Arkansas Department of Education

Special Education Unit

IN RE:

Xxxxxx and Xxx Xxxxxxxxxx
as Parents in behalf of
Xxxxxx Xxxxxxxxxx, Student PETITIONER

VS. NO. H-16-04

Xxxxxxxxxxxxx School District RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioners allege that the Respondent has denied the Student with a free and appropriate public education (FAPE) for school year 2014-15 by not referring and evaluating him for all of his disabilities and as such failing to identify him as a child eligible for special education services under the Individuals with Disabilities Education Act (IDEA).

Issues raised by the Petitioners in their request for a due process hearing that were decided by the hearing officer as non-judicable under the IDEA included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973.

Procedural History:

On July 22, 2015, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from Xxx and Xxxxxx Xxxxxxxxxx (Hereinafter referred to as "Parents"), the parents and legal guardians of Xxxxxx Xxxxxxxxxx (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Xxxxxxxxxxxxx School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate special education services as noted above in the issue as stated.

The Department responded to the Petitioners' request by assigning the case to an impartial hearing officer and establishing the date of August 20, 2015, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims as noted above, was issued on July 22, 2015.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parents were represented by Theresa L. Caldwell, attorney of Maumelle, Arkansas and the District was represented by Jay Bequette, Attorney of Little Rock, Arkansas.

On July 24, 2015, counsel for the Respondent filed a motion for an extension of time to response to the District's complaints as ordered by the hearing officer. A verbal response to the District's counsel was that a hearing officer does not have the prerogative to grant such a request; however, it was advised to discuss the matter with counsel for the Petitioners. The Respondent subsequently provided a response to the Petitioner's complaints on August 3, 2015. On August 11, 2015, counsel for the Petitioner filed a notice of due process violation and objection to the sufficiency of the District's response to the Petitioner's complaints, stating that the District was ordered to respond to the complaints by July 30, 2015, and did not do so until August 3, 2015. The Petitioner also noted that the Respondent failed to conduct a resolution conference as directed by the hearing officer. The Petitioner further objected to the District's response to the complaints by stating that the response provided failed to adequately explain the rationale for their actions in response to the complaints. The Respondent replied to the Petitioner's request for sanctions regarding the alleged violations by stating that the District had complied with applicable law and regulations regarding the response to the due process complaint. The IDEA allows a hearing officer substantial discretion to direct the pre-hearing procedures in a manner that he or she deems appropriate, with few exceptions. One of the exceptions is the form and subject matter of the answer to a complaint whether that be by a school district or a parent. The IDEA requires specific elements in the answer to a complaint, with no language that suggests that

they are discretionary.[1] Given the express requirements in the Act, a school district that fails to meet the criteria within the answer to the complaint must either amend the answer to meet the guidelines or suffer some consequence for failure to do so. A hearing officer has the authority to enter a default judgment as the action taken if a school district fails to answer a complaint in the appropriate fashion, within the appropriate time. However, the only case on point is from the D.C. Circuit, which stated that an entry of a default judgment on procedural violations would constitute a judgment based on procedural and not substantive law. [2] The D.C. court restated that a complainant can only prevail if the district's procedural violations rise to the level of a substantive violation, and in this case, this hearing officer does not see that the procedural violations rise to the level of a substantive violation of the IDEA.

On August 6, 2015, the Respondent filed another motion asking the hearing officer to limit the length of the hearing even though the hearing had yet to begin. The cited Department regulation by the Respondent that "in general, a hearing **should** last no longer than three (3) days" is not to be interpreted that a hearing **must** be conducted within that or any other time frame.[3] The hearing officer elected not to provide a written response to the motion.

On August 18, 2015, the Respondent filed yet another motion this time asking the hearing officer to dismiss the case alleging that the Student had been voluntarily removed from the District by the Parents and that as such was not entitled to a due process hearing. On August 19, 2015, the Petitioner responded to the motion to dismiss by referring to *Sobal v. Burr* wherein the United States Supreme Court affirmed the position that a student who was deprived of services to which he was entitled under the IDEA has a right to a remedy without regard to his current or

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[1] 20 USCS § 1415 (c)(2)(i)(l)

[2] *Sykes v. District of Columbia*, 518 F. Supp. 2d 261, 267, 2007 U.S. Dist LEXIS 80235, *13-14 (D.D.C. 2007)

[3] *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.32 [Emphasis added]

future eligibility for such services.[4] Hereto, no written response was deemed necessary by the hearing officer in that the IDEA and the Department's regulations were the holding factors.

The hearing began as scheduled on August 20, 2015. At the end of the day the Petitioners requested and were granted a continuance on the record in order to complete their presentation. The dates of September 30, 2015, and October 2, 2015, were agreeable to both parties for the hearing to continue. The hearing was conducted as scheduled; however, on October 2, 2015, the Petitioners again requested a continuance on the record. The request was granted without objection for the hearing to be heard on November 10, 2015.

The Petitioners entered a binder of evidence labeled Parent Binder and the Respondent entered a binder of evidence labeled District Binder. The record also includes a Hearing Officer Binder containing all of the correspondence generated between parties and copies of all orders issued.

Findings of Fact:

During school year 2014-15 did the District fail to refer and evaluate the Student for all of his disabilities and as such fail to identify him as a child eligible for special education services?

At the time the hearing was requested the Student was a six-year-old, male, who was scheduled to begin his first grade after having completed his kindergarten year in the District. However, prior to entering the first grade his Parents transferred him to another school. Before entering Kindergarten in August 2014 he attended a pre-school head start program operated by Ozark Unlimited Resources Cooperative (O.U.R. Co-op). The head start facility, although not operated by the District, was located on the District's campus. While in the head start program the Student was identified as a child in need of early childhood special education services in the areas of "academic/cognitive in mathematical/general concepts and social emotional."[5] The

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[4] *Sobal* v. Burr, 492 U.S. 902, 109 S.Ct 3209, 106 L.Ed.2d 560 (1989), aff'd on reconsideration, ***Burr v. Sobal***, 888 F. 2d 258 (1989)

[5] Parent Binder, Page 29

developmental evaluation report on which the eligibility was determined was conducted by a bachelors level developmental therapist rather than a doctoral or masters level educational examiner. Nevertheless, with the existing data the head start staff, including the developmental therapist, the Student's head start teacher, and the Student's mother, developed an Individualized Education Program (IEP) for the Student.[6] The IEP's consideration of special factors included the need for "positive behavioral interventions and supports and other strategies to address behavior that impedes his/her learning or that of others."[7] The IEP also included instructional modifications, supplemental aids, and supports that the head-start teachers were to implement which included "model appropriate behavior" and "praise appropriate behavior immediately."[8] The evaluation completed by the early childhood behavioral therapist included the results of the DAYS Social Emotional Subtest which revealed that the Student's social skills were at the fourth percentile, meaning that his social skills were ranked as poor.[9]

On the recommendation of the Student's primary care physician the Parents had the Student examined by a licensed clinical social worker at the J.L. Dennis Developmental Center in Marshall, Arkansas on January 14, 2014. The concerns presented by the Parents included difficulty with transitions, parallel play with classmates, attention and focus at school and difficulty expressing his needs. Although not licensed to provide medical or psychological diagnoses, the licensed clinical social worker who examined the Student in January 2014, was left with the impression that the Student was "at risk for developmental delay and learning disability."[10]

The District was made aware that the Student would transition from the head start program to their Kindergarten program for school year 2014-15 and thus conducted a referral

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[6] Parent Binder, Pages 1-15

[7] Parent Binder, Page 3

[8] Parent Binder, Page 12

[9] Parent Binder, Page 23

[10] Parent Binder, Page 32

conference prior to his leaving the head start program on March 10, 2014.[11] The committee included the Student's mother, the District's elementary special education teacher, the head start special education teacher, and the head start developmental therapist. They considered accepting the evaluation administered by the developmental therapist, but determined that the assessment data did not meet the eligibility criteria for public school special education services. Consequently, they obtained parental consent to conduct a comprehensive evaluation to determine if the Student met the need for special education services as defined by the IDEA and Department regulations.[12]

The District's elementary special education teacher conducted two separate systematic classroom observations of the Student in his head start program on March 17, 2014, and a third observation on March 18, 2014.[13] On all three of those occasions she reported that the Student was not actively working; he was not on appropriate task; he did not appear to be organized; he was not following directions; his behavior was not appropriate; he did not accept feedback; he did not ask for feedback; he did not interact with his peers; he did not give appropriate responses; his activity level was not appropriate; and he did not respond to cues or visual aids.[14] On testifying, however, the teacher stated that she "did not notice any – in [her] observations there [were not] any definite red flags."[15] The Student's mother provided a social history on March 18, 2014, and in contrast to the teacher's observations she noted that the Student liked school most of the time and that he did not have any difficulty getting along with others.[16]

A speech/language evaluation was conducted on March 18, 2014. The speech/language pathologist concluded that based on the results of her evaluation that the Student did not need,

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[11] District Binder, Page 10-13

[12] Parent Binder, Page 41

[13] Parent Binder, Page 42-43 and 50; District Binder, Page 3-5

[14] Ibid

[15] Transcript, Vol III, Page 80-81

[16] Parent Binder, Page 44-46

nor should he receive speech/language therapy and that she did not observe any speech language deficits that would interfere with his participation in the kindergarten classroom.[17]

On March 25, 2014, the head start staff along with the Student's mother, but absent of any one from the District, met to discuss the Student's "behavior - transitions." They concluded that the Student needed "more time/warning about change of activities" and that his mother "will think/consider further evaluation." As noted above no staff person from the District was present for this meeting. The head start staff decided to provide him with more warnings before transitions, to let him know when it is not okay to "throw fit" and to work with him on self-help skills.[18]

With parental consent on April 2, 2014, the District's psychological examiner conducted a psychoeducational evaluation. She administered the Wechsler Preschool and Primary Scale of Intelligence - III (WISC-III); the Wechsler Individual Achievement Test - II (WIAT-II); the Test of Auditory Perceptual Skills-R (TAPS-R); the Beery-Buktenica Dev Test of Visual-Motor Integration (Beery VMI); and the Bender Gestalt Visual Motor Test II (BGVMTII). The behavioral observations she included were those conducted by school personnel. They reported that the Student exhibited an appropriate attitude but was not actively engaged in the class activities; that he was easily distracted and did not interact with his peers; that he did not follow instructions and that he exhibited some behavioral problems. "He would not sit on the carpet with the other students and did not appear to be interested in the lesson being presented. He chose not to answer questions directed to him."[19]

The Student's mother testified that she observed the Student having difficulty with communication as early as two years of age and that on taking him to the physician at age three "the primary care physician thought he had [autism] and recommended that [she] take him to

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[17] Parent Binder, Page 47-49, and Transcript, Vol III, Page 221

[18] Parent Binder, Page 51

[19] Parent Binder, Page 53

Children's" for an evaluation.[20] At age four he was provided the developmental evaluation as previously noted, wherein he scored "4/11 consistently in the 4-5 year old section" and that "he is able to use sentences of 4 to 8 words, talk about his experiences, and his speech is usually understood by others."[21] The only other documentation presented as evidence of such an evaluation was not until he was six years old and the impression at that age was that although he demonstrated features of an Autism Spectrum Disorder (ASD), he lacked the communication deficits that are key to the disorder and therefore did not meet the criteria for an ASD.[22] The District's special education teacher testified that she had been made aware of the Parent's concern about the possibility of his having an ASD, but she was not sure at what point in time that she became aware.[23] The teacher was aware of a possible sensory processing disorder in that she made recommendations for his Kindergarten teacher to use a weighted pillow.[24] Given the limited degree of a possible autistic issue and the differences in observations by both the evaluators and the teachers, there does not appear any justification for the District to have suspected ASD prior to or during his kindergarten school year.

Based on the evaluation data, curriculum based assessment information, and the classroom observations the examiner determined that the Student did not meet the criteria as a student with specific learning disabilities.[25] Even though the Student exhibited numerous maladaptive behaviors in his pre-school environment there was no evidence that his behaviors adversely affected his learning or that of his classmates. The record would indicate that with

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[20] Transcript, Vol IV, Page 12

[21] Parent Binder, Page 27

[22] Parent Binder, Page 110

[23] Transcript, Vol III, Page 90

[24] Ibid, Page 92

[25] Parent Binder, Page 52-61

the pre-school IEP in place that he was able to master the majority of his goals and objectives.[26] The subsequent evaluation/programming conference conducted on May 7,2014, concluded that the Student's evaluation data did not substantiate the existence of a learning disability consistent with state and federal regulations implementing the IDEA.[27] The team reaching this decision included the Student's mother, the District's elementary special education teacher, and the District's kindergarten teacher. Thus the Student entered into the District's kindergarten in August 2014 as a student who was declared to no longer need special education services; even though the head start special conference was conducted, albeit in the absence any District representatives, regarding the behaviors exhibited by the Student that interfered with his school and class activities.

According to evidentiary documents as well as testimony from both District personnel and the Student's mother, the Student began exhibiting the same maladaptive behaviors discussed at the head start special conference upon entering his kindergarten year. The District's elementary principal testified that the Student is a sweet child who seeks affection; that transitions are difficult for him; that he has trouble keeping his hands and feet to himself; and that he had difficulty communicating with her. For her, the Student's "extreme behaviors" that signaled a need to do something was not until the second semester of his kindergarten year.[28] However, in the fall semester of 2014 she contacted the behavior specialist for assistance with the kindergarten classroom and then in April 2015 submitted a formal CIRCUIT (Centralized Intake and Referral/Consultant Unified Intervention Team) referral for assistance with the Student.[29] The behavior specialist testified that she could not provide specific assistance to the District for the Student during the fall semester because he was not receiving special education services. However, she provided suggestions for the classroom during the fall semester through

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[26] Parent Binder, Page 68-83

[27] Parent Binder, Page 63; District Binder, Page 17-20

[28] Transcript, Vol I, Page 34-35

[29] District Binder, Page 106-108; Page 234 and Transcript, Vol III, Page 232-233

correspondence with the District's elementary principal which included specific suggestions for the Student.[30] After the District submitted a referral for special education she was prepared to conduct a formal behavior assessment; however, on coming to the school she learned that the Parents had withdrawn consent for any further evaluations. Thus she did not complete the CIRCUIT referral.[31]

Although the time frame is absent from her testimony, the District's literacy interventionist testified that as a playground supervisor she observed and responded once to the Student when he was chasing other children with a stick.[32] She also testified that for her the most difficult times she encountered with the Student "was just the transitions, getting him to come in on time."[33] The Student's physical education coach, who was also the District's Dean of Students, testified that at times the Student was a "bit physical – more physical than some of his other peers as far as doing some of the age-appropriate activities that we do in our class." He went on to explain that "whenever we would be doing an activity, whatever it may be, he might be a little more hands-on, or a little more handsy [sic] than some of the other students."[34] He also testified that the Student had trouble getting in line and staying in line when the class lined up to transition from one location to another, as well as keeping his hands off the other students. Unlike the school principal, he did not see the Student's behavior getting worse across the school year, only that "just like the first semester, the second semester there was times that the physicality was a little more major."[35] Contact records regarding disciplinary actions show that in the month of September 2014, the Student's mother was contacted twice; during the month of October 2014 she was contacted three times; during the months of November and December

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[30] District Binder, Page 93-103

[31] Transcript, Vol III, Page 239-240

[32] Transcript, Vol I, Page 244-245

[33] Ibid, Page 246

[34] Transcript, Vol II, Page 12

[35] Ibid, Page 25

2014 there were no parental contacts noted; during the month of January 2015 she was contacted twice; during the month of February there were no contacts noted; and during the month of March 2015 she was contacted four times.[36] Disciplinary action reports contained in the Parent's binder of evidence include maladaptive behavior events on September 28, 1014; October 6, 2014; October 23, 2014; November 15, 2014; December 18, 2014; March 11, 2015; and April 8, 2015.[37]

On January 20, 2015, the Student's parents accompanied him to see a physician with the stated reason for referral being to conduct a diagnostic evaluation. The parental concerns as contained in the physician's report included:

> "In the classroom he's disruptive to peers, touches and grabs others. He has difficulty following directions and paying attention. He's been paddled twice for pushing a peer. We're called or notified by note of him having difficulties in the classroom at least 2 times per week." They further reported that "he also has other strange behaviors including chewing on clothes, posturing hands, making odd noises, squeals and thinking that he's a character in Angry Birds. He has difficulty with task transition, he has to be physically removed or the toy taken from him, he no longer has severe tantrums. Socially, he has several friends, plays with them, and takes turns. There are some children that are mean to him, he doesn't know it. He mixes up his pronouns. He has a great imagination, tells stories, can tell us what happened at school, has gestures, tell jokes and points. Except for angry birds, has no other intensive interests. We first became concerned at the age of 2 when he screamed when going to the stores and he didn't answer questions. He's had no developmental regression."[38]
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> The physician's diagnostic impressions were that the Student met "the diagnostic criteria

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[36] Parent Binder, Page 90

[37] Ibid, Page 92-99

[38] Parent Binder, Page 108

for ADHD-Hyperactive Impulsive Type with functional impairments in the social and behavioral domains" and that although he"demonstrates associated features of an Autism Spectrum Disorder, he lacks the communication deficits that are key to this disorder and therefore does not meet criteria for an ASD."[39] The physician recommended among other medical suggestions that the Student be considered for an occupational therapy evaluation to rule out a sensory processing disorder and that the Parents meet with the school to consider classroom and curricular modifications including a possible 504 plan.[40] Prior to completing the write up of his evaluation the physician provided the Parents on the same day a note indicating his diagnosis of ADHD for them to provide to the District.[41]

Rather than submitting a referral for special education consideration, on February 12, 2015, the District held a meeting with the District's school counselor, the Student's kindergarten teacher, the elementary school principal and both Parents for the purpose of developing a 504 Student Accommodation Plan as recommended by the physician. The accommodations included providing him with preferential seating (his own space); extended time for work and testing; physical active involvement whenever his behavior is appropriate; plenty of notice for transitions; positive re-enforcement (point system); behavior redirection; time out/restriction of privileges for discipline; short & specific directions; and consistent routines.[42]

Following the development of the 504 Plan the evidentiary records show that the District began collecting data which included date, time, antecedent, behavior, consequence, and possible function of the Student's maladaptive behaviors.[43] The evidentiary record indicates that the Student's maladaptive behaviors continued in spite of the 504 accommodations. The District conducted a parent/teacher conference on April 10, 2015, to discuss how to help [the Student]

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[39] Ibid, Page 110

[40] Ibid

[41] Ibid, Page 111

[42] Parent Binder, Page 123

[43] Parent Binder, Page 124-142

with behavior. The subsequent agreement with the Parents was to "be firm with him when redirecting, continue with divider as needed, try a noise muffling headset, have a 'regroup' time to think about good choices, [and] work on staying in his own space."[44] On April 14, 2015, a nurse practitioner in the Student's evaluating physician's office provided the District with a letter on behalf of the Parents requesting that the Student's 504 Plan exclude paddling and suspensions for his maladaptive behaviors. The note further indicated that after a plan was in place that the Parents may consider a trial of medication, but not until other methods/plans for behavior management have been initiated.[45] The nurse practitioner further noted that since the District had access to a behavior specialist who would come and observe and make recommendations for all involved in the Student's schooling she recommended the District make contact with the specialist for assistance. She apparently did not know that the specialist could only be involved if the Student were being considered for or already was receiving special education services.

The evidentiary record did not indicate that the Student's maladaptive behavior had an adverse affect on his learning as testified to by the District's literacy interventionist. Her assessment of the Student's classroom looked at all of the students and their response to intervention (RTI). She placed each student in one of three tiers for intervention purposes. She explained that tier one involved "strong classroom instruction;" tier two employed "strategic interventions delivered mostly by the classroom teacher:" and tier three required "intensive interventions" that are deliver to students who exhibit a greater need of help that has not been met with tier one and tier two.[46] All students receive screening at the beginning, middle, and end of the school year. When asked on direct examination where the Student placed she replied "he was never in tier three."[47] She was not able to assess the Student at the end of the year because the Parents had elected to not let him return to school. His grade report also did not indicate an

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[44] District Binder, Page 104

[45] Parent Binder, Page 144

[46] Transcript, Vol I, Page 228-229

[47] Ibid, Page 230

adverse affect on his learning.[48]

On April 15, 2015, without consulting with the District, the Parents obtained an independent speech-language pathology evaluation. The date the evaluation was conducted is listed in the report as having taken place on May 3, 2015, and the report itself is dated May 10, 2015.[49] The speech/language pathologist who conducted the evaluation testified that the initial request came to her from the Student's primary care physician's office rather than the Parents. She stated that her initial visit with the Parents and Student took place in April and that from that visit she determined it necessary to conduct the speech-language pathology evaluation. According to her testimony she was also asked by the nurse practitioner to assess the Student for autism. She stated that she had completed course work and supervision hours in BCBA; however, was not otherwise qualified to make a diagnosis of autism.[50] Following her visit with the Student and his Parents in April 2015 she referred him to a psychologist for an evaluation to determine if indeed the Student had an autistic disorder.[51] The psychologist conducted a psychological evaluation on May 18, 2015, concluding with the diagnostic impressions of ADHD and Autism Spectrum Disorder (minimally mild level). The psychologist also suggested ruling out a sensory processing disorder and that it was by report only that the Student had a severe receptive and expressive language delay.[52] At this time the Student was no longer attending school.[53]

The Parents elected to not return the Student to school within the District following a behavioral incident on May 7, 2015, consequently neither the findings by the psychologist or the speech/language pathologist were shared with the District. Additionally, on April 20, 2015,

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[48] Parent Binder, Page 209

[49] Parent Binder, Page 151 and 168-173

[50] Transcript, Vol III, Page 106

[51] Transcript, Vol III, Page 109-111

[52] Parent Binder, Page 197-201

[53] Transcript, Vol IV, Page 159-160

following the visit in their home by the speech/language pathologist and prior to obtaining the written reports conducted by her and the psychologist, the Parents filed for a due process hearing and withdrew their informed consent and consent for the release of any information regarding the Student.[54] However, on April 16, 2015, unbeknownst to her of the Parents' actions for obtaining the evaluations or filing for a due process, the District's elementary principal had submitted a referral for the Student to be evaluated and considered as a student in need of special education services. The reason for the referral as stated in the document was the result of the Student's maladaptive behaviors having escalated despite the 504 Plan, the behavior plan, or the classroom accommodations.[55] Having being notified on April 20, 2015, of the Parent's withdrawal of consent the District could no longer engage in testing to determine the Student's eligibility for special education services. However, the District proceeded with the evaluation conference on May 4, 2015, without the Parents being present.[56] The decision reached by the committee, and as testified to by the District's special education supervisor, was that the Student would remain on his Section 504 plan due to the stay-put requirement of the IDEA after the Parents had withdrawn their consent and asked for a due process hearing.[57]

Three days later the Student was involved in a behavioral incident, after which the Parents elected to not return him to school. They had taken him to the Student's primary care physician where the nurse practitioner who examined the Student, provided the Parents with a note stating that he may return to school "when released with written release."[58] Following the dismissal without prejudice of the due process hearing complaints in April 2015 the Parents elected to file the current request for due process.

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[54] Parent Binder, Page 166

[55] District Binder, Page 21

[56] District Binder, Page 24 (notice) and Page 30A (decision)

[57] District Binder, Page 30A-30D and Transcript, Vol IV, Page 231-232

[58] Parent Binder, Page 202 and Transcript, Vol IV Page 160

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.[59] 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.[60] The term "special education" means specially designed instruction.[61] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[62]

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards , Arkansas Department of Education, 2008. Did the District in this case deny the Student FAPE by failing to refer and evaluate the Student for all of his disabilities? The jurisdiction of a hearing officer in IDEA due process hearings is confined to ruling on any matter that pertains to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Arkansas Code Annotated 6-41-202, et seq.[63]

The record shows that the Student presented to the District prior to entering his

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[59] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[60] 20 U.S.C. § 1401(3)(A)

[61] 20 U.S.C. § 1402(29)

[62] 34 CFR § 300.26(b)(3)

[63] *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

kindergarten school year as being a child who had been receiving special educations services in his pre-school program. It further shows that he was potentially eligible to continue to receive special education services based on the possibility that the maladaptive behaviors he exhibited, as recorded by the staff of his head-start program, his Parents, and the District's special education teacher were indicative of a possible diagnosis of attention deficit disorder (ADHD). However, there were no indications at that time that his maladaptive behaviors adversely affected his learning or the learning of his classmates. A referral at that time to consider if the Student's maladaptive behaviors could be related to a possible diagnosis of ADHD was not considered by the District. At the transition conference, even though the District was aware of the maladaptive behaviors, they elected to conduct an evaluation to determine only if the Student met the criteria of having a specific learning disability.

The District did not elect to make a referral for an evaluation on his entering the kindergarten or his engaging in multiple disruptive behaviors. Their choice to elect how he might respond to behavioral interventions through a 504 Plan, although laudable, are not provisions of the IDEA. If the Parents had not withdrawn consent in April 2015, and if they had shared with the District the evaluations they had obtained, the District could have taken the results of the evaluations into consideration and could have developed a temporary individualized educational program (IEP). Although the evidence indicates that the District could have acted sooner in considering a referral for special education services to address the Student's maladaptive behaviors, the Parents could also have not withdrawn their consent and could have provided the District with the assessments that they had already obtained. These actions if taken by both parties may have resulted in no need for this due process hearing.

Whether not the actions and/or inactions of the District were a denial of FAPE needs to be addressed with respect to the intent of the IDEA. 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." Given that this is the crux of the Parent's contention in this case it is critical to understand in making a decision about the Parent's allegations of the District's failure to provide FAPE. The Court noted that the following twofold

analysis must be made by a court or hearing officer:

> (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
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> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[64]

Given the fact that an IEP was never developed only the first part of the twofold analysis need be addressed. In 1988, once again the Supreme Court addressed FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[65] Hereto in the absence of an IEP, other than the IEP developed for him as a pre-school student, the decision in this case must hinge on whether or not the child's unique needs were being considered in the identification and evaluation process. With regard to looking at a child's eligibility for special education services the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability.[66] Too often this hearing officer has found that parents, school administrators and attorneys representing them, agree on the basis but do not make this distinction in their arguments on the complaints or the differences they've encountered. For example, whether or not the Student has or doesn't have ADHD or an autistic disorder is not relevant; however, whether or not the manifestations of either or both of these disorders adversely affect his obtaining an education is critical. The charge to education professionals is to concentrate on the unique needs of the child rather than a specific disability. Such as in this case, the Student's maladaptive behaviors may or may not have been related to subsequent diagnoses of ADHD and/or autism. The identification and evaluation process need take these diagnoses into consideration as relevant only if, when, and

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

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

[66] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

how the consequences of the diagnoses interfere with his obtaining an educational benefit from his educational program.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on what they believed to be the unique needs of the Student by developing a 504 Plan with accommodations to address his maladaptive behaviors. However, by recognizing earlier that the accommodations were inadequate the District could have sought parental consent and obtained an evaluation to specifically address these concerns. At the same time the record shows that even as maladaptive as were some of his behaviors his academic achievement in pre-school and kindergarten were not jeopardized. The frustration expressed by the Parents in being called to assist in responding to the discipline of the Student is understandable; however, in and of itself these issues do not rise to the denial of FAPE. The Parents were obviously concerned as to how the District staff responded to the Student's behaviors; however, here too such actions or inactions are hearable under the IDEA only if they are inconsistent with a student's IEP. In this case there was no IEP. Should there have been is the question being addressed.

It is necessary, therefore for this hearing officer to look at the facts in this case as to whether or not the District responded to the unique needs as expressed by the Student on entrance into their kindergarten program. The evidence and testimony indicates that they, in cooperation with the Parent, elected to discontinue the special education services provided to him in his pre-school program and for him to enter kindergarten as a non-special education student. Only after three months of his engaging in various maladaptive behaviors and at the suggestion of his physician did the Parents and District consider the development of a 504 accommodation plan. Rather than assessing only for a possible learning disability, the evidence would indicate that a more comprehensive behavior assessment was warranted prior to his entering kindergarten. The testimony by District personnel elicited in the course of the hearing suggest that they too believed that the unique behavioral needs of the Student were not being met by the accommodations of the 504 Plan, even though he continued to show academic progress. To further exacerbate the problem, once a referral for special education consideration was made by

the District's elementary principal, the Parents had withdrawn their consent for an evaluation to determine his needs.

The evidence and testimony supports the fact that the District failed to recognize and respond to the Student's unique needs for special education consideration on his entering kindergarten. Had the Parents not withdrawn consent and given the District opportunity to evaluate him, even though later in the school year, and had they provided the District with the evaluations they had independently obtained, this hearing may not have been necessary.

The Parent's challenge that FAPE was denied on the Student entering kindergarten is justified by the evidence. The identification and evaluation of this Student's unique needs were not responded to as early as they should have been according to the evidence. The evidence and testimony show that the District, apparently recognized the error of their way and were attempting to respond to the concerns of the Parents in requesting permission to evaluate the Student in order to determine an appropriate educational plan and placement. However, the actions of the Parents did not permit them to conduct a more comprehensive evaluation.

Although this case does not involve the question of the denial of FAPE because of an inadequate IEP, it does however, address the question as to whether or not the District failed to evaluate for special education services and the development of an appropriate IEP when the Student first entered the District. The findings of fact show that he was provided an education by the District under a Section 504 Accommodation Plan. The complaints that the Parents presented involving violations of Section 504 of the Rehabilitation Act were deemed as non-hearable under the Act. At the same time the adequacy of the educational placement and the consequent results did play a part on the question of whether or not the District failed to evaluate the Student for consideration of a need for special education services.

Keeping in mind, 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. Thus the question as to whether or not the Student was denied FAPE by the District for failure to evaluate requires: (1) looking at each individual issue raised by the Parents to determine whether or not the District has been in

compliance with the definition of FAPE under the IDEA, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in Zumwalt v Clynes[67] agreed with the Supreme Court's decision in Rowley in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.[68] Further, Rowley recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

> "Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)."[69]

The Eighth Circuit Court of Appeals has addressed the issue of the appropriateness of an education in meeting the standards established in IDEA in order to provide FAPE. In Fort Zumwalt School District v. Clynes, the majority is quoted as stating that the IDEA does not require the best possible education or superior results. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student.[70]

A major question with regard to the current case and whether or not FAPE was denied is whether or not the District failed to refer the Student for an evaluation of all of his disabilities to determine the need for special education. The evidence shows that the District chose to not

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

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

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

[70] *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

consider the Student as in need of special education services based on the sole evaluation as to whether or not he had a learning disability. They did not pursue the concern of the Parents with respect to his behaviors being related to either ADHD or an autistic spectrum disorder.

The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the court when the alleged violation has been based solely on procedural violations.[71] The alleged procedural violation of not following the IDEA's due process procedure such as not making a referral for consideration of services earlier in his educational process has been shown to meet that level of a violation of FAPE.

Order

The Parent has introduced sufficient evidence in the record to reflect that the District's failure to consider a referral and evaluate for all of the Student's disabilities earlier in his kindergarten year was a violation of FAPE for the Student. However, the Parents are not without responsibility to have provided the District with consent when the decision to evaluate was considered. The decisions made by the District, however, on being approached with the challenge to meet the social and behavioral needs of the Student failed to comply with the standards set forth by the IDEA and the Department. Those decisions do not appear to have been intentional or malicious, but rather the accumulatively basis of first impression – that being that the Student would not qualify for special education services because he was making academic progress and he did not have a learning disability. The immediate and subsequent failures to address and assess all of the Student's needs on entering the District as a kindergarten student and the subsequent failure of the 504 Plan to adequately address his behavior and social

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

needs contributed to the Student's failure to receive FAPE.

From the testimony and evidence the District attempted to remedy their failure by attempting to refer and conduct a comprehensive evaluation. However, the Parents has thwarted those efforts by withdrawing their consent and removing the Student from school. Given that they have enrolled the Student in school in another state, the remedies sought by the Parents are quite limited. Therefore, should the Parents agree to return the Student to the educational responsibility of the District it is hereby ordered that:

1. The District will immediately upon receipt of this order, but no later than January 29, 2016, develop a temporary IEP and begin the process of providing the Student with a comprehensive evaluation which will include an assessment of any behavior, sensory, or autism related, as well as any learning deficits as defined by the Department.

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 District or independent evaluators.

3. The comprehensive evaluation as ordered in (1) above will be completed no later than February 19, 2016.

4. Upon completion of the evaluation as ordered in (1) above and no later than February 26, 2016, the District's director of special education services 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 as indicated by the results of the evaluation.

5. Between the date of this order and the completion of item (4) above, the District will provide the Student with opportunities and number of hours as deemed agreeable to by the Parent 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 will be no less than eight (8) hours per week until item (4) above is completed.

Should the Parents not agree with returning the Student to being the educational responsibility of the District, all of the above order will be considered null and void and their

complaints are to be dismissed with prejudice. Regardless of their decision, the Parents are judged to have exhausted their administrative remedies as to Section 504 claims.

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

December 11, 2015
Date