grade levels used in the State's regular education; and

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

[78] 34 C.F.R. § 300.300(a)(3)

(4). They comport with the student's IEP.[79]

The definition of children covered under IDEA is doubly circular. A child with disabilities must be so disabled as to require special education and related services. Special education and related services as noted above are those that meet **the unique needs of a child** with disabilities. Moreover, related services are those that **assist a child to benefit from special education**, which can only be received by a child with disabilities.[80] Such related services might include speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services may also include school health services and school nurse services, social work services in schools, and parent counseling and training.[81]

As noted above FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, **which meet the standards set forth by the Department**. Consequently, a hearing officer must look at the issue to determine whether or not a district has been compliant with that definition and whether or not any single violation or the accumulation of violations are severe enough to constitute a denial of FAPE. The educational document that must contain how a district will be in compliance with those standards and the document that defines what specifically designed instructions are to be implemented to meet the unique needs of a student is the Individual Education Plan (IEP). The

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

[80] 20 U.S.C. § 1400©

[81] 34 C.F.R. § 300.34(a)

Supreme Court as noted in the Rowley case opined that an IEP must be considered appropriate if it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[82] In an administrative due process hearing, the petitioner has the burden of proving the essential elements of its claim.[83] The Parents in the instant case bore such burden.

The first issue of compliance for the HSS District is whether or not they met the Department's standards with regard to providing FAPE for the Student when he entered their district for school year 2006-07.[84] The Department in adopting the IDEA standards has outlined the responsibilities for a district to follow when a special education student enters their district with an IEP from another district or state. That standard reads that:

> "if a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE **(including services comparable to those described in the child's IEP from the previous public agency**, until the new public agency) -
>
> A. Conducts an evaluation pursuant to 34 CFR 300-304 through 300-306 (if determined to be necessary by the new public agency); and -
>
> B. Develops, adopts, and implements a new IEP, if appropriate, that meets the

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

[83] *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed 2d 387]

[84] The reader is referred to the argument by the HSS District and the Hearing Officer's response to the challenge and motion to dismiss that the 2006-07 school year went beyond the statute of limitations for redress.

applicable requirements in 34 CFR 300-320 through 300-324."[85]

Although a copy of the Student's IEP developed by his previous school is missing from the record, the evidence and testimony presented in the course of the hearing reflects that the HSS District failed to follow the standards of the Department by not implementing and providing the Student with a comparable IEP. His previous school was providing him with specialized instruction for his learning disabilities in a resource room setting and speech therapy services as an indirect service. The temporary IEP developed by the HSS District addressed the speech disability by providing for two 30-minute sessions of speech therapy per week, but the only attention given to the Student's specific learning disability was that it would be addressed indirectly from his placement in a regular classroom, without resource room involvement. For this to be a comparable IEP to that which was developed for him by his previous school is impossible to say without the document itself; however, based on the evidence available it does not appear that he would be receiving equivalent services for a specific learning disability. The temporary IEP did not address any health or behavior issues brought to their attention by the Parents, which may or may not have been a part of the previous IEP.

From the testimony elicited in the course of the hearing in general it became clear that neither the HSS District personnel, nor subsequently the FLS District personnel, had a good handle on the specific and unique educational needs of the Student. The issues he presented to both school districts was obviously clouded by the perceptions and difficulties presented to them by the Parents who were quite concerned with how the Student was being treated by all individuals involved in

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[85] *Special Education and Related Services: Procedural Requirements and Program Standards,* Arkansas Department of Education, 2008, Section 8.03.4.1

his education and mental health therapies. The HSS District did evaluate and consider his previous school's assessment of the possibility of there existing a specific learning disability; however, they did not consider the possibility of an attention deficit disorder, a serious emotional disorder or other behavior disorders.

The HSS District, and subsequently the FLS District, relied only on the behavioral assessments and opinions provided by the Parents. They elected to base their decisions on this limited information rather than formerly and judicially making their own assessment by their own professionals to determine the possible existence of any other disability category which might help explain the Student's difficulties that he had been experiencing in their education environment.

Although the school year 2006-07 may have been outside the statute of limitations for which the Parents could seek redress, the decisions reached by the HSS District, and subsequently by the FLS District, made at that time led to the decisions by both the districts and the Parents with regard to options for educating the Student.

The subsequent evaluation conducted by the HSS District did not show that the Student was eligible under the Department's standards for students to receive special education in that the data did not support the existence of a specific learning disability for which he had qualified in the previous school district. Since the Student was not adapting well to the regular classroom setting he was referred to a non-accredited school operated by an organization who advertised themselves as being a non-traditional school for students who had difficulty adapting to a regular school environment. At the same time the HSS District had available for the Student their own ALE which was accredited and offered the same therapeutic environment. This program would have allowed him access to more one-on-one instruction as well as counseling for him and his Parents. The HSS

District did not elect to transfer him to that particular program because the Parents were interested in him going to the same program where his siblings were attending, the non-accredited program. Why this was allowed to occur by the HSS District without adequate counsel to the Parents and the Student as to the consequences of such a transfer is unknown.

By assisting and possibly encouraging such a transfer was not in an of itself a violation of FAPE according to the federal and state guidelines; however, the failure to make sure the Parents and the Student were fully informed about the potential consequences of their choice appears in the record and testimony as a failure in ethics for which there is no redress under the IDEA.

Subsequent testing by the private organization to which the Student was transferred for educational and psychological services indicated the possibility of the existence of not only a serious emotional disorder, but also with a diagnosis of an attention deficit disorder, and later a DSM-IV diagnosis of a major depressive disorder.

The Office of Special Education has responded to numerous inquiries regarding the use of the DSM-IV as a means of addressing eligibility for services under IDEA. Their response has been consistent in that a diagnosis under DSM-IV, as provided in this case by the physician of the private agency to which the Student was assigned for home-schooling, does not guarantee eligibility under the IDEA.[86] These diagnoses were not available at the time the Student entered the HSS District; but were available when the Student entered the FLS District.

The HSS District's decision to not fully inform the Student and Parents of the consequences of removing the Student from their district, and for him to be "home-schooled" by a private agency, was not in and of itself a violation of IDEA. However, the failure to implement the existing IEP

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[86] *Letter to Coe*, Office of Special Education Programs, 32 IDELR 204, September 13, 1999

and to provide a comprehensive evaluation to include formal classroom assessments of the Student''s behavior and to assess for the possibility of either an attention deficit disorder or a serious emotional disorder, was a failure to provide FAPE, not only for the school year in which he entered the HSS District, but subsequent years.

The Rowley case, as noted above, addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. In that case the Court determined that a student's IEP be reasonably calculated to provide him or her with **some** educational benefit; however, the Court also stated that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities.[87] The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to **specialized instructional** and **related services** which are individually designed to provide educational benefit to the student.[88] The evidence presented in this case adequately demonstrated that the Student was denied both specialized instruction for the disabilities for which he entered the HSS District; however, with the exception of his behavioral difficulties he advanced relatively well academically, especially in the smaller class setting offered by the private agency, until here again the behavior issues became more intense.

The Supreme Court in the Rowley case recognized the importance of adherence to the

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[87] *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 200, 102 S.C. 3034 (1982), at 198 - 200.

[88] Ibid at 201.

procedural requirements of the IDEA.[89] The analysis of whether a student has been provided a FAPE, as noted above, is twofold. In this case it must be decided as to whether the procedural safeguards of the IDEA have been satisfied and whether the FAPE offered was substantively appropriate. According to the evidence presented and the testimony given the Student possibly had a need for not only specialized instruction, but for he and his parents to have psychological services in order for him to receive a basic floor of opportunity to succeed.

Contrary to the assessment results and opinions of the HSS District, the evidence presented regarding his educational needs for his middle school and subsequent high school years were not adequately evaluated and thus inconsistent with the development of an appropriate IEP. Therefore, the evidence shows that not only was a there a denial of FAPE by the HSS District for the year he became their educational responsibility, but the two subsequent years he lived within the district.

For the FLS District to have accepted only the evaluation provided them by the HSS District in deciding, without interview or further assessment by education professionals, prior to the Student being transferred to their ALE is also a reflection of dereliction of responsibility in not considering the unique needs of the Student in determining the best course of action to take with regard to providing him an appropriate educational opportunity, thus a denial of FAPE according to the IDEA.

Order

The Parents have introduced sufficient evidence in the record to reflect that the decisions made by both the HSS District and the FLS District on being approached with the challenge to meet the educational needs of the Student contributed to the production of there being an adverse affect

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[89] Ibid at 205

on his educational progress. Those decisions do not appear to have been intentional or malicious, but rather the accumulatively basis of first impression – that being that the Student did not qualify for special education services according to the evaluation conducted by the HSS District in 2006 where they determined that a specific learning disability didn't exist, as well as the difficulties they encountered in dealing with extremely concerned, overly zealous parents with limited skills themselves. The immediate and subsequent failures to address and assess all of the Student's needs on entering the HSS District, and then the FLS District, proved to be decisions which contributed to the Student's failure to receive FAPE. Unfortunately these decision were made not only by the two districts, but also by the private agency involved in this saga, as well the decisions that were made under their guidance by the Parents.

In order to compensate the Student with what has not been provided as an appropriate education it is hereby ordered that:

1. The financial and administrative resources of both the HSS District and the FLS District will be equally utilized to provide the Student with a comprehensive evaluation which will include an assessment of any emotional disorders, attention problems, as well as any learning deficits as defined by the Department which may allow him to benefit from special education services.

2. The comprehensive evaluation as ordered in (1) above will be conducted by examiners that the Parents, in coordination with their council, agree are appropriate to conduct the examinations, which can be those typically contracted with by the districts or independent evaluators.

3. The comprehensive evaluation as ordered in (1) above will be completed no later than July 15, 2010.

4. Upon completion of the evaluation as ordered in (1) above and no later than August 1,

2010 both the HSS District and the FLS District special education coordinators will assemble an appropriate IEP team, to include the examiners contributing to the evaluation, to consider the results of the evaluation and to develop an IEP if indicated by the results of the evaluation.

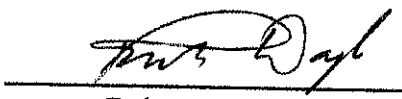
5. Between the date of this order and the completion of item (4) above, the HSS District and the FLS District will jointly provide the Student with opportunities and number of hours as deemed agreeable to by the Parents for compensatory educational opportunities consistent with the known levels of educational functioning. The specific educational opportunities are not being ordered; however, the amount of time to be offered will be no less than six (6) hours per week until item (4) above is completed.

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.

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

May 31, 2010
Date