ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT

[]
AS PARENTS OF
[]

VS. **NO. H-11-12**

GUY-PERKINS SCHOOL DISTRICT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

In the due process complaint initially filed by the Parents, the issues identified were as follows:

Did the District deny the Student a free and appropriate public education (hereinafter referred to as "FAPE") during the 2010-2011 school year according to the Individuals with Disabilities Education Act (hereinafter referred to as "IDEA") by:

(A) failing to hold a Referral/Individualized Education Program (hereinafter referred to as "IEP") Conference upon the Student's enrollment in the District;

(B) failing to place the Student with special education services upon his enrollment in the District;

(C) failing to provide the Student with special education and related services consistent with the special education and related services contained in the Student's Texas IEP from August 19, 2010, and September 17, 2010;

(D) failing to provide any special education and/or related services for the Student between August 19, 2010, and September 17, 2010.

(E) failing to provide appropriate evaluations for the Student to address all the Student's disabilities, specifically the Student's depression, anxiety, and anger; and sensory, adaptive behavior, and pragmatic deficits;

(F) failing to hold an IEP Conference to discuss the need for behavior interventions for the Student when the Student exhibited "meltdowns" and other behaviors that resulted in him being ridiculed and ostracized;

(G) failing to provide special education and related services consistent with the Student's Texas IEP after the Student's placement in special education after September 17, 2010;

(H) failing to provide a continuum of placements for the Student after September 17, 2010;

(I) failing to follow due process procedures by:

* failing to provide the Parents adequate and reasonable Notice of IEP Conference Decisions;

* failing to provide the Parents information on the implementation of goals and objectives on the Student's [IEP] since September 17, 2010;

* failing to implement the goals and objectives and/or provide the Student the same or similar special education and related services as those on the Student's Texas IEP since September 17, 2010.

The Parents also raised issues under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Fourteenth Amendment to the United States Constitution. The hearing officer dismissed these claims as they are not cognizable in a hearing under the IDEA and he does not have jurisdiction.

Procedural History:

On November 12, 2010, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from [] (hereinafter referred to as the "Parents" or as "mother" or "father" singularly when necessary), the Parents and legal guardians of [] (Petitioner) (hereinafter referred to as the "Student"). The Parents requested the hearing because they believe that the Guy-Perkins School District (hereinafter referred to as the "District") failed to comply with the Individuals with Disabilities Education Act (20 U.S.C. Sections 1400-1485, as amended) (IDEA) (also referred to as the "Act" and Public Law 108-446) and the regulations set forth by the Department in providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Parents' request by designating January 4, 2011, 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 November 15, 2010, which included the District convening a resolution session with the Parents on or before November 27, 2010. On November 23, 2010, the District notified the hearing officer that a resolution session was held.

The burden of proof was assigned to the Parents. The hearing began as scheduled on January 4, 2011. Additional sessions were held on January 5, February 1, February 2, March 14, and May 18, 2011; after which time the record was closed and closing statements were waived in lieu of submitting Post Hearing Briefs. The briefs were due within seven (7) days of the receipt of the transcripts from the Court Reporter. The Parties jointly requested a one-month extension of time regarding the briefs on June 6, 2011. The hearing officer granted an extension of time until July 5,

2011. The District submitted its brief on July 5, 2011. The Parents requested an additional two (2) days on July 5, 2011, and said request was granted by the hearing officer. The Parents' brief was submitted on July 7, 2011.

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, Garry J. Corrothers, Hearing Officer for the Arkansas Department of Education, conducted a closed, impartial hearing. The Parents were represented by Theresa Caldwell, Attorney at Law, of Little Rock, Arkansas, and the District was represented by William Clay Brazil, Attorney at Law, of Conway, Arkansas.

At the time of the hearing, the Student was a nine (9) year old third (3rd) grade student at Guy-Perkins Elementary School. He attended the Borger School District in Borger, Texas, during his first and second grade years. He was evaluated by the Borger School District on or about April 5, 2010. That evaluation showed him to have specific learning disabilities in reading, math and written expression. An IEP was developed for the 2010-2011 school year in Texas providing the Student with special education instruction in reading, math and the related services of occupational therapy.

The Student enrolled in the Guy-Perkins School District on August 9, 2010. He was not initially enrolled in special education. The District started providing special education services on or about August 24, 2010.

Findings of Fact:

1. During the 2009-2010 school year, the Student attended the Borger School District in Texas. He was placed in special education by the Borger School District on April 21, 2010, during his second grade year. An IEP was developed to provide service for one year. Specifically, the Borger IEP became effective April 21, 2010, and ran for the remainder of the 2009-2010 school year, and through April 21, 2011, for the 2010-2011 school year (P. Exh. Vol. I, PP. 1-24).

2. The Student was evaluated by the Borger School District on April 5, 2010, which revealed that he had specific learning disabilities in reading, math and written language (T. Vol. I, P. 9).

3. On August 9, 2011, the Parents enrolled the Student as a third grader in the Guy-Perkins School District (P. Exh. Vol. I, PP.182-183).

4. The Parents filled out a social history for the District indicating that the Student had been evaluated for learning problems during April 2010. It was further stated on this document that the Student had not been in remedial or special classes. The form indicated that the Student had been in "Only learning lab" (D. Exh. P.1).

5. There was testimony by one of the Parents (mother) that the father of the Student had hand-carried paperwork from Borger, Texas, which included the Student's IEP, and delivered it to the secretary at Guy-Perkins Elementary School (T. Vol. VI., P.12). This testimony was inconsistent with the aforesaid written record regarding the Student being in "Only learning lab".

6. School started at Guy-Perkins Elementary School on August 19, 2011. On August 20, 2011, the second day of school, the Student's regular classroom teacher noticed that he was not participating in the classroom and had difficulty answering questions and following directions (T. Vol. IV, PP. 131-132). The classroom teacher informed Jenny Bassett, the Special Education

Teacher, of her concerns, and she checked the Student's file. When she did not find anything in his file, she contacted Gateway Elementary (the Student's Borger School District school) to see if there were any records available indicating whether the Student had been receiving any services. She was told that Gateway Elementary did not begin until Monday, August 23, and that she should call back on that day. Ms. Bassett again called Gateway Elementary on August 23 and did not reach anyone. She called the school again on August 24 and reached someone who checked the Student's records and informed her that the Texas school district had determined that the Student had a disability and that an IEP had been developed for him. While Gateway had a policy of not faxing special education documents, Ms. Bassett was told that pursuant to his Texas IEP, the Student had been receiving a 45-minute period of special education in math, a 45-minute period of special education in reading, and 15 minutes of occupational therapy every twentieth instructional day. After verbally relaying the contents of the Student's Texas IEP, the Texas school then agreed to mail the IEP to the District.

7. Based on the confirmation of the services that the Student had been receiving under his Texas IEP, the District began providing the Student with special education and related services in accordance with his Texas IEP. In light of the information that she had received with regard to his IEP, Ms. Bassett began observing the Student to determine what skills he had maintained over the summer and working with him on the skills that his Texas IEP, as relayed to her by the Texas school, indicated were a struggle for him (T. Vol. II, PP. 7, 8, 19, 35-37, 42, 81; D. Exh. Vol. III, P. 41).

8. The District received the written IEP in the mail from the Texas school during the first week of September, and it sent a Notice of Conference to the Parents on September 7 for a conference scheduled September 17. (T. Vol. II, PP. 44, 85; D. Exh. Vol. III, Notice of Conference, P. 118). The Notice of Conference provided the following description of proposed action: "We have

received records from Gateway Elementary Public Schools from Boger [sic], Texas, showing [the Student] has been receiving Special Education services. We need to hold a conference to review the appropriateness of his IEP and least restricted [sic] environment (LRE) and determination of disability and consider if all necessary due process documentation is in place. Also, it is necessary for committee to conduct a reevaluation data review conference as it is necessary to review the information coming from out of state. The team will review existing evaluation data, and determine on the basis of that review, if obtaining additional evaluation data is necessary."

9. In attendance at the conference were one of the Parents (mother); Ramona Perry, the Student's classroom teacher; Lisa Baker, the school principal; and Ms. Bassett (T. Vol. II, P. 37, Vol. V, P. 65; D. Exh. Vol. III, Existing Data Review, Decision Form, and Notice of Decision, P. 122).

10. At the September 17 meeting, the IEP Committee reviewed the Texas IEP, which consisted of placement in special education for reading and math, as well as occupation therapy services. The Committee determined that further data and evaluation was needed in each of the assessment categories before an Arkansas IEP could be developed. One of the Parents (mother) signed her consent to the agreed upon evaluations (T. Vol. II, PP. 100-101; D. Exh. Vol. III, PP. 121-122). Also at the meeting, the mother initialed a document entitled "Information for Parents Regarding Consent", which states that public agencies are required to obtain written informed consent from parents before conducting any initial evaluation or re-evaluation of a child with a disability (D. Exh. Vol. III, PP. 123-125). Finally, the mother signed a document in which she authorized the placement of the Student in special education in the District (D. Exh. Vol. III, P. 126).

11. While data was being gathered and the evaluations being conducted, the District testified that it implemented the Texas IEP. There was further testimony that the services were based on the implementation of the Texas IEP in light of the Arkansas frameworks (T. Vol. II, PP. 113-

228). Beginning in September 2010, the Student was provided occupational therapy services by the District (T. Vol. I, PP. 150-152).

12. With regard to the evaluations, Beth Varvil, a licensed psychological examiner, did a comprehensive evaluation on September 29, 2010. She administered the Reynolds Intellectual Assessment Scale for intellectual assessment, the Woodcock Johnson III and the Kaufman Test of Educational Achievement, Second Edition, for academic achievement testing, and the Bender Visual-Motor Gestalt Test-II and Auditory Discrimination Test for learning processes assessment. Ms. Varvil also did a language screening and adaptive behavior assessment. For the adaptive behavior assessment, Ms. Varvil screened the Student using the Attention Deficit Disorder Evaluation Scale, Behavior Assessment System for Children (BASC-2), and the Adaptive Behavior Evaluation Scale (ABES) to determine whether further testing was necessary. Based on the results of the screening, Ms. Varvil determined that further testing of the Student was necessary. In the summary of her evaluation, Ms. Varvil concluded that the adaptive behavior results "should be discussed by the evaluation committee," and she "recommended that behavior intervention/modification be implemented with at least some of the more severe behavioral concerns." The IEP meeting was never held (T. Vol. I, PP. 212-213, 221-222, 226, 229, D. Exh. Vol. III, PP. 135-146).

13. On October 16, 2010, Melinda Johnson conducted an occupational therapy evaluation. Ms. Johnson recommended that the Student receive occupational therapy two times per week for thirty minute sessions. Ms. Johnson was prepared to present her findings and recommendations at the upcoming IEP meeting; however, she did not have the opportunity to increase the services to the Student because the meeting was never held (T. Vol. I, PP. 161, 176; P. Exh. I, PP. 131-132). On October 13, the Systematic Observation of Student Performance was completed by Ms. Basset (D. Exh. Vol III, P. 134A).

14. On October 21, 2010, Katie Horn, a speech therapist, did the language screening followed by a language evaluation. Based on her testing, Ms. Horn recommended that the Student receive thirty minutes each week of speech therapy; however, the second IEP conference was never held and the requisite parental permission was not obtained (T. Vol. V, PP. 53-54, 70-71; D. Exh. Vol. III, PP. 150-153).

15. On October 19, 2010, a Notice of Conference was sent to the Parents that notified them that the evaluations had been completed and a meeting was scheduled for October 26, 2010. At the meeting, the evaluations were going to be reviewed and the recommendations considered so that a new Arkansas IEP could be developed. The recommended behavior evaluations were also going to be discussed and the requisite parental consent for a behavior evaluation was going to be requested. However, in a written note on the Notice, one of the Parents (mother) responded that she wanted to attend the scheduled meeting, but that she could not because the father was out of town for three (3) weeks and she wanted him there. She did not complete the blanks for rescheduling the meeting on a different date and time. The District sent a second Notice of Conference rescheduled for November 1, 2010, but the mother again could not attend. Because the mother requested on the Notice that she received notice that she receive notice of the rescheduled meeting by telephone, Ms. Bassett contacted the mother by telephone to ask when the father would be returning so that a meeting could be scheduled, and the mother stated that she did not know and would call her back. When she did not call back, Ms. Bassett called again and emphasized that a meeting needed to be scheduled. Because the mother continued to respond that the father made these decisions, Ms. Bassett sent a certified letter to the father with the Notice of Conference. Finally, Ms. Bassett was able to reach the father by telephone on November 8, 2010, and he agreed to attend a November 12, 2010, meeting at 3:00 p.m. Jill La Rosa, the special education supervisor for the District also contacted the father to

verify that he would be attending the meeting and he confirmed that he would be there. The meeting was never held because the Parents filed their due process hearing complaint on November 12, 2010, the day that the meeting was to be held. (D. Exh. Vol. III, Notice of Conference, PP. 132-133, T. Vol. II, PP. 275-276, 280-281, T. Vol. VI, PP. 122, 126, 129-130, & 139).

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 three and twenty-one, 20 U.S.C. Section 1412(a) and 34 C.F.R. Section 300.300(a). The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech and 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. 20 U.S.C. Section 1401(3)(A).

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

The United States Supreme Court provided guidance for determining whether a student has received FAPE in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court's first case involving the IDEA. In *Rowley*, the Court set forth a two-fold inquiry for determining FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" This procedural test was based on Congress's belief that compliance

with the requirements of the Act would probably produce substantive compliance. *Rowley* clearly established that a school district's failure to comply with the Act's procedures constitutes a sufficient basis for determining that a child has been denied a FAPE. Generally, courts only overlook procedural violations when they are technical and no harm has occurred to the student as a result. See, e.g. *Doe v. Alabama Dept. of Educ*., 915 F.2d 651 (11th Cir. 1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

See *M.I. et al. v. Federal Way School District*, No. 02-355547 (2005) (9th Circuit) for a summary of the applicable law regarding the second (substantive) prong of the two-part test. ("The test for determining whether IDEA procedural error affects the substantial rights of the parties has been established by our prior precedent. In *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) ('Target Range'), we stated: 'Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formation process, clearly result in the denial of a FAPE. *Id.*, (internal citations omitted"). (Also see *Adam J. v. Keller Indep. School Dist*., 328 F.3d 804, 812 (5th Cir. 2003) (citing *Target Range . . .*); *Dibuo v. Bd. of Educ*. 309 F.3d 184, 191 (4th Cir. 2002) (rejecting the argument that a procedural IDEA violation should constitute a *per se* denial of a FAPE;) *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4th Cir. 2002) (holding that "[w]hen such a procedural defect exists, we are obliged to assess whether it resulted in the loss of educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of IDEA); *T.S. v. Indep. School Dist*. No. 54, 265 F.3d 1090, 1095 (10th Cir. 2001) ("Procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of educational opportunity."); *Knable v. Bexley City School Dist*., 238 F.3d 755, 765 (6th Cir. 2001) ("[A] procedural violation of the IDEA

is not a *per se* denial of FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents . . .[P]rocedural violations that deprive an eligible student of an [IEP] or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA"); *Weiss v. Sch. Bd. of Hillsborough County*, 141 F.3d 99), 996 (11th Cir. 1998) ("For the [plaintiff family] to prove that [their child] was denied a FAPE, they must show harm to [the child] as a result of the alleged procedural violations. Violation of any of the procedures of the IDEA is not a *per se* violation of the Act"); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997) (quoting the *Target Range* standard); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F. 3d 556, 562 (8th Cir. 1996) ("An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits") (internal quotation marks omitted); *Murphy v. Timberlane Reg. Sch. Dist.*, 22 F.3d 1186, 1196 (1st Cir. 1994). ("[N]ot every procedural irregularity gives rise to liability under the IDEA. Nevertheless, procedural inadequacies [that have] compromised the pupil's right to an appropriate education . . . or caused a deprivation of educational benefits are the stuff of successful IDEA actions." (Internal quotation marks omitted); *Hampton Sch. Dist. v. Dobrowolski,* 976 F.2d 45, 52-53 (1st Cir. 1992)).

THE GUY-PERKINS SCHOOL DISTRICT DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE IDEA AND STATE AND FEDERAL REGULATIONS, HOWEVER, THE LACK OF COMPLIANCE DID NOT RESULT IN SUBSTANTIVE HARM, THEREBY DENYING THE STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION.

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 for by the Department. Consequently, a hearing officer must look at the issues to determine whether or not a district has been compliant with that definition and whether or not a single violation or the accumulation of violations are severe enough to constitute a denial of FAPE.

The Parents in their Due Process Complaint asserted two apparently conflicting and alternative theories that the District did not comply with the IDEA and federal and state regulations. One main assertion in the Due Process Complaint stated basically that the District did not hold a Referral/IEP Conference as the Student should have been identified and referred as a special education student under the provisions of, *inter alia*, Arkansas Department of Education Regulations Sections 3.00 (Child Find) and 4.00 (Referral). Alternatively, they maintained that the Student should have been served as a special education student pursuant to an IEP developed by the Borger School District in Texas in April 2010, which would have been in effect for one year. In fact, one of the Parents testified that a copy of the Texas IEP was provided to the District prior to the start of school. There appears to be at least four (4) allegations in the complaint regarding the District's lack of compliance with the Texas IEP.

For its part, the District understood that its obligation, after it knew about the Texas IEP, was to implement services comparable to the Texas IEP. The Student began as a new student in the District at the start of the 2010-2011 school year. The District understood that it was obligated to

follow Arkansas Department of Education Regulation 8:03.4.1 which provides:

> "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 -
>
> Conducts an evaluation pursuant to 34 CFR 300.304 through 300.306 (if determined to be necessary by the new public agency); and
>
> Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR 300.320 through 300.324."

The Arkansas regulations mirror 34 CFR 330.324(f).

However, the District misunderstood its obligations. The Student was not a transfer student within the meaning of the Arkansas and federal regulations. The term transfer student means a student who transfers during a school year, not a student who leaves one school at the end of a school year and enrolls in another at the start of another school year. In *Maynard v. District of Columbia*, 701 F. Supp.2d 116 (2010), the United States District Court for the District of Columbia reversed a hearing officer's decision under these exact same circumstances. One issue before that Court was the hearing officer's reliance on 34 C.F.R. Section 300.323(f). The hearing officer found that a failure to convene an IEP meeting in advance of the first day of school in August 2008, did not constitute a denial of FAPE "because pursuant to 34 C.F.R. Section 300.323(f), [the District] was entitled to provide [the Student] with a FAPE by providing services comparable to those described in his IEP from the private school, which is located in another jurisdiction, until such time as [the District] either conducted evaluations . . . or it developed, adopted, and implemented a new IEP for [the Student]."

The Court found this regulation inapposite because the student transferred school during the summer, not "within the same school year". The Court concluded that [the District] was required to develop its own IEP. *See also* 300 CFR Section 300.323(a) ("At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Section 300.320.") The Court preliminarily concluded that the failure of [the District] to timely convene and conduct an IEP meeting denied FAPE.

The District's failure to understand its federal and state procedural obligations led to one of the related procedural violations delineated in the Parents' Post-Trial Brief. As stated above, there was a failure to make a written referral and therefore, strictly comply with ADE Special Education and Related Services Section 4.01.01, which states, in part, that "a referral is to be made **in writing** (emphasis added) through the completion of the required Referral Form and provided to the principal . . . "Since the District thought it could rely on the Texas IEP, it apparently viewed an additional referral as superfluous, which was procedural error. Therefore, there was no written referral, which is a state procedural violation.

Furthermore, Section 4.03.04 of the Arkansas Regulations, states, in part, that the referral conference shall be held no later than 21 days from the written referral. Therefore, the Student should have been referred for special education on or about August 20, 2011, which is the date that the regular classroom teachers contacted the special education teacher when they suspected that the Student had a disability. A referral conference should have been held on or before September 10, 2010.

However, the conference that was held took place September 17, 2010, and substantially contained any information that you would expect to have at a referral conference wherein a student was already being served with an IEP in another state (T. Vol. II, P. 100-101; D. Exh. Vol III, PP.

121-122). Therefore, there was a one week delay in having a referral conference.

Subsequent to September 17, 2010, the District continued to provide the Student with special education services by providing services comparable to the Texas IEP. The Parents' arguments that the Texas IEP that the District implemented was not reasonably calculated to provide educational benefit is not persuasive in that there was credible testimony by the District that the services were given in light of the Arkansas frameworks (T. Vol. II, PP. 113-228). In any event, and stated above, the Texas IEP had no force nor effect. The facts here indicate that the Student had been implicitly referred for special education services in Arkansas.

Additionally, the Parents stated in their Post-Hearing brief that the Parents were never consulted or consented to special education prior to the September 17, 2010, IEP meeting - even though the Student was placed with special education services. This was another procedural violation. The Parents have not demonstrated any substantive harm. A legal requirement for an IDEA violation is substantive harm. Additionally, they have leveled several allegations that the District was not providing the Student with special education, but now complain that he was placed without consent.

Here, the Parents have not met their burden of showing that the procedural inadequacies resulted in substantive harm. In this case that would be the loss of educational opportunity or deprivation of an IEP (although the undersigned hearing officer noted procedural violations herein, there is no finding that the Parents' were denied the opportunity to participate in the IEP process. The Parents received adequate notice of the IEP meetings that were held and the District diligently worked to ensure that both of the Parents participated in the process.)

The Parents have not shown that the procedural inadequacies denied substantial educational opportunities to the Student. Certainly, the District committed a state procedural violation by failing

to timely hold a Referral Conference after the District knew or should have known that the Student qualified for special education services.

Additionally, the Parents have demonstrated to the undersigned hearing officer that the District wrongfully followed the Texas IEP (even though they have also stated that they should not have been following the Texas IEP.) Again, the Texas IEP had no force nor effect. The Student should have been referred for special education with no IEP at all and been served initially in the general curriculum, where all admit that the Student struggled. The District noticed on the second day of school that The Student had problems and subsequently checked with his prior school and found out that he had been a special education student. The District then set into motion the process of referring the Student for special education by setting up an IEP conference with the Parents on September 7, 2010. School started on August 19, 2010. Therefore, even if there was no formal written document and though not technically called a referral conference, an IEP conference was scheduled and held, even though not scheduled in a timely manner.

As early as October 19, 2010, the District sent out notices to schedule a conference to consider the evaluations and develop an Arkansas IEP. The conference was scheduled for October 26, 2010. At that point, the evidence indicates that the Parents delayed the process until they requested a due process hearing on November 12, 2010. Any delay in developing an IEP subsequent to October 26, 2010, cannot be charged to the District as a failure by Parents to participate in the IEP process cannot inure to the benefit of the Parents. See *JJ. v. District of Columbia*, 56 IDELR 93 (D.D.C. 2011) and *Winkelman v. Parma City Sch. Dist. Bd. of Educ.*, 53 IDELR 215 (N.D. Ohio 2009). The Parents' assertion that they did not develop an IEP at all is unpersuasive. The District began the process of developing an Arkansas IEP. They were on course to develop an IEP until the Parents filed a Due Process Complaint. Furthermore, many cases indicate that when a delay in developing an IEP has

been adjudged a denial of FAPE, significant amounts of time has elapsed before an IEP is prepared. See *Department of Education, State of Hawaii v. Carl Rae*, 158 F. Supp.2d 1190 (2001). In that case, the District had reason to suspect that the student had a disability in the fall semester of 1997. However, the Student was not determined to have a disability until May 1998, and an IEP was developed in May of 1998. The Court found that the delay violated the IDEA. The Court cited 20 U.S.C. Section 1412(a)(3)(A) and 34 CFR Section 200.125(a), stating that the "child find" provision applies to, among others" children who are suspected of being a child with a disability . . .and in need of special education . . . "The child find duty is "triggered when the [state or LEA] has reason to suspect a disability, and reason to suspect that special education may be needed to address that disability." *Corpus Christi Indep. Sch. Dist*. 31 IDELR Section 41, at 158, No. 105-SE-1298 (1999). *Cf. WB v. Matula*, 67 F. 3d 484, 501 (3rd Cir. 1995) (finding that "child find" duty requires children to be identified and evaluated "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability"). Also see *O.F. v. Chester Upland School District*, 246 F. Supp. 409 (2002), a denial of FAPE was found where the process began in January 1997, but no IEP was in place until December 1997, almost a year later. Additionally, in *Knable et al. v. Bexley City School District*, 238 F. 3d 755 (6th Cir. 2001), a delay of one year (referral on August 31, 1993, until a draft IEP in August 1994), was found to deny FAPE. In *Knable*, the Court cited regulations enacted pursuant to the IDEA that require a school district to convene a meeting to develop an IEP for a child within thirty (30) calendar days of the determination that the child needs special education and related services. See 30 CFR Section 343(c)(1).

Here, presuming that the determination that the child needed an Arkansas IEP was made on September 17, 2010 (the day the referral/IEP conference was held), the District had 30 days to convene the next IEP meeting, which was scheduled for October 26, 2010. This matter should have

been scheduled for October 17, 2010. This meeting should have been scheduled nine (9) days earlier. Finally, as noted above, the September 17, 2010, referral conference was late in being scheduled. It should have been scheduled for September 10, 2010, within 21 days of the day that a special education referral should have been made. There is a seven (7) day delay here in holding the first Referral/IEP Conference. The question becomes whether the District's actions in causing approximately sixteen (16) days of delays were such significant violations as to violate the IDEA and cause substantive harm to the Student. The undersigned hearing officer does not find that to be the case. Finally, the Parents have not proved any substantive harm to the Student.

ORDER

In that the Parents have provided insufficient evidence and testimony to warrant support of allegations of a denial of FAPE their request for the relief requested is hereby denied.

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 2000, the Hearing Officer has no further jurisdiction over the parties to the hearing. It is so ordered.

DATED:

August 18, 2011

SIGNATURE

S/ Garry J. Corrothers

GARRY J. CORROTHERS
HEARING OFFICER