

Arkansas Department of Education
Special Education Unit

IN RE:

XXXXXXXX XXXXXXX
as Parent in behalf of
XXXXXXXX XXXXXXX, Student

PETITIONER

VS. NO. H-16-35

XXXXXXXXXXXXX School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioner alleges that the Respondent has denied the Student with a free and appropriate public education (FAPE) between April 29, 2015 (school year 2014-15) and February 29, 2016 (school year 2015-16) by:

1. Failing to implement the Student's IEP in place on April 29, 2015;
2. Failing to evaluate and provide services for the Student's communication, fine motor, and behavior deficits;
3. Failing to educate the Student in the least restrictive environment; and
4. Violating the Student's due process procedures by:
 - A. Not including a special education teacher at the 12/04/2015 IEP meeting;
 - B. Failing to provide the Parent information regarding the implementation and progress of the Student on his IEP;
 - C. Failing to have personnel knowledgeable about the Student's disabilities at IEP meetings;
 - D. Changing the Student's placement for services without due process; and

E. Violating the stay-put provision of the IDEA.

Relief sought by the Petitioner included:

1. Compensatory special education and related services (no amount specified).
2. Consultant approved by Parent to assist in:
 - A. Developing and monitoring an FBP and Behavior Support Plan;
 - B. Developing and implementing an appropriate IEP;
 - C. Training District staff and administrators in implementing the IEP and the data gathering and monitoring of the Behavior Support Plan;
3. For the IEP to be implemented in the least restrictive environment;
4. Provide evaluations for occupational therapy services, executive functioning training, and assistive technology; and
5. Reimbursement for costs associated with the Parent's provision of tutoring services (No amount specified).

Issues raised by the Petitioner in his 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. These issues were dismissed by pre-hearing order issued on March 2, 2016. (See Hearing Officer Exhibit 2)

Procedural History:

On February 29, 2016, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from XXXXXXXX XXXXXXXX (Petitioner) (Hereinafter referred to as "Parent"), the parent and legal guardian of XXXXXXXX XXXXXXXX (hereinafter referred to as "Student"). The Parent requested the hearing because he believes 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 issues as stated.¹

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of March 31, 2016, on which the hearing would commence should the parties fail to resolve the complaint issues 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 March 2, 2016.

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 Little Rock, Arkansas and the District was represented by Jay Bequette, Attorney of Little Rock, Arkansas.

Counsel for the Petitioner requested and was granted a continuance on March 17, 2016, due to the none availability of counsel on the date set for the hearing. The closed hearing began on April 14, 2016; however, at the closing of the hearing on that date the Petitioner requested and was granted a continuance in order for him to complete his case. The hearing was scheduled and heard on May 2, 2016, with continuances also being granted on the record for the hearing to

¹ For the purpose of clarification regarding the issues and timelines it is to be noted that the Petitioner filed the identical complaint against the District on January 13, 2016, with the hearing to begin on February 12, 2016. A continuance was granted the Petitioner on February 10, 2016, with the hearing set to begin on Thursday, February 25, 2016. On February 25, 2016, the case was dismissed without prejudice due to a failure to appear by either the Petitioner or Petitioner's Counsel. The following Monday (February 29, 2016) the current complaint was filed with the Department.

continue on May 12, 2016; with the final date conducted on June 24, 2016.

The Petitioner entered evidence in the course of hearing which has been labeled as Parent Binder and the District entered evidence in the course of the hearing which has been labeled as District Binder. The record also includes Hearing Officer Exhibits containing all previously issued orders and correspondence between parties relevant to the issues of the hearing.

Findings of Fact:

1. On April 29, 2015, did the District fail to implement the Student's IEP?

On April 29, 2015, the Student at age thirteen, in the second semester of his sixth grade year transferred from a charter school in XXXXXXXXXXXX, Arkansas, into one of the two middle schools within the District. The Student was receiving special education services at the previous school according to the IEP provided to the District.² The previous school's IEP was developed on December 8, 2014, with the scheduled duration of services being from that date until December 7, 2015. He was receiving special education services under the eligibility category of Other Health Impaired (OHI).

A neuropsychological evaluation conducted in November 2011, concluded that the Student had a history of developmental delay with problems in maintaining academic progress. The neuropsychologist stated that the Student needed a more current and full developmental cognitive and psychoeducational evaluation.³ A second neuropsychologist conducted an evaluation in July 2012. The second neuropsychologist's diagnostic impressions were that the

²District Binder, Page 1-19

³ Parent Binder, Page 123-125

Student had a frontal lobe and executive function deficit as well as a psychomotor deficit.⁴ Also in July 2012, the Student received a speech-language consultation which stated that he had previously been diagnosed with an attention deficit disorder (ADHD); that his language skills were in the severely impaired range; that his articulation skills were found to be adequate for his age and gender; and that he continued to meet the criteria for a fluency disorder.⁵ In July 2014, the same neuropsychologist that conducted the evaluation in July 2012 conducted a re-evaluation. This time the neuropsychologist concluded that the Student's "neuropsychological/neurocognitive profile provided data supporting diagnoses of [a] frontal lobe and executive function deficit, [a] visuospatial deficit, [a] psychomotor deficit, and other signs and symptoms involving cognition." Although he did not provide a diagnostic impression, he further noted that the Student's "pattern" was consistent with a previous diagnosis of attention deficit disorder (ADHD).⁶ In addition to all of the above evaluations, the records presented to the District from the previous school included a Functional Behavior Assessment Report and a Behavior Intervention Plan.⁷

The previous school's IEP developed on December 8, 2014, indicated that he was scheduled to receive all of his educational activities, other than electives, in the special education setting (less than 40% of the instructional day in general education). In addition to Reading, Writing, Math, Science, Social Studies and Speech, he received speech and occupational therapies twice weekly for sixty minutes as related services. Additionally, he was assigned a paraprofessional to assist him on a daily basis. Although the IEP indicated that he could follow

⁴ Parent Binder, Page 119-122

⁵ District Binder, Page 304-306

⁶ Parent Binder, Page 115-118

the school's regular discipline policies, it was noted on the IEP that his lack of academic progress was due to behavioral issues that kept him from attending to lessons and completing work.⁸ As noted above a behavior intervention plan was developed at the previous school at which the developing participants included the Student, the Parent, two special education teachers, the school principal, and two paraprofessionals.⁹

Although the Student could have remained in the previous school, the Parent elected to transfer him to one of the District's middle schools because he understood that the teacher of the classroom to which the Student would be assigned was trained in handling student's with disabilities such as his son.¹⁰ The Parent testified that he discussed his son's having been diagnosed with autism on enrolling him in the District; however, as noted above from the evaluations presented to the District, none of them provided such a diagnosis.¹¹ He testified that he did not agree with the IEP that had been developed by the previous school, but in testimony did not elaborate on the disagreement.¹² Even though the Parent testified that he did not agree with the previous school's IEP, the District personnel to which the Student was assigned on entering the middle school all testified that they were mandated to implement the previous school's IEP until a transition conference could be held to develop a plan more suited to the Student's needs within the District.

On April 29, 2015, following the Student's transition into the District a conference was

⁷ Parent Binder, Page 215-225 and 091-094

⁸ District Binder, Page 4

⁹ District Binder, Page 375-378 and Parent Binder 091-094

¹⁰ Transcript, Vol IV, Page 93

¹¹ Ibid, Page 87

¹² Ibid, Page 95-96

conducted for the purpose of developing an IEP for the Student.¹³ The attendees at the conference included the Parent, an occupational therapist, a speech pathologist, the special education coordinator, the director of special services, a health teacher, a physical education teacher, and a special education teacher. The IEP was identical to that which was developed by the previous school with the exception of including writing and reading into language arts. He was programmed to receive the same related services of speech and occupational therapies with the addition of transportation as a related service and the absence of a personal paraprofessional. The disability category for which he was considered qualified for special education services also continued to be other health impaired (OHI). The special education teacher to which he was assigned in April 2015, recalled that the disability for which he qualified for services was OHI, but she also noted that he exhibited autistic behaviors as well.¹⁴ Although he exhibited such behaviors consistent with autism she further testified that to her knowledge there was not a health care provider nor was there testing which provided the District with a formal diagnosis.¹⁵ On May 1, 2015, she sent a fax to the Student's primary care physician asking for a diagnosis to support the Parent's claim of autism. However, the information from the physician was not received by the District until after the school year ended.¹⁶ The Parent also solicited and received a prescriptive note from the Student's treating psychiatrist stating that the Student carried the diagnosis of "Autism Spectrum Disorder (F84.0) for which he is taking medications."¹⁷ The note was dated December 5, 2015. The psychiatrist testified that he did not

¹³ Parent Binder, Page 017-040

¹⁴ Transcript, Vol II, Page 10-12

¹⁵ Ibid

¹⁶ Parent Binder, Page 84

¹⁷ Parent Binder, Page 126

begin treatment with the Student under that diagnosis until September 2015.¹⁸

The Student's first special education teacher in the District testified that the behavior intervention plan developed by the previous school was not needed because "we had very few behavioral issues, you know, with him."¹⁹ This is consistent with the statement of parental participation and concerns contained in the IEP developed in April 2015, which was that he "seems to be doing great at his new school."²⁰ However, behavioral goals and objectives were included in the April 2015 IEP under the standard of classroom/social skills. The impact statement of the standard was that his diagnosis of OHI causes him to have trouble regulating behavioral and emotional responses, making transitions within or between tasks, and adjusting to changes in routine or instructional method. He was challenged to meet the objectives of the goal with 90% accuracy; however, by the end of the year in May 2015 his progress was considered to be only at the 50% mark and thus would need to be continued.²¹

Although the initial special education teacher to which he was assigned testified, as noted above, that they had few behavioral issues, the Parent testified to the contrary stating that "he had issues."²² The Parent testified that he had been called "a few times" to go to the school and get the Student.²³ Even though the evidence presented does not include recordings of any behavioral incidents between April 29, 2015, and the end of school year 2014-15, the special education teacher testified that she could recall only one behavioral incident.²⁴ At the same time,

¹⁸ Transcript, Vol IV, Page 7

¹⁹ Transcript, Vol II, Page 9

²⁰ Parent Binder, Page 018

²¹ Parent Binder, Page 036

²² Transcript, Vol IV, Page 85

²³ Ibid, Page 86

²⁴ Transcript, Vol II, Page 58

she testified that she had to call the Student's father on three or four occasions to come to the school to assist in talking to the Student following acting out behaviors.²⁵ This is consistent with the Parent's recall of being called a few times. However, the previous school's IEP included a behavior management plan, which could have been implemented. Even if the District had done so there was no credible evidence presented that it would have made a difference in the academic advancement of the Student.

Although the Parent may have disagreed with the previous school's IEP, other than failing to include the BIP, the evidence and testimony presented shows that the District did implement the prior IEP as well as the one they developed for the Student once a conference was conducted. The absence of a diagnosis of autism; however, should not have prevented the District from addressing the autistic behaviors as reported by the Parent and as witnessed by the special education teacher. A more aggressive behavior intervention would have been more appropriate. With the exception of having not developed and implemented a behavior intervention plan on his entering the District, there is insufficient evidence to show that the District denied the Student FAPE by failing to implement the IEP April 29, 2015.

2. Did the District fail to evaluate and provide services for the Student's communication, fine motor, and behavior deficits?

A. Communication deficits:

The Student's IEP developed in April 2015 provided speech therapy as a related service

²⁵ Transcript, Vol II, Page 62

for sixty minutes weekly.²⁶ At the annual review conference on December 4, 2015, the IEP also provided speech therapy as a related service for sixty minutes weekly.²⁷ The speech therapy evaluation from which the previous school's IEP, as well as the District's April 2015 IEP, was developed was conducted in July 2012.²⁸ The student obtained severe scores on language fundamentals, receptive language, expressive language, and core language. The District's speech therapist who provided services for the Student on entering the District testified that "we didn't work long" because of the time between his coming to the District in April 2015, and the end of that school year.²⁹ However, the therapist did provide the IEP team with an end of the year report on May 29, 2015. The District's speech/language pathologist also conducted an evaluation on May 15, 2015, concluding that the Student demonstrated strengths in articulation, voice, and using simple sentences; however, he demonstrated weaknesses in fluency, defining words with more than one attribute, word associations, understanding quantitative and directional adjectives, understanding/using inferences, understanding/using conjunctions, understanding figurative language, understanding/using passive voice, asking appropriate questions, using irregular past tense, and providing additional information. The conclusions from the evaluation were that the continuation of speech/language therapy was necessary for him to improve his language and fluency skills.³⁰

The speech therapist who provided the services noted that the Student continued to make progress towards his receptive and expressive language disorder, but that he continued to

²⁶ Parent Binder, Page 017

²⁷ Parent Binder, Page 001

²⁸ District Binder, Page 21

²⁹ Transcript, Vol III, Page 192

³⁰ District Binder, Page 312

struggle with vocabulary, formulating grammatically correct sentences, answering questions, maintaining topic and completing tasks in conversation, and following multi-step directions. It was recommended that he continue to receive speech therapy services for the next school year (2015-16) at sixty minutes weekly.³¹ The speech therapy logs and progress notes between April 29, 2015 and the end of school in May 2015, were not provided as evidence. However, her testimony was, as noted above, that he was making progress. She also agreed in her end of the year report that speech therapy services continued to be necessary in order for him to obtain an educational benefit. The therapy logs and therapy notes from August 2015 through April 2016 were introduced into evidence.³² The therapist testified and the documents show that the only therapy sessions missed were those when the Student was absent from school and while he was in the hospital; all of which according to the testimony and the records, were made up.³³

B. Fine motor deficits:

As with speech therapy, occupational therapy was recorded on the IEP for both school years as related services at sixty minutes weekly.³⁴ The results of the occupational assessment on which the goals and objectives were developed for both the previous school's IEP and the District's IEP for school year 2014-15 are contained in the April 29, 2015, IEP. The evaluation results used were from an evaluation conducted in September 2013. Those findings included deficits in visual motor integration and motor coordination.³⁵ An initial occupational therapy evaluation was also conducted by the District in May 2015 prior to the ending of school year

³¹ District Binder, Page 313

³² District Binder, Page 372-374

³³ Ibid and Transcript, Vol III, Page 179

³⁴ Parent Binder, Page 001-040

³⁵ Parent Binder, Page 018

2014-15. Those findings concluded that the Student had difficulty with age-appropriate fine motor tasks; some core weakness; below average in fine motor control and manual coordination; as well as supplement motor coordination difficulties. The recommendations were that he continue to receive sixty minutes of occupational therapy on a weekly basis and a treatment plan was developed.³⁶ The same results were presented at the annual review conference conducted in November 2015.³⁷ However, according to the therapist the Student was not making progress in either individual or group occupational therapy sessions due to his behavior problems. She recommended that rather than continuing direct services that he “be monitored for classroom needs and modifications once per semester to assist with his ability to independently perform needed skills in the classroom.” The therapist reported to the IEP team conference in December 2015 that “any further direct occupational therapy intervention is not beneficial.”³⁸

The occupational therapy notes from August 2015 through January 27, 2016, reflect a total of thirty-one individual or group sessions. Some of the session notes indicate that the sessions were shortened due to the Student’s maladaptive behaviors such as “inappropriate comments made to [the] therapist.”³⁹ This maladaptive behavior was a part of her report of November 2015 presented to the IEP team in December 2015.⁴⁰ It was also her testimony.⁴¹ Even though he exhibited inappropriate behaviors during therapy sessions the therapist testified that he did not miss any sessions of direct therapy services.⁴² Although counsel for the Parent

³⁶ Parent Binder, Page 160-166

³⁷ Parent Binder, Page 167-169

³⁸ Parent Binder, Page 169

³⁹ District Binder, Page 363

⁴⁰ Parent Binder, Page 168

⁴¹ Transcript, Vol IV, Page 49-50

⁴² Ibid, Page 50

implied in questioning of the witness that his occupational therapy was “dropped” or “terminated” the record and the testimony shows that the therapy was changed to his being monitored by the therapist in the classroom rather than direct services by individual or group sessions because he was unable to make any progress due to his inappropriate behaviors.⁴³

Even though the occupational therapist altered the manner in which the services were to be provided after January 27, 2016, direct services were re-instigated on February 19, 2016, as a result of the Parent having filed for a due process hearing implementing the stay-put provision of the IDEA.⁴⁴ Consequently the only direct therapy sessions missed were those between January 26, 2016 and February 19, 2016. The therapy notes after February 19, 2016, continue to indicate the Student exhibited inappropriate behaviors such as grabbing and pulling the therapist’s shirt and attempting to hug the therapist.⁴⁵ Other than the direct occupational therapy services between January 26, 2016 and February 19, 2016, there is no indication that the Student’s fine motor deficits were not addressed in direct occupational therapy services.

(C) Behavior deficits:

The Student’s behavior problems became the major focus of the hearing as judged by both the volume of evidence presented and the testimony elicited. As previously noted the first special education teacher in the District to which the Student was assigned, testified that they did not adopt the previous school’s behavior intervention plan (BIP) because “we didn’t have any behavior issues with him” through the end of May 2015. Nonetheless, as previously noted, the

⁴³ Ibid, Page 54-55

⁴⁴ District Binder, Page 368-369 (The reader is directed to footnote one as to the timeline for the stay-put provision of the IDEA)

⁴⁵ Ibid, Page 368

District's IEP team elected to provide the Student with behavior goals on his IEP.⁴⁶ During that first month and a half of her involvement with the Student in her classroom, as previously noted, she recorded only one discipline referral "for a fight he had."⁴⁷ Even though she did not consider the Student having any serious discipline problems during that first month and a half, she testified that the justification for the District to conduct a functional behavior assessment the following school year (2015-16) was more likely than not related to what she had observed. She testified that "he had increased in some inappropriate behaviors as far as yelling out a little bit more, being a little more aggressive...he had become somewhat verbally inappropriate, off task, refusing to follow directions."⁴⁸

Her classroom was physically moved from one District campus to another at the beginning of the 2015-16 school year, with the Student scheduled to remain in her self-contained classroom. The campus where her classroom was re-located was referred to as the sixth grade campus. It was located directly across from what was referred to as the seventh-eighth grade campus. The Student was now going into the seventh grade in a self-contained classroom on the sixth grade campus, even though there was another special education self-contained classroom in the "7-8 building."⁴⁹ According to the special education teacher's testimony the Student's behavior, as noted above, escalated on entering his seventh grade year at the six grade campus. She testified that the Student's father approached her stating that one of the possible reasons the Student was acting out more in her classroom at the beginning of the year on the new campus

46 Transcript, Vol II, Page 21-22; Page 38-39; Page 55; Page 57; Parent Binder Page 17-40

47 Transcript, Vol II, Page 58

48 Transcript, Vol II, Page 60

49 Ibid, Page 62

was because “he did not like being on the sixth grade campus as a seventh grader.”⁵⁰ Contrary to this; however, and according to the Parent he recalled in testimony that he “was told that [the Student] was doing better, was doing good, and that going to [the other] class [in the 7-8 building] would be a really good idea, and he was asked to put him in [the other class] and try it out.⁵¹ The District’s school psychologist testified that the Parent “expressed concern about [the Student] being unhappy, that he was on the sixth grade campus...even though there [were] students from grade six through eight [on the sixth grade campus]...and the team also discussed [the Parent’s] thought that [the Student] may respond better to a male teacher...so, at that meeting [in December 2015] the team agreed that he could go to [the other classroom with the male teacher] as opposed to [the current classroom on sixth grade campus with the female teacher]...both are self-contained classrooms, so it’s not a change of placement, but a change in instructor.”⁵²

Between the beginning of school year 2015-16 in August 2016 and prior to the change in classrooms in December 2015, the evidence presented shows that the Student received numerous discipline referrals as well as local police incident reports. After the location of his special education services was changed to the male teacher’s classroom the discipline referrals and reports continued to escalate.⁵³ During the school year his teachers and other personnel kept copious daily notes of his maladaptive behaviors and their responses to them.⁵⁴ There did not appear to be a consistent pattern to their responses even though the maladaptive behaviors were

⁵⁰ Ibid

⁵¹ Transcript, Vol IV, Page 98

⁵² Transcript, Vol I, Page 50

⁵³ District Binder, Page 164-224; 203-209; 233-234; 238-278 and Parent Binder, Page 183-225a

consistent.

As previously noted, following the initial placement in the District in April 2015 the Student did not exhibit any significant maladaptive behaviors that warranted major interventions according to the special education teacher. That same female teacher, as noted above, was also the Student's special education teacher when the location of his instruction was moved to the new campus. According to the evidence presented and as noted above, it was at this time that the majority of disruptive behaviors began to escalate. It is important to note, however, that prior to the Student transferring into the District the previous school developed and implemented a behavior intervention plan (BIP).⁵⁵ Even though the Parent objected to previous school's IEP, the BIP they developed addressed the same maladaptive behaviors as were now being observed in the District (e.g., yelling out in the class once every three seconds; being aggressive at the rate of two episodes per week with the aggression great enough to cause physical injury and/or property damage; and elopement at the rate of eight to ten times per week lasting one to ten minutes per episode).

When the implementation of his IEP became the responsibility of the male special education teacher on the 7-8 campus in December 2015, the recordings of the maladaptive behaviors became more pronounced in the evidence as presented. The male special education teacher made twenty-nine discipline referrals in the three months of the Student being in his classroom.⁵⁶ The types of maladaptive behaviors were consistent with those noted by the previous school's records and in the first of the current school year while in the female teacher's

⁵⁴ Parent Binder, Page 238-259 and 300-425

⁵⁵ District Binder, Page 375-378

⁵⁶ District Binder, Page 164-224

classroom. However, after being escorted from the classroom during a valentine day party for making inappropriate remarks to a female student, the behavior escalated to the point of his throwing chairs, hitting the paraprofessional, being handcuffed by the school resource officer, and threatening to kill the male special education teacher.⁵⁷ The event resulted in the special education teacher filing a police report in Juvenile Court.⁵⁸

Even though the teacher was threatened to be killed, the Student remained assigned to his classroom due to the stay-put provision of the IDEA. When asked what actions were taken by the District following such an egregious act the special education teacher testified that we “had meetings and we have tried to incorporate strategies in the classroom to help [him]. You know, we’ve come up with self-management plans, we’ve come up with charts, trying to chart his behavior, talking to [him], giving him motivation. You know, hey, you know, I have led [him] aside, even after he threatened me, and talked to him and being just as caring as I would if I was talking to my son, even though he did say that” he was going to kill me.⁵⁹

Prior to this valentine party incident on February 14, 2016, the school psychologist testified that in accordance with the December 2015 IEP conference decision and the Parent’s consent, she conducted a Functional Behavior Assessment between the middle of January through the first of February 2016.⁶⁰ At this point in time the Student had been in the male special education teacher’s classroom for four weeks. Following the valentine day incident an IEP meeting was conducted on February 16, 2016, to address the Student’s behavior issues. The school psychologist testified that the plan after the December 2015 IEP conference was for her,

⁵⁷ Transcript, Vol I, Page 185-191

⁵⁸ Ibid, Page 194 and Parent Exhibit Page 208-209

⁵⁹ Ibid, Page 205

to present her findings of the Functional Behavior Assessment in April 2016.⁶¹ She testified that the plan was for her to have the report ready for an evaluation conference scheduled for April 7, 2016; however, due to the valentine day event the results were presented at the conference held on February 16, 2016. After filing for a due process hearing the IEP team, with the Parent's consent, also decided at the February 16 IEP team meeting that the school psychologist would conduct an ADOS (Autism Diagnostic Observation Scales). The team also agreed to return the Student to the female special education teacher's classroom.

The Functional Behavior Assessment Report she presented on February 16, 2016, included not only a review of the Student's educational record, but his behavior records, formal observations, interviews and behavior rating scales. Her overall assessment was that the Student exhibited verbally aggressive behaviors in order to gain attention from others and that his behaviors at times resulted in escape from non-preferred tasks or activities.⁶² The agreed on ADOS was not completed until after the Parent filed for the second due process hearing. Although no formal report was included as evidence the school psychologist testified that during the administration of the ADOS she did not notice a significant amount of sensory behaviors consistent with autism other than the Student engaging in self-stimulatory behavior.⁶³ Her observations and recommendations for developing a behavior support plan were discussed on March 16, 2016, after the second due process hearing had been filed with the Department. According to testimony the parent was in attendance at the meeting and did not object to the

⁶⁰ Transcript, Vol I, Page 47-49

⁶¹ Ibid, Page 52

⁶² District Binder, Page 379-403 (It should be noted that her evaluation was conducted after the Parent filed the initial complaint on January 13, 2016, and prior to its dismissal on February 25, 2016; however, with the Parent's consent.)

District's decisions.

The evidence indicates that the District did not fail to evaluate for all of the Student's suspected disabilities after his initial enrollment into the District in April 2015. However, the evidence presented shows that the District did fail to implement the previous school's BIP which addressed the same maladaptive behaviors that he exhibited after enrolling and for which the subsequent evaluations appeared to be warranted.

His direct occupational therapy services were altered with justification, but not discontinued as claimed by the Parent's attorney. However, due to the provision of the IDEA stay-put, the direct services were resumed. The previous school's evaluation and subsequent development of an IEP for school year 2014-15 determined that his speech and language impairment was justification for special education services with occupational therapy being necessary in order for him to obtain an educational benefit in his educational performance. The Student's maladaptive behaviors while being provided direct occupational therapy could have been addressed more effectively had a BIP been in place and appropriately implemented. Further, the data collected and considered at the evaluation conference in December 2015 was sufficient to consider the Student's additional need to address his autistic types of behavior and the adverse impact of the related behaviors had on his educational performance. Although the District delayed in developing an IEP to include a behavior management plan the delay in doing so would appear not to have had a negative impact on his educational performance. With regards to his behavior, the severity of this delay in implementing an effective BIP is difficult at best to determine based on the evaluative data eventually collected.

The delay in acting in this case is important. The Student's maladaptive behaviors were not shown to be having a negative impact on his academic performance or those of his classmates; however, they had escalated to the point of involving police restraint. The District's failure to act earlier in the assessment of his behavior, to include whether or not they were related to his diagnosis of autism cannot be judged any other way except as a denial of FAPE. More effective earlier intervention may have prevented the continued escalation of his inappropriate and maladaptive behaviors.

3. Between April 29, 2015 (school year 2014-15) and February 29, 2016 (school year 2015-16) did the District fail to educate the Student in the least restrictive environment?

The Parent failed to address this issue during the course of the hearing and presented no evidence to support the complaint. The only testimony elicited regarding the least restrictive environment was that of the District in questioning two witnesses (the school psychologist and the director of special services). They were asked if they believed the Student was educated in the least restrictive environment, to which both replied "yes."⁶⁴ Consequently, the Parent has failed to show that the District did not educate the Student in the least restrictive environment.

4. Between April 29, 2015 (school year 2014-15) and February 29, 2016 (school year 2015-16) did the District violate the Student's due process procedures by:

A. Not including a special education teacher at the 12/04/2015 IEP meeting?

The evidence presented does not support the Parent's contention that a special education

⁶⁴ Transcript, Vol I, Page 95 and Vol IV, Page 268

teacher failed to be present at the annual review conference held on December 4, 2015.⁶⁵

B. Failing to provide the Parent information regarding the implementation and progress of the Student on his IEP?

Also as with the above complaint the evidence presented and the testimony elicited does not support the Parent's contention that he was not provided with the Student's progress as outlined on his IEP. The conference held on December 4, 2015, contains progress reports completed on all of the goals and objectives of the IEP.⁶⁶ The special education teacher testified that she updates the Student's progress in the computer every nine weeks and sends a copy home to the Parent.⁶⁷ On cross examination the school psychologist testified that at the IEP conference the Parent was provided with information regarding the implementation and progress of the Student on his goals and objectives.⁶⁸ The Parent was not asked about his failure to receive progress reports on either direct or cross examination.

C. Failing to have personnel knowledgeable about the Student's disabilities at IEP meetings?

At the initial IEP conference on April 29, 2015, the attendees, in addition to the Parent, included the occupational therapist, the speech pathologist, the special education coordinator, the director of special services, a health teacher, a physical education teacher, and a special

⁶⁵ District Binder, Page 117

⁶⁶ District Binder, Page 37-52

⁶⁷ Transcript, Vol II, Page 45

⁶⁸ Ibid, Vol I, Page 104

education teacher.⁶⁹ At the annual review conference on December 4, 2015, in addition to the Parent, the attendees included the school principal, a physical education teacher, the speech-language pathologist, the due process designee, the special education coordinator, the school psychology specialist, the LEA director and a special education teacher.⁷⁰ At the separate programming conference held on February 16, 2016, after the filing of the first due process complaint and before it was dismissed on February 25, 2016 and resubmitted on February 29, 2015, the attendees, in addition to the Parent, included a behavioral specialist, the school psychology specialist, the physical education teacher, the special education teacher, the occupational therapist, the principal, the due process designee, the assistant school principal, the director of special services, the special education coordinator, and the speech-language pathologist.⁷¹ The allegation that knowledgeable person was not present at the IEP meetings was never challenged in testimony. Consequently, there is no evidence to support the complaint as presented by the Parent.

D. Changing the Student's placement for services without due process?

The Parent believed that the District changed the Student's placement for special education services when he was switched from the self-contained classroom on the sixth grade campus to the self-contained classroom on the 7-8 grade campus. As discussed above this change in location where the Student would receive services was agreed on and supported by not only the District but the Parent. As pointed out by the District's school psychologist in

⁶⁹ District Binder, Page 36

⁷⁰ District Binder, Page 67

⁷¹ District Binder, Page 137

testimony this decision was not a change in placement, but a change in instructor.⁷²

E. Violating the stay-put provision of the IDEA?

When the initial complaint was filed on January 13, 2016, the Student was receiving special education services as programmed by the IEP developed on December 4, 2015. The Student was programmed to receive all of his educational classes in a self-contained classroom with the exception of four-hundred and ninety minutes per week of electives in the general education setting. He was scheduled to receive sixty minutes of speech therapy weekly and transportation on a daily basis. That which was changed from the previous IEP was the related service of occupational therapy. Rather than the provision of direct services he was to be monitored once per semester.⁷³ As noted above, the Parent was present at the conference and did not present an objection to the change in occupational therapy services. In testimony he was never questioned on either direct or cross examination as to his concern with the change in occupational therapy services. On examination Parent's counsel attempted to portray the change in the way the occupational services would be rendered as him having been dropped and the services terminated. However, the occupational therapist testified that due to his inappropriate behaviors during direct services that he was not making any progress, which called for a change in how the services were to be provided.⁷⁴ Even though the record shows that direct occupational therapy services were resumed after the Parent filed for a due process hearing there is no evidence to show that the change in the way in which the services would be provided as a

⁷² Transcript, Vol I, Page 50

⁷³ District Binder, Page 52

⁷⁴ Transcript, Vol IV, Page 49-54

consequence of the December 2015 IEP was a violation of the stay-put provision of the IDEA.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.⁷⁵ The IDEA establishes that the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.⁷⁶ The term “special education” means specially designed instruction.⁷⁷ “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.⁷⁸

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 implement the Student’s IEP in place on April 29, 2015; or by failing to evaluate and provide services for the Student’s communication, fine motor, and

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

⁷⁶ 20 U.S.C. § 1401(3)(A)

⁷⁷ 20 U.S.C. § 1402(29)

behavior deficits; or by failing to educate the Student in the least restrictive environment; or by violating the Student's due process procedures by: (a) not including a special education teacher at the 12/04/2015 IEP meeting; (b) failing to provide the Parent information regarding the implementation and progress of the Student on his IEP; (c) failing to have personnel knowledgeable about the Student's disabilities at IEP meetings; (d) changing the Student's placement for services without due process; or by violating the stay-put provision of the IDEA? 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.⁷⁹

The record shows that the Student presented to the District from a local charter school in the second semester of his sixth grade school year (2014-15). The previous school had developed and was implementing an IEP for the Student under the eligibility category of other health impaired (OHI). One of the reasons the Parent transferred the Student into the District was because he disagreed with the IEP. The prior school provided speech therapy and occupational therapy as related services, with his academic education being provided in a special education classroom. Even though the Parent suspected and was concerned with other issues exhibited by the Student that he believed to be autistic in nature, there was no indication in the previous school's records to indicate such a diagnosis. The Student's maladaptive behaviors exhibited at the previous school more likely than not were the primary reason for the transfer,

⁷⁸ 34 CFR § 300.26(b)(3)

⁷⁹ *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

with the Parent believing that the District was better able to address those concerns. The previous school's IEP provided consideration for these issues by developing a behavior intervention plan (BIP); however, the District did not see the need for such intervention until the following school year (2015-16). On entering the District the Parent, and the District's special education teacher, were aware of the medical diagnosis of attention deficit disorder (ADHD). The District did not receive a medical diagnosis of autism until after the end of school year 2014-15. Even though the medical diagnosis of autism was obtained before the beginning of school year 2015-16, no action was taken prior to December 2015. By this time the Student's behavior had escalated to the degree that it required major intervention and even further in the second semester of 2015-16 requiring police intervention. However, more likely than not due to the limited intellectual capacity of the Student, there were no indications at that time that the inappropriate classroom behaviors adversely affected his learning or the learning of his classmates. A referral to assess the potential of other factors being involved in the Student's maladaptive behaviors, such as autism, was not considered until after the Student's behaviors had escalated to such a degree that manifested outside assistance, primarily his father. These decisions were made without the benefit of additional evaluative information to consider the unique needs of the Student coming into a new educational environment.

The District did not elect to make a referral for an evaluation immediately after the documents and a diagnosis of autism was provided prior to the beginning of school year 2015-16, but rather waited until he engaged in extremely disruptive behaviors in the academic setting. The Parent provided the District with the evaluations he had obtained prior to and after the Student entered the District. Even though those evaluations did not conclude that there was a

definitive diagnosis of autism, the District could have taken the results of the evaluations along with the Parent's belief of autism into consideration and could have evaluated and developed a behavior intervention plan.

The evidence and testimony reflect that these actions and inactions of the District were a possible denial of FAPE. Hereto they need 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
- (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?⁸⁰

Given the fact that the Student's IEP developed by the previous school was fully implemented, with the exception of the behavior intervention plan (BIP), on his entry into the District, only the first part of the twofold analysis needs 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

⁸⁰ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207

services to enable a disabled child to meet his or her educational goals and objectives.⁸¹ Here the presence of such an IEP, although previously designed by another school, the decision to not implement the BIP on the Student's entry into their responsibility is a potential violation of the IDEA, since it must be assumed by the receiving district that the previous school developed the IEP in considering the Student's unique needs. In this case however, it is difficult to make such an assumption given that the Parent expressly disagreed with the previous school's IEP. This issue went unexplained in the course of the hearing thus the failure to implement the BIP cannot be ruled as a violation of FAPE without some substantial evidence.

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.⁸² In this case those unique needs were assumed by the District to have been considered by the previous school in developing the Student's IEP. Thus the IDEA requirement of a receiving district to immediately implement the existing IEP. The subsequent maladaptive behaviors exhibited by the Student may or may not have been related to his previous eligibility category of OHI following a diagnosis of ADHD, given that the Parent expressly believed that the District was better equipped to deal with the Student's autistic behaviors. The identification and evaluation process need take these diagnoses as well as parental concerns into consideration as relevant when the consequences of the supposed diagnoses interferes with a student's obtaining an educational benefit from his educational program.

In reviewing the elicited testimony and the evidence, in this case there is ample

(1982)

⁸¹ *Honig v. Doe*, 484 U.S. 305 (1988)

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

testimony and evidence that the District attempted to focus on the Student's unique needs, but they did not do so in evaluating and developing a behavior intervention plan earlier in their contact with him. His special education teachers acknowledged his need for behavioral intervention early in their contact with him, but his IEP team failed to move for a formal assessment and development of behavior intervention plan. Had the District implemented the previous school's BIP without change and following their own evaluation taken into consideration the Student's unique needs a more appropriate BIP could have been developed and implemented earlier. Even as maladaptive as were some of his behaviors his academic achievements do not appear to have been jeopardized.

The Parent was obviously concerned as to how the District staff, including the school resource officer, responded to the Student's behaviors. Here to, such actions or inactions on the part of the District are hearable under the IDEA as a possible denial of FAPE, but only if they are inconsistent with an appropriate IEP. In this case the District failed to address those unique behavior deficits by not assessing the needs earlier and thus not addressing them in his IEP.

It is necessary now 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 the District in April 2015 and whether or not they continued to respond to his unique needs in school year 2015-16. The evidence and testimony indicates that the District acknowledged the Student's communication and fine motor needs on entrance into the District and even though they altered the manner in which occupational therapy services were rendered they did not violate FAPE in doing so. Only after an escalation of maladaptive behaviors did the District consider addressing the Student's unique needs regarding behaviors possibly associated with autism. The evidence is

clear that his individual teachers knew and were aware of his maladaptive behaviors, but made no attempt to consider a formal evaluation for almost a full year of his acting out. The testimony by District personnel elicited in the course of the hearing suggests that they believed that the unique needs of the Student were being met by the behavior support plan they provided during his academic day.

Although the evidence and testimony does not support the Parent's complaint that the District failed to implement the April 29, 2015, IEP, it does show they subsequently failed to respond to the Student's unique needs by not evaluating and developing an appropriate BIP for inclusion in his IEP as determined by their own evaluations as well as outside evaluations.

The Parent's challenge that FAPE was denied on the Student entering the District by failing to implement the IEP of April 29, 2015, is not justified by the evidence. However, by not adequately identifying and evaluating for the Student's unique behavior deficits the Parent is justified in believing that such actions and inactions constitute a denial of FAPE. The evidence and testimony show that the District recognized the unique needs associated with Student's behavior deficits, but elected to not to proceed earlier in conducting a formal assessment.

This case involves addressing the question of the denial of FAPE because of not only a failure to implement an IEP, it also addresses the question as to whether or not the District failed to evaluate and develop an appropriate behavior intervention plan for the Student's behavior deficits. The findings of fact show that he was provided special education services in the least restrictive environment, with appropriate related services; however, they failed to adequately address the behavior deficits. The evidence shows that his special education needs included not only his academic, speech/language, and fine motor deficits, but also his unique behavior

deficits. As noted above, the IDEA maintains that the term educational performance and the regulations being implemented by the IDEA is not limited solely to academic performance. As the District amply points out that the Student despite his behavior deficits has made academic progress; however, the regulations clearly establish that the determination about whether or not a student is a student with a disability is not limited to information about his or her academic performance.

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 for all of his disabilities requires: (1) looking at each individual issue raised by the Parent 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*⁸³ 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.⁸⁴ 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:

⁸³ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

“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).”⁸⁵

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.⁸⁶

A major question with regard to the current case and whether or not FAPE was denied is whether or not the District failed to adequately address all of the Student's deficits, including his behavior deficits. The evidence shows that the District chose to conduct an evaluation of the Student's possible autism and behavior deficits after the Parent filed for a due process hearing. The Parent is to be commended for permitting the evaluation in that such action will not delay the development and implementation of an appropriate BIP.

Order

The Parent has introduced sufficient evidence in the record to reflect that the District's

⁸⁴ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

⁸⁵ *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

failure to evaluate and develop a behavior intervention plan to address the unique behavior deficits of the Student has been a violation of FAPE. However, there is insufficient evidence regarding the other complaint issues including the failure to implement the IEP of April 29, 2015; the failure to evaluate and provide services for the Student's communication and fine motor deficits; the failure to educate the Student in the least restrictive environment; and the alleged violations of the Student's due process procedures to warrant a denial of FAPE.

The decisions made by the District on being approached with the challenge to meet the 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 appear to be related to the belief that the behavior support plan in place was sufficient to meet the unique behavior needs. However, the failure to immediately address the Student's unique behavior deficits constitute a failure to provide FAPE. Consequently, it is hereby ordered that:

1. The District will immediately upon receipt of this order, but no later than August 19, 2016, develop an IEP for school year 2016-17, based on the unique needs of the Student as expressed in all of the evaluations conducted thus far.

2. Prior to the beginning of school year 2016-17, if possible, but no later than September 1, 2016, the District, with Parental consent will develop a behavior intervention plan to address all of the unique behavior deficits exhibited by the Student for inclusion in the IEP as developed in (1) above. Such will be assisted in development by a behavior consultant approved by the Parent, in coordination with his council, which can be those typically contracted with by the District.

⁸⁶ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

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.

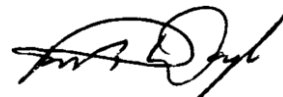
Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so ordered.

Robert B. Doyle, Ph.D.

August 1, 2016

Date

A handwritten signature in black ink, appearing to read "Robert B. Doyle", written in a cursive style.