

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXX

Parent on behalf of **XXXXXXXXXX**, Student

PETITIONER

VS.

CASE NO. H-16-34

Earle School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Earle School District (hereinafter "District" or "Respondent") denied **XXXXXXXXXX** (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") during the spring 2016 school semester, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) failing to provide Student with an individualized educational program (hereinafter "IEP") that was reasonably calculated to provide educational benefit; (2) failing to provide an appropriate behavioral intervention plan (hereinafter "BIP") or cooperate with a retained Behavioral Support Specialist acting on Student's behalf; and (3) failing to conduct a proper manifestation review prior to suspending Student from school.

PROCEDURAL HISTORY:

On February 25, 2016, the Arkansas Department of Education (hereinafter referred to as "Department") received a written request from Parent to initiate due process hearing

procedures on behalf of Student. Parent requested a due process hearing because she believed that the District failed to comply with the IDEA, as well as the regulations set forth by the Department, by failing to provide Student with an IEP reasonably calculated to provide educational benefit, failing to provide Student with an appropriate BIP, failing to cooperate with a retained Behavioral Support Specialist regarding same, and failing to hold appropriate manifestation determination review meetings prior to suspending Student from school.¹

At the time that Parent filed her request for a due process hearing, Student (male) was fourteen years old and attending school in the District. Parent and District stipulated that the time period to be addressed by this Hearing Officer was specifically January 7, 2016 through February 25, 2016, the date Parent filed her due process complaint in this matter.²

In response to the Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of April 11, 2016 was set as the date on which a hearing would commence if the Parent and District failed to reach resolution prior to that time. Ultimately, following a continuance, the hearing of this matter was scheduled to begin on May 9, 2016.³

On May 6, 2016, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing

¹ See Hearing Officer Binder of Pleadings and Orders.

² In October 2015, Parent filed a due process complaint. Thereafter, Parent and District reached a resolution and memorialized same in an agreement on January 7, 2016. As such, with regard to any issues occurring prior to January 7, 2016, Parent's remedy is to file suit for breach of contract.

³ See Hearing Officer Binder of Pleadings and Orders.

conference, the parties discussed unresolved issues to be litigated at the hearing of this matter, as well as the witnesses and evidence necessary to address same.

On May 9, 2016, the closed hearing of this matter commenced. Testimony was heard on May 9, 2016, May 10, 2016, and May 20, 2016.⁴ All testimony was heard at the Earle School District Administrative Offices. The hearing concluded on May 20, 2016.

The following witnesses testified in this matter: Mary Ann McIntyre (hereinafter referred to as “McIntyre”), Dr. Fredonia Bean (hereinafter referred to as “Dr. Bean”), Janet Moody-McDonald, Greg Rodrigue, Kitanda Moore (hereinafter referred to as “Moore”), Albert Coleman (hereinafter referred to as “Coach Coleman”), Juanita Bohanono as “Bohanon”), and Parent.⁵ Parent had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parent was represented by Thomas Nichols and Cassie Howell of Disability Rights Arkansas (Little Rock, Arkansas) and the District was represented by Jay Bequette (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs, and both submitted briefs in accordance with the deadline set by this Hearing Officer.⁶

⁴ See Hearing Transcripts, Volumes I-III.

⁵ *Id.*

⁶ See Hearing Officer Binder of Pleadings and Orders.

FINDINGS OF FACT:

Student is a fourteen-year-old male who attends school in the Earle School District. During the 2015-2016 school year, Student was in the eighth grade. Student moved from the Marion School District to the Earle School District in the fall of 2013, when Student was in the sixth grade.

Student's Medical History, Diagnoses, and Recommendations

Student was diagnosed at approximately nine months of age with hydrocephalus and underwent a procedure for placement of a ventriculoperitoneal shunt at approximately eleven months of age. Student had a shunt replacement very shortly after the initial procedure and, thereafter, a shunt revision approximately two years after the initial procedure.⁷ When Student was two years of age, he underwent a brain MRI that indicated that the cerebellar hemispheres in his brain were fused, consistent with a condition called rhombencephalosynapsis. Many other brain abnormalities were detected at that time. An MRI in the year 2014 confirmed that Student still suffers from rhombencephalosynapsis and other brain abnormalities suggestive of a possible Chiari malformation.⁸

Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and there are notations of issues with attention and hyperactivity as early as three years of age. Student has been treated for many years with medication and is currently on medication for this disorder.⁹ Medical records indicate that Student has also had a history of mood dysregulation and behavioral difficulties and has been treated with numerous medications

⁷ Parent's Binder, Tab 20; District Binder, pp. 301-02.

⁸ *Id.*

⁹ *Id.*

in response.¹⁰ At one point, Student was diagnosed with Oppositional Defiant Disorder as well.¹¹ Student is currently being treated with medication for mood dysregulation and behavioral issues.

Academically and behaviorally, Student has struggled while enrolled in the District, as well as a previous school district. Dr. Amanda Adamson, Ph.D., a Pediatric Neuropsychologist with the Neuroscience Institute at Le Bonheur Children's Hospital, evaluated Student in July 2015 and, in her report, noted behavioral incidents as far back as fourth grade. These incidents resulted in various consequences, including suspensions, homebound instruction, and psychiatric in-patient hospitalizations.¹²

Student transferred to District as a sixth grader and received special education services during the 2013-2014 school year, as he had in previous school years at another district. At the end of sixth grade, however, Student was dismissed from special education services and did not receive any services while in the seventh grade at District (2014-2015 school year).¹³ During his seventh grade school year, Student continued to have academic and behavioral issues and eventually, in May 2015, prior to the 2015-2016 school year, was identified under the IDEA as having emotional disturbance and provided an IEP.¹⁴

Based on Dr. Adamson's July 2015 evaluation, Student's general intellectual ability is in the mildly impaired range for his age. Academically, Student demonstrated average basic

¹⁰ *Id.*

¹¹ District's Binder, p. 306.

¹² Parent Binder, Tab 20; District Binder, p. 302.

¹³ *Id.*

¹⁴ Parent Binder, Tab 2; District Binder, p. 22. It should be noted that there is significant information regarding Student's history, including special education services provided, based on records from his previous school district (Marion School District) as well as Student's current district. In this case, however, only the period of January 7, 2016 to February 25, 2016 is at issue and, as such, details pertaining to prior school years have been omitted.

word reading, phonetic decoding, and spelling skills, and low average math calculation skills.¹⁵ He exhibited difficulty with perceiving, manipulating, and remembering nonverbal information. In addition, Student demonstrated visual issues. Specifically, Student's visual spatial judgment is in the impaired range on tasks in which he was asked to judge spatial orientation of angled lines. In addition, Student showed impairment regarding visual discrimination skills, visual motor integration skills, memory, and fine motor speed/dexterity.¹⁶ Student also complained of blurred vision, frequently rubbed his eyes, adjusted his seated position or angle of test forms, and closed one eyelid during visually presented tasks, all indicative of visual issues that could impact academic functioning. Looking at these impairments in totality, Dr. Adamson found them to be consistent with a Nonverbal Learning Disability (NVLD) profile.¹⁷

Dr. Adamson also noted that Student struggled with tasks assessing attention and executive function, noting issues with inattention, vigilance, and impulsivity on certain tasks. Dr. Adamson found Student's inattention, hyperactivity, poor executive functioning skills, including, but not limited to, inhibition, shifting attention, emotional control, working memory, planning, organization, and self-monitoring consistent with his previous diagnosis of ADHA – Combined Type.¹⁸

Regarding Student's behavior. Dr. Adamson stated the following:

[Student's] emotional and behavioral dysregulation is multifaceted and is at least partially related to underlying neurological complications and anatomical abnormalities in the brain . . . [C]urrent findings are . . . consistent with what would be expected in individuals with cerebellar malformations

¹⁵ Parent Binder, Tab 20; District Binder, pp. 307-08.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

such as rhombencephalosynapsis. That is, while the cerebellum was originally thought to primarily be involved with motor skills such as coordination and balance, more recent evidence suggests that the cerebellum plays additional roles in higher-order cognitive and emotional functioning For this reason, a wide array of neuropsychological impairments can occur with cerebellar involvement. Specifically, rhombencephalosynapsis and other cerebellar malformations have been associated with deficits in attention, executive functioning, visual-spatial processing, and expressive language. Problems with emotional and behavioral dysregulation are also very common in children with cerebellar lesions and malformations. **This is especially important to understand in [Student's] case because his behavioral issues often seem to be viewed as purposeful and willful, and there has not been an adequate understanding of the neurological causes underlying these behaviors or of the cognitive deficits that are associated with his condition.** ¹⁹

In light of her findings, Dr. Adamson, in her July 2015 neuropsychological report, made numerous recommendations pertaining to school placement and services.²⁰ These recommendations include, but are not limited to, the following: (1) provide additional academic instruction in a small-group setting; (2) provide additional time to complete tests and assignments; (3) create and present shortened assignments and tests; (4) provide increased structure when learning new information; (5) provide increased relevance of information to Student's interests; (6) provide intonation and verbal emphasis to permit increased recognition of critical sentence elements; (7) break down larger instructions into smaller steps; (8) emphasize repetition; (9) use multiple modalities for teaching; and (10) use natural consequences.²¹

Specifically regarding academic intervention for math, recommendations included, but were not limited to, the following: (1) present material in combined visual and auditory

¹⁹ Parent Binder, Tab 20; District Binder, pp. 309-10.

²⁰ Parent Binder, Tab 20; District Binder, pp. 311-14.

²¹ *Id.*

modalities; (2) encourage Student to verbalize steps involved in solving a problem; (3) distinguish each operation on paper for problems that have missed operations; (4) provide correctly solved math demonstration module for Student to study and interpret; (5) use concrete manipulations; (6) allow Student to use a calculator for classroom assignments; (7) use alternatives to math tests, including giving chances for extra credit or using multiple choice questions; and (8) provide step-by-step instructions when teaching a new math skill.²²

Regarding academic intervention to address fine motor, visual-organizational, and visual-motor skills, recommendations included but were not limited to, the following: (1) minimize graphomotor output demands via oral responding, shortened assignments, and alternate formats for responses when possible; (2) provide rest breaks for writing long passages; (3) provide increased time for written tests and assignments to decrease stress; (4) provide seating within close proximity to the board; (5) provide lines on the sides of papers; and (6) enlarge the font on written materials and the computer screen.²³

Regarding academic intervention for attention and executive functioning, recommendations included, but were not limited to, the following: (1) continue medication to manage ADHD symptoms; (2) seat Student close to board or teacher; (3) obtain Student's attention before giving instructions; (4) use verbal and nonverbal cues to direct attention to tasks; (5) provide regularly scheduled breaks; (6) reduce distractions such as hallway noise to the extent possible; (7) break multiple-step directions and large assignments into short segments; (8) check for understanding of key points; (9) assist

²² *Id.*

²³ *Id.*

Student in planning his approach to tasks, assignments, and projects; (10) provide instruction and practice in self-monitoring work; (11) vary instructional method and pace to sustain interest; (12) decrease attention given to inappropriate behavior; (13) increase attention given to Student for desired behaviors; and (14) teach appropriate way to solicit teacher attention.²⁴

Regarding academic intervention for behavioral and emotional functioning, recommendations included, but were not limited to, the following: (1) provide individual behavior therapy to Student to promote prosocial responding; (2) set clear rules and expectations for behavior to provide predictability; (3) provide short breaks or cooling off periods prior to emotional outbursts where possible; (4) provide more attention for engaging in positive activities than for failing to participate; (5) provide outlets to express feelings; and (6) designate a check-in person who will touch base with Student periodically throughout the day to provide assistance.²⁵

When questioned specifically about Dr. Adamson's July 2015 report, Dr. Bean, Director of Special Services at District, indicated that she thought the report did not seem to apply to Student, noting that she did not understand why Parent wanted a document in Student's file that indicated that he was mentally retarded when he was not.²⁶ Dr. Bean also stated that her interpretation of the report recommendations was that school personnel had to allow Student to walk out of class and refuse to do work if that was his choice, and that, ultimately, he would be allowed to fail.²⁷

²⁴ *Id.*

²⁵ *Id.*

²⁶ Transcript, Vol. I, p. 26.

²⁷ Transcript, Vol. I, pp. 149-50.

Student's May 14, 2015 IEP

During the 2015-2016 academic year, Student received special education and related services pursuant to an IEP developed on May 14, 2015 (duration of services to be through May 27, 2016).²⁸ Pursuant to the IEP, Student was scheduled to receive 1700 minutes of general education per week (all subjects and activities besides math) and 250 minutes of special education per week (math).²⁹ The IEP stated that Student needed positive behavioral interventions and supports, specifically noting that Student has a BIP and attends counseling. The IEP further stated that Student could follow regular discipline policies.³⁰ Per the IEP, Student was also to receive the following instructional modifications and supports: (1) opportunity to respond orally; (2) preferential seating; (3) opportunity to repeat and explain instructions; (4) study guides; (5) use of calculator; (6) small group setting; (7) clearly defined limits, rules and consequences; (8) frequent reminders of rules (verbal and/or nonverbal prompts and cues; (9) praise for appropriate behavior; and (10) frequent eye contact/proximity control/teacher circulation around room.³¹

The IEP contained a statement in the "Student Profile Summary" indicating that Student has high academic skills in all areas except math, and that Student was being placed in the resource room for help in that subject. The statement further noted that Student had behavior goals in place to help him overcome his behavior problems, noting that his behavior results in incomplete assignments and, thus, failing grades.³² Regarding academic

²⁸ Parent Binder, Tab 3; District Binder, pp. 22-31.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

performance, the student profile summary stated that Student had been administered academic testing and had scored 115 (grade equivalent of 10.8) in reading, 91 (grade equivalent 5.7) in sentence comprehension, 117 (grade equivalent of 12.2) in spelling, and 88 (grade equivalent of 5.1) in math.³³ Finally, the IEP noted that Student had a psychiatric evaluation significant for ADHD and depression.³⁴

Student's May 14, 2015 IEP contained no annual goals.³⁵ Dr. Bean testified that there should have been a goal for math, but that she did not check the IEP after it was completed by a teacher.³⁶ Behavioral goals were not included in the IEP because the District felt that goals of this nature belonged in the behavior plan.³⁷ Dr. Bean explained that Student was not always offered small settings per his IEP because the only small setting at District was the special education classroom, stating that all special education services were provided in the special education classroom.³⁸

Dr. Bean testified that Student was only placed on an IEP so that he could receive behavior assistance through a CIRCUIT referral, adding that District normally did not provide IEPs to students who are only a grade behind regarding academic subjects.³⁹ Dr. Bean explained that the IEP was purely academic and did not address behavior, adding that, because of the academic IEP, Student would be eligible for behavioral assistance through CIRCUIT.⁴⁰ Student was classified as emotionally disturbed to qualify under the IDEA, but

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Transcript, Vol. I, p. 101.

³⁷ Transcript, Vol. I, p. 102.

³⁸ Transcript, Vol. I, p. 168.

³⁹ Transcript, Vol. I, p. 92.

⁴⁰ Transcript, Vol. I, p. 97.

District considered emotional disturbance to be the same as other health impaired, or OHI.⁴¹ Dr. Bean initially had Student classified as OHI but Parent requested emotional disturbance and Dr. Bean changed the IEP to reflect same. Dr. Bean testified that she did not mind changing OHI to emotional disturbance because she did not see a difference between the two.⁴²

When questioned about the various modifications in the IEP, Dr. Bean repeatedly stated that it was impossible to deliver such modifications because Student continually got up and walked out of class.

There were no revisions to the IEP during the 2015-2016 academic school year. When District received Dr. Adamson's July 2015 neuropsychological assessment, the IEP team did not meet to discuss the report. Instead, Dr. Bean made a copy of the report and gave it to all of Student's teachers so that they would know how to work with Student.⁴³ Dr. Bean did not feel that Student's IEP needed to be revised because Student's "academics were still the same," in her opinion.⁴⁴

When Moore, Student's special education teacher, was asked to describe his disabilities, she testified that she remembered him being OHI and also specific learning disability, or SLD. She further stated that she believed that Student's disability had something to do with his thinking patterns.⁴⁵ Moore testified that, since she taught math and science, she would allow Student to switch subjects if he became frustrated.⁴⁶ Moore

⁴¹ Transcript, Vol. I, pp. 97-98.

⁴² Transcript, Vol. I, pp. 179-80.

⁴³ Transcript, Vol. I, pp. 89-90.

⁴⁴ Transcript, Vol. 1, p. 90.

⁴⁵ Transcript, Vol. II, p. 197.

⁴⁶ Transcript, Vol. II, p. 198.

recounted one teacher bribing Student with a candy bar, adding that she too used food (chips) on occasion as incentive.⁴⁷ Moore explained that Student would accept help if it was 1:1, but that he had a problem if her attention was diverted to another student.⁴⁸ Regarding grades, Moore testified that she curved Student's grade based on what he actually completed. She further explained that if the assignment had twenty-five questions, but Student only completed fifteen, she would only grade those fifteen questions and consider that the entire assignment.⁴⁹ Student often left Moore's class and walked to see Coach Coleman, who was one of the Deans at the school.⁵⁰

Student's Behavioral Issues and Behavioral Intervention Plan

Student had continuous behavior issues while at District. Between January 7, 2016 and February 25, 2016, the relevant timeframe for consideration in this case, Student received the following: (1) January 7, 2016 discipline notice for walking out of class; (2) January 7, 2016 discipline notice for refusing to do work, leaving classroom without permission, and verbally refusing to do work; (3) January 11, 2016 discipline notice for walking out of class; (4) January 15, 2016 discipline notice and detention for walking out of class; (5) January 18, 2016 detention notice and in-school-suspension for arguing with teacher regarding cell phone; (6) January 19, 2016 discipline notice for skipping class; (7) January 27, 2016 discipline notice and suspension notice indicating three days out-of-school suspension for refusing teacher's orders, arguing, trying to fight another student, and calling teacher an "ugly ape"; (8) February 1, 2016 discipline referral and suspension notice

⁴⁷ Transcript, Vol. II, pp. 199-200.

⁴⁸ Transcript, Vol. II, p. 201.

⁴⁹ Transcript, Vol. II, p. 202.

⁵⁰ Transcript, Vol. II, p. 210.

indicating three days out-of-school suspension for walking out of classroom without permission; (9) February 8, 2016 discipline notice for walking out of class without permission; (10) February 8, 2016 discipline notice for continuing to talk after being asked to stop; (11) February 9, 2016 discipline notice and suspension notice indicating three days out-of-school suspension for walking out of in-school-suspension; (12) February 18, 2016 suspension notice and five days out-of-school suspension for calling a teacher a “stupid ass bitch” and stating that the teacher’s test was “bullshit.”⁵¹

Regarding the January 27, 2016 incident resulting in three days out-of-school suspension, the record contains a suspension notice indicating that Student was suspended for disrespecting authority, which constituted a violation of the student handbook. There is no indication in the record that a manifestation determination review was conducted.⁵²

Regarding the February 1, 2016 incident resulting in three days out-of-school suspension, the record contains a suspension notice indicating that Student was suspended for insubordination, specifically walking out of in-school-suspension on two occasions, constituting a violation of the student handbook. There is no indication in the record that a manifestation determination review was conducted.⁵³

Regarding the February 9, 2016 incident resulting in three days out of school suspension, the record contains a suspension notice indicating that Student was suspended for insubordination, specifically walking out of in-school-suspension on two occasions,

⁵¹ Parent Binder, Tab 7, 9; District Binder, pp. 128-46.

⁵² *Id.*

⁵³ *Id.*

constituting a violation of the student handbook. There is no indication in the record that a manifestation determination review was conducted.⁵⁴

Regarding the February 18, 2016 incident resulting in five days out-of-school suspension, the record contains a suspension notice indicating that Student was suspended for disrespecting authority and using profane language toward a school district employee, constituting a violation of the student handbook. A manifestation determination review was conducted on February 18, 2016. Parent came to the school expecting to attend a wrap-around or informational meeting regarding Student and was told at that time that there would be a manifestation review meeting regarding Student's behavior.⁵⁵ Parent requested that she be permitted to call the special education advocate that had been assisting her, but was told the advocate did not need to be present.⁵⁶ Not all members of the IEP team were present and the IEP was not provided to those that were present, despite the fact that the manifestation review determination paperwork indicates that Student's IEP was reviewed.⁵⁷ Regarding the question as to whether child has a history of exhibiting this specific conduct, Dr. Bean, the LEA Supervisor, indicated "No." In addition, she marked "Yes" for the question asking whether Student's IEP had been implemented prior to the incident.⁵⁸ Dr. Bean stated that, at the time of this incident, it was her impression that Student was doing what he wanted to and that he could control his behavior, resulting in the behavior not being a manifestation of his disability.⁵⁹

⁵⁴ *Id.*

⁵⁵ Transcript, Vol. III, p. 108.

⁵⁶ Parent Binder, Tab 7, 9; District Binder, pp. 128-46.

⁵⁷ *Id.*; *see also* Parent Binder, Tab 9; Transcript, Vol. I, p. 201.

⁵⁸ Parent Binder, Tab 9.

⁵⁹ Transcript, Vol. I, p. 227.

Student had a BIP dated April 22, 2015 which was in effect during the 2015-2016 school year. There were at least three BIPs in the file and, although all witnesses testified that they had knowledge of a plan, not all witnesses recognized or referenced the same plan. Despite the fact that Student was receiving services under the IDEA, the BIP indicates that it is a Section 504 behavior plan.⁶⁰ The plan indicates the following modifications that teachers should apply: (1) set clearly defined limits; (2) seat student near teacher; (3) give frequent reminder of rules; (4) journal daily behaviors in all classes; (5) provide in-class cooling off periods (2 minutes outside classroom door); (6) reinforce appropriate behavior; and (7) have Student sign a behavioral contract.⁶¹ The plan further states that points would be given to Student per class and accumulated weekly, indicating some type of reward system. It is noted on the BIP that suspension or arrest will be the interventions employed if Student does not respond to stated modifications.⁶² Dr. Bean testified, however, that Student was permitted to get up and walk out of class to go see the Dean or the SRO Officer if he needed to do so.⁶³

An appendix to Student's April 22, 2015 behavior plan notes that Student refuses to stay on task and complete assignments in class "despite having the ability to do so." It further notes that Student is frequently disrespectful to adults. In the portion of the document that asks for a summary of previously collected information and records relevant to Student's behavior, the following is stated: "The Student is able to control anger and stay in class with male teachers. He recently won spelling bee and represented the county. Records show that

⁶⁰ Parent Binder, Tab 5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Transcript, Vol. I, p. 124.

he is able to work at or above grade level.”⁶⁴ Regarding measurement procedures for problem behaviors, Student’s BIP states that “2 out of 3 times Student will get back on task after redirection.”⁶⁵ On the subsequent page of the BIP, it stated that Student will “get back on task 3 out of 5 times without arguing, threatening, or disrupting class.”⁶⁶ Finally, the BIP states that weekly logs will be kept, and that the plan will be reviewed weekly and modified as needed.⁶⁷

Coach Coleman testified that Student, who he understood to be classified as emotionally disturbed and diagnosed with oppositional defiance disorder, was initially allowed to come see him as a reward for following directions in class but, at the end, Student was allowed to see him anytime he was upset about something.⁶⁸ Student had a good relationship with Coach Coleman and he felt that Student was becoming overly attached to him.⁶⁹ Coach Coleman’s impression was that Student made selective choices regarding his behavior, citing an example where he refused to do work in class but was willing to complete the same work in Coach Coleman’s office.⁷⁰ Coach Coleman could not recall if he had seen the neuropsychology report provided by Dr. Adamson.⁷¹ He did, however, recall a meeting in which he was told that documentation indicated that Student was “mildly retarded” and unable to function in a normal classroom because of same.⁷² Coach Coleman did not believe this because Student had participated in and won a spelling bee, beating other children, such

⁶⁴ Parent Binder, Tab 5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Transcript, Vol. III, pp. 7, 9.

⁶⁹ Transcript, Vol. III, pp. 7-8.

⁷⁰ Transcript, Vol. III, pp. 10-11.

⁷¹ Transcript, Vol. III, p. 12.

⁷² Transcript, Vol. III, p. 19.

as Coleman's children, who had high grade point averages.⁷³ When questioned about Student and a diagnosis of unspecified depressive disorder, Coach Coleman testified that Student's demeanor was often dependent on his appearance, explaining that if he had a new haircut that he would have a good day. If he was unkempt, he would have a bad day.⁷⁴

On August 25, 2015, Parent requested a CIRCUIT referral so as to allow State Behavior Support Specialists to observe Student and make recommendations and a plan regarding Student's behavior. On August 31, 2015, Student's case was assigned to a behavior consultant. It appears from the record that District also requested a CIRCUIT referral following Parent's request.⁷⁵ McIntyre, a co-coordinator for the behavior support specialists in association with the Arkansas Department of Education, Division of Special Education, described the process of getting requested information from District was slow, inaccurate, and sometimes incomplete, describing this conduct as atypical based on her experience.⁷⁶ McIntyre received Student's IEP, although it took some time. In addition, she eventually received Student's BIP. McIntyre planned to close the case in November 2015 based on lack of information; however, District requested that the case remain open and agreed to provide additional information.⁷⁷ Ultimately, daily data sheets submitted by District were often incomplete.⁷⁸ McIntyre did make some recommendations, including the following: (1) review student's medical concerns based on Le Bonheur report; (2) review Student's mental

⁷³ Transcript, Vol. III, p. 20.

⁷⁴ Transcript, Vol. III, p. 32.

⁷⁵ Parent Binder, Tab 21; District Binder, pp. 182-88.

⁷⁶ Transcript, Vol. I, p. 24.

⁷⁷ Transcript, Vol. I pp. 25-27.

⁷⁸ Transcript, Vol. I, p. 32.

health concerns in light of his behaviors; and (3) consider conducting other assessments.⁷⁹ McIntyre noted that Student had significant deficits regarding processing, memory, and language, social skills. McIntyre also recommended that modifications for Student be reviewed for appropriateness.⁸⁰

On January 20, 2016, a training session regarding Student's disability was held for all relevant staff members. On this same date, according to sign-in records, special education topics were discussed, as well as requirements for conducting a manifestation review determination.⁸¹

Regarding the issue of manifestation reviews, Dr. Bean testified that it was determined that District would reset the clock regarding Student's out-of-school days in January 2016 since there would be new paperwork pursuant to a previous resolution agreement. Student had already been suspended for ten days in fall 2015, but the number of suspension days would be adjusted to zero. Dr. Bean's intention was to give Student "every opportunity to stay in school."⁸² Dr. Bean testified that Student benefited from this, and the lack of manifestation determination reviews.⁸³ Had Student's out of school suspension days not been restarted, District would have been required to hold a manifestation determination review for all suspensions in spring 2016.⁸⁴

⁷⁹ Transcript, Vol. I, pp. 39-40.

⁸⁰ Transcript, Vol. I, p. 41; Parent Binder, Tab 30.

⁸¹ Parent Binder, Tab. 31.

⁸² Transcript, Vol. I, p. 221.

⁸³ Transcript, Vol. I, p. 222.

⁸⁴ Transcript, Vol. I, p. 71.

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.⁸⁵ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.⁸⁶ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.⁸⁷

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts no procedural violations; therefore, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of procedural violations of the IDEA.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student. Pursuant to *Rowley*, the goal of the IDEA is “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”⁸⁸ Essentially, an IEP is not required to be designed to “maximize a student’s potential

⁸⁵ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

⁸⁶ 458 U.S. 176, 206-07 (1982).

⁸⁷ *Id.*

⁸⁸ *Id.* at 192

commensurate with the opportunity provided to other children,” thus making the standard that District must meet very minimal.⁸⁹ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”⁹⁰

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”⁹¹ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”⁹² Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”⁹³ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”⁹⁴ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from

⁸⁹ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

⁹⁰ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

⁹¹ *CJN*, 323 F.3d at 641.

⁹² *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

⁹³ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁹⁴ *Pachl*, 453 F.3d at 1068.

mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”⁹⁵

In the present case, Parents asserted that the District failed to provide FAPE when it: failed to develop and implement an appropriate IEP for Student that was reasonably calculated to provide educational benefit, failed to develop and implement an appropriate BIP, and failed to conduct manifestation determination reviews, as required by IDEA, prior to suspending Student from school.

IEP. Parent asserted that the District failed to develop and implement an appropriate IEP for the 2015-2016 school year, particularly in light of evaluation data from Dr. Adamson of Le Bonheur Children’s Hospital. The IDEA requires that IEPs include the following: “(1) a statement of the student’s present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence.”⁹⁶

In the present case, the record clearly establishes that Student’s IEP was not reasonably calculated to enable Student to receive educational benefit while at District. Although the District prepared an IEP for Student prior to the 2015-2016 school year, the IEP did not include an adequate statement of Student’s present levels of academic and functional performance. The IEP included a brief statement outlining scores from a single

⁹⁵ *Roncker*, 700 F.2d at 1063.

⁹⁶ *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). *See also* 20 U.S.C. § 1414(d)(1)(A)(i).

assessment; however, the data provided was not from the most recent evaluation available. In addition, the IEP did not address, in any manner, the copious amount of information regarding student's academic performance that was provided by Dr. Adamson. In fact, the IEP was dated May 14, 2015 and the record is clear that there was no IEP meeting or revision of Student's IEP after receiving Dr. Adamson's report in July 2015.

In addition to failing to address student's present levels of academic and functional performance, the IEP had zero measurable goals and did not describe in any way how progress would be measured for Student. There was a single statement dealing with Student's need for math assistance, but this was not listed as a goal and did not have any progress measures. The IEP also lacked an explanation of the extent to which Student would not be in the regular classroom.

Student's IEP did have a statement of educational services to be provided, with a statement that Student would receive 250 minutes of special education instruction per week in the subject of math. In addition, the IEP included a statement of accommodations necessary to implement the IEP goals, despite the lack of goals. Finally, the IEP addressed dates of service.

As stated above, from a basic elemental standpoint, the IEP was severely deficient. Aside from this, however, Student's IEP was not appropriate because it did not take into account known data so as to create appropriate programming for Student. It was clear from the testimony of Dr. Bean and Coach Coleman that, despite medical documentation from a reputable children's hospital, school personnel did not believe that Student had an academic

disability. In addition, school personnel did not believe that Student's behavioral issues were a result of his disabilities.

First and foremost, ability to excel in a single subject area should not be generalized to all other subject areas. It was repeatedly mentioned that Student had succeeded in winning a school spelling bee. In addition, some spelling test scores relied on by District indicated that student's spelling ability was at the twelfth grade level, far above Student's grade level. Certainly, the data suggests that spelling was a strength for Student. This, however, cannot be generalized to all other areas of language for Student. In fact, some of Student's language scores indicated that he was below grade level, and Dr. Adamson indicated a need for services in this area. Second, school personnel are not qualified to evaluate Student in the same manner as a neuropsychologist. School personnel, while qualified in many areas pertaining to education, are not medically trained to evaluate disabilities like those presented by Student.

Third, what few modifications and accommodations stated in the IEP were not regularly provided to Student. In addition, Dr. Bean, Coach Coleman, and Moore all gave different accounts of Student's diagnoses when asked to describe his disabilities. While it is not expected that school staff understand with specificity every facet of Student's disabilities, they should at least be able to identify the disabilities and associated diagnoses with consistency, as well as understand the impact of the disabilities on academic and functional performance.

Given the information in the record, receipt of the July 2015 report from Le Bonheur Children's Hospital should have prompted Dr. Bean to call together Student's IEP team for

consideration of the new evaluation. Thereafter, the IEP should have been revised to address recommendations contained in Dr. Adamson's report. Instead, however, Dr. Adamson's report was simply distributed to teachers. This is unacceptable and in violation of the IDEA. Essentially, there is no data, whatsoever, to suggest that Dr. Adamson's report was ever genuinely considered. In fact, the evidence indicates the opposite. The report was written off as indicating that the student was mentally retarded, an assertion that, in fact, was nowhere indicated in the report, and tossed aside.

In light of the information in the record, Student's IEP should have addressed several academic subjects, as well as behavioral issues, and set forth goals regarding each. As such, Parent has met her burden in regards to establishing that Student's 2015-2016 IEP was not reasonably calculated to enable Student to receive educational benefit.

BIP.

Parent asserts that Student was not provided FAPE on account of the fact that the BIP developed by the District was inappropriate in light of Student's behaviors, and, further, was not properly implemented and followed. "When a child's learning is impeded by behavioral issues, the IDEA requires that the IEP team 'consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.'"⁹⁷ A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student.⁹⁸ The Eighth Circuit Court of Appeals has stated that "it is 'largely irrelevant' if the school district could have employed 'more positive behavior interventions'

⁹⁷*M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

⁹⁸*Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

as long as it made a ‘good faith effort’ to help the student achieve the educational goals outlined in his IEP.”⁹⁹

In the present case, District developed a BIP, although it is somewhat unclear which plan was being followed by staff members at any given time. It appears, based on documents and testimony, that the April 22, 2015 BIP was the operative document being utilized with Student during the 2015-2016 school year. The BIP did not adequately identify triggering behaviors and replacement behaviors, and included goals that not only were internally inconsistent, but lacked specificity for staff to properly measure behavioral improvement. In addition, many of the stated modifications, such as journaling daily behavior, providing in-class cooling off periods, use of a behavioral contract, and implementing a point system were not followed. Essentially, the BIP did not adequately address Student’s behavioral issues and what modifications were listed were not implemented.

In addition to the fact that District neither developed an appropriate BIP nor implemented the modifications in the BIP that existed, District failed to revise the BIP to address updated information and changes in Student’s behavior. District received Dr. Adamson’s report at the beginning of the 2015-2016 school year, and the report specifically addressed Student’s behavioral issues and made numerous recommendations. Nonetheless, no IEP meetings were held to discuss Student’s BIP and consider plan revisions. Instead, Dr. Adamson’s report was determined to be inaccurate and was dismissed because District’s opinion of Student, despite medical evidence, was that he was willfully engaging in negative behavior.

⁹⁹ *M.M.*, 702 F.2d at 479 (citing *C/N*, 323 F.3d at 639).

Finally, regarding this issue, District did not actively cooperate when Parent made a CIRCUIT request seeking behavioral assistance for Student. State behavioral support specialists were ready and willing to review collected data and assist District in the creation of an appropriate BIP; however, District was slow to produce information and information produced was typically incomplete.

In light of all of these factors, it is the opinion of this Hearing Officer that District's failure to adequately address Student's behavior constituted a denial of FAPE. The District did not make a good faith effort to address Student's ongoing behavior issues. As such, there is sufficient evidence based on the facts of this case to conclude that the District failed to properly develop, implement, and follow a BIP for Student.

Manifestation Determination Reviews.

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

Pursuant to regulation, the threshold issue in deciding whether a manifestation determination review is required is whether the disabled child has suffered a change of placement. A change of placement occurs (1) when the removal is for greater than ten consecutive school days or qualifies as a pattern of removals, and (2) constitutes a foundational change in Student's education program. *M.N. v. Rolla Public Sch. Dist. 31*, 2012 WL 2049818. A pattern of removals exists when the removals (1) total more than ten school days in a school year, (2) the child's behavior is substantially similar to child's behavior in

previous incidents that resulted in removal, and (3) other factors, such as length of each removal, total amount of time child has been removed, and proximity of removals to one another indicate a pattern. 34 C.F.R. § 300.536. Regarding the issue of whether a removal constitutes a foundational change in Student's education program, it is well established that a suspension is a change of placement. *Honig v. Doe*, 484 U.S. 305, 328 (1988).

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

In the present case, Student had been suspended for at least ten days during the fall 2015. Between January 7, 2016 and February 25, 2016, Student was suspended four more times, specifically on January 27, February 1, February 9, and February 18. The suspensions were for disrespecting authority, walking out of class without permission, and profanity. The evidence in this case established a clear pattern of removal in that Student was suspended in excess of ten days, the reasons for various suspensions were similar, and the proximity of removals was close in time. In addition, because all of these removals were suspensions, Student clearly suffered a foundational change in his educational program. In light of all of these factors, Student's removals between January 7, 2016 and February 25, 2016 constituted changes in placement.

In that Parent established that Student's removals from school between January 7, 2016 and February 25, 2016 constituted changes in Student's educational placement, the

question remains whether Student's removals were for disciplinary reasons. In the present case, suspension notices for all removals indicated violations of the student handbook. Student was suspended repeatedly for violating a various codes of student conduct and, thus, the removals constitute disciplinary removals.

Because Student's removals constituted a change of placement for disciplinary reasons, Student was entitled to a manifestation determination review prior to each suspension. Testimony and documentation clearly established that there was a manifestation determination review for only one of the four suspensions. Dr. Bean explained that, in light of a previous resolution agreement and plans for new paperwork, she reset Student's days to give him an opportunity to stay in school. While it appeared from the genuineness of Dr. Bean's testimony that her intentions were pure, the reality is that resetting Student's removal days denied him the right to a manifestation review for each of the four suspensions that he was given between January 7, 2016 and February 25, 2016. As such, he was automatically suspended without any discussion by his IEP team on three separate occasions, specifically January 27, February 1, and February 9.

The record established that there was a manifestation determination review held on February 18, 2016, and that mother attended. However, documentation and testimony established that the meeting was treated as a formality, as opposed to a true review of Student's disabilities, documentation in support thereof, and his behavior on the date in question. Parent did not have any clue until she arrived at the school on February 18, 2016 that there would be a meeting. Parent was denied the opportunity to contact Student's special education advocate, and not all members of the IEP team were present. In addition,

Student's IEP was not brought to the meeting for review. In fact, there is no indication that anything in Student's special education file was reviewed.

In light of these findings, it is the conclusion of this Hearing Officer that District violated the IDEA in refusing to hold manifestation determination reviews on January 27, 2016, February 1, 2016, and February 9, 2016. In addition, District essentially violated the IDEA, despite the fact that held a manifestation determination review on February 18, 2016, as the review was not held in a manner that resulted in a fair consideration of Student's disabilities and their effect on Student's behavior.

Conclusion. Having considered Parent's allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was denied FAPE between January 7, 2016 and February 25, 2016 as a result of substantive violations of the IDEA. Student's disabilities are very complicated and it is uncertain at this time the extent to which Student will be academically successful. What is certain, however, is that Student must be provided all procedural and substantive rights under the IDEA in order to have a chance to succeed.

ORDER:

The results of the testimony and evidence warrant a finding for the Parent. Specifically, Parent has introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between January 7, 2016 and February 25, 2016 by failing to provide Student with an IEP that was reasonably calculated to provide educational benefit, failing to provide an appropriate BIP and cooperate with a retained Behavioral Support Specialist acting on Student's behalf, and

failing to follow IDEA regulations pertaining to conducting manifestation review hearings prior to suspending Student from school.

In light of these findings, District is hereby ordered to take the following actions regarding Student: (1) request a CIRCUIT referral on behalf of Student **no later than the first day of the 2016-2017 school year** so that State behavioral support specialists can fully evaluate Student and determine what behavioral supports and interventions are necessary; (2) provide all requested documentation to State behavioral support specialists involved in the CIRCUIT referral process in a timely manner; (3) ensure that all documentation provided to State behavioral support specialists involved in the CIRCUIT referral process be accurate and complete; (4) to the extent not provided as a result of the CIRCUIT referral, hire a behavioral specialist of parent's choosing to conduct a functional behavior assessment (FBA) regarding Student and revise BIP as required based on FBA results; (6) convene Student's IEP team **no later than the first day of the 2016-2017 school year** to consider all current evaluations, including Dr. Adamson's July 2015 neuropsychology report/evaluation, and draft an IEP that addresses all subjects in which Student will receive special education as well as Student's behavior, and provide measurable goals and objectives for each; (7) if necessary, administer additional academic evaluations to Student to determine present level of academic functioning; and (8) ensure that manifestation determination reviews are conducted as required pursuant to the IDEA.

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 Individual's with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards (Arkansas Department of Education 2008), the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

06/17/2016

DATE