

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXXXXXXXXXXXXX, Parent on behalf of  
XXXXXXXXXXXXXXXXXX, Student**

**PETITIONER**

**VS.**

**CASE NO. H-18-08**

**LITTLE ROCK SCHOOL DISTRICT**

**RESPONDENT**

**HEARING OFFICER’S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Little Rock School District (hereinafter “District” or “Respondent”) denied XXXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between November 2, 2015 and November 2, 2017, 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 “IDEA”), by: (1) failing to conduct necessary evaluations so as to identify Student as being eligible for special education programming pursuant to the IDEA; and (2) failing to develop and implement an individual education plan (hereinafter “IEP”) designed to provide educational benefit for Student.<sup>1</sup>

**PROCEDURAL HISTORY:**

On November 2, 2017, the Arkansas Department of Education (hereinafter “Department”) received a written request from Parent, acting *pro se*, to initiate due process hearing procedures on behalf of Student. On November 30, 2017, Parent submitted an

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<sup>1</sup> See Due Process Complaint and Amended Complaint.

amended complaint, through counsel, pursuant to an Order issued on November 21, 2017 and finding Parent's initial complaint to be insufficient. Based on both initial and amended complaints, Parent requested a due process hearing because she believed that District failed to comply with the IDEA by failing to properly evaluate Student for the purpose of determining whether Student has a disability in need of special education programming, and failing to provide an appropriate IEP to address Student's deficits.<sup>2</sup>

In response to Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of December 5, 2017 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 the resetting of timelines due to insufficiency of complaint, as well as subsequent continuances, the hearing of this matter was scheduled to begin on February 8, 2018.<sup>3</sup>

On February 2, 2018, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing 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 February 8, 2018, the closed hearing of this matter commenced. Testimony was heard on February 8, 2018, February 16, 2018, February 20, 2018, March 2, 2018, March 13, 2018, and March 21, 2018.<sup>4</sup> All testimony was heard either in person at the Little Rock

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<sup>2</sup> *Id.* The allegations stated herein are derived from the initial and amended complaints, as clarified by Parent at the hearing of this matter.

<sup>3</sup> See Hearing Transcript, Vol. I.

<sup>4</sup> See Hearing Transcript, Vols. I-VI.

School District Administrative Offices or via telephone. The hearing concluded on March 21, 2018.

The following witnesses testified in this matter: Parent, XXXXX (hereinafter “XXXXX”), XXXXXXXX (hereinafter “XXXX”), XXXXXX, XXXXX (hereinafter “XXXXX”), and XXXXX (hereinafter “XXXXX”).<sup>5</sup> 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 Lawrence Anthony “Tony” Walker (Little Rock, Arkansas) and the District was represented by Khayyam M. Eddings (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs. Counsel for Parent submitted a brief for consideration by this Hearing Officer.<sup>6</sup>

**FINDINGS OF FACT:**

Student is a seventeen-year-old male (DOB 08/03/2000) who is enrolled in the Little Rock School District. Between November 2, 2015 and November 2, 2017, the time period statutorily covered in this action, Student has been enrolled at three different high schools within the District. During the 2015-2016 school year, Student attended Parkview Arts and Science Magnet High School (hereinafter “Parkview”).<sup>7</sup> Parent made the choice to move

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<sup>5</sup> *Id.*

<sup>6</sup> See Hearing Transcript, Vol. VI.

<sup>7</sup> Hearing Transcript, Vol. I, p. 29.

Student from Parkview to Hall High School (hereinafter “Hall High”) because Student was going to be exited out of Parkview on account of his low and failing grades.<sup>8</sup> Thereafter, Student began the fall semester of the 2016-2017 school year enrolled at Hall High.<sup>9</sup> In September or October 2017, Student was moved from Hall High to J.A. Fair Magnet High School (hereinafter “J.A. Fair”).<sup>10</sup> Student has remained at J.A. Fair since that time. Student is currently a senior in high school. Student is currently a senior at J.A. Fair.

Student was placed on a 504 plan during his elementary school years due to a diagnosis of Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”), and remained on a 504 plan until June 2017.<sup>11</sup> Parent admits that Student had many absences, but stated that those absences were excused on account of Student’s documented asthma diagnosis or other medical issues.<sup>12</sup> Parent received no notices of truancy regarding Student throughout his tenure with District.<sup>13</sup> School transcripts indicate that Student’s grades during the 2015-2016, 2016-2017, and 2017-2018 school years are extremely low, with numerous Ds and Fs noted.<sup>14</sup> Student has been involved in numerous incidents which resulted in disciplinary infractions, including, but not limited to, skipping class on a regular basis, fighting, disrupting the classroom, talking excessively, threatening to have his mother and father come to the school and shoot a teacher, calling staff profane names, and inappropriately touching the private area of another student on the school bus.<sup>15</sup> The discipline records provided by

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<sup>8</sup> Hearing Transcript, Vol. 1, p. 107.

<sup>9</sup> *Id.* at 40-41.

<sup>10</sup> *Id.* at 25, 160.

<sup>11</sup> Please note that this Hearing Officer does not have authority to hear 504 claims. Any facts pertaining to Student’s 504 plan are provided for background purposes only.

<sup>12</sup> Hearing Transcript, Vol. I, pp. 14-15; Exhibit Volume, Ex. 13, pp. 84-95.

<sup>13</sup> Hearing Transcript, Vol. I, pp. 14-15.

<sup>14</sup> Exhibit Volume, Ex. 12, pp. 80-83.

<sup>15</sup> Exhibit Volume, Ex. 14, pp. 141-147.

District showed significantly less disciplinary incidents since the beginning of the 2017-2018 school year than in previous years.<sup>16</sup>

### **Educational Evaluations**

Student was referred for a special education evaluation in 2011, as well as early spring 2015. Those referrals did not result in Student being evaluated for dyslexia.<sup>17</sup> Regarding the 2015 referral, Student's attendance record, grades, and feedback from instructors were considered by XXXXX, the special education teacher at Parkview.<sup>18</sup> XXXXX, along with two other individuals at the referral conference, determined that Student's excessive absences from school had prevented him from getting the benefit of his existing 504 plan and, therefore, no evaluation was initiated.<sup>19</sup> At the time of this decision, XXXXX knew of the specific accommodations on Student's 504 plan, but did not know the underlying disability resulting in those accommodations.<sup>20</sup> In addition to having a 504 plan, Student had also received reading intervention in past grades. XXXXX, the District's behavior specialist, testified that she was aware that Student had received reading intervention because it was noted in Student's due process folder; however, she was unaware of the timeframe.<sup>21</sup> District was unable to locate any notes or progress reports regarding reading intervention provided to Student.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Exhibit Volume, Ex. 9, Ex. 10.

<sup>18</sup> Hearing Transcript, Vol. I, pp. 10-19.

<sup>19</sup> *Id.* at 19; Exhibit Volume, Ex. 9, pp. 69-75. The District's actions in 2011 and spring 2015 fall outside of the statute of limitations applicable to this case. As such, the decisions to not evaluate Student in 2011 and 2015 cannot be adjudicated for the purpose of determining whether a procedural or substantive IDEA violation occurred in this case. This information is relevant, however, to provide background as to what the District knew about Student as of November 2, 2015, the beginning of the statutory time period in this case.

<sup>20</sup> Hearing Transcript, Vol. II, pp. 70-75.

<sup>21</sup> *Id.* at 178-83.

<sup>22</sup> Hearing Transcript, Vol. 5.

When Student moved from Hall High School to J.A. Fair in the fall of 2016, Parent spoke with and emailed the 504 coordinator, specifically in December 2016, and expressed that she wanted Student to be tested for dyslexia.<sup>23</sup> A few days later, Parent was notified by the 504 coordinator that District had begun the process to have Student tested.<sup>24</sup> On January 5, 2017, a 504 conference was held and the 504 team recommended psychoeducational and dyslexia testing for Student.<sup>25</sup> An official referral was made by the 504 team to the special education team, which approved the request on February 13, 2017.<sup>26</sup>

Student was tested beginning March 15, 2017.<sup>27</sup> Specifically, Student was tested on March 15, 2017, April 12, 2017, April 17, 2017, and May 1, 2017.<sup>28</sup> Student's psychoeducational report included a section which addressed state-required standardized tests. Records pertaining to the Arkansas Benchmark Examinations (ACTAAP) indicated that Student had scored below basic in nearly every subject for grades five, six, seven, and eight.<sup>29</sup> Regarding the Iowa Test of Basic Skills (ITBS), Student scored below basic in nearly every subject for grades five, six, seven, and eight. The SOAR exam which was given when Student was in the tenth grade indicated that Student scored no higher than the 68<sup>th</sup> percentile in any subject, with one subject falling in the 38<sup>th</sup> percentile.<sup>30</sup>

XXXXX administered eight different tests to Student as part of the assessment. Specifically, Student was given the Reynolds Intellectual Assessment Scales (hereinafter

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<sup>23</sup> Hearing Transcript, Vol. I, pp. 47, 160-61; Exhibit Volume, Ex. 15, p. 164.

<sup>24</sup> Hearing Transcript, Vol. I, p. 47.

<sup>25</sup> Hearing Transcript, Vol. IV, pp. 18-20.

<sup>26</sup> *Id.* at 24; Exhibit Volume, Ex. 8, pp. 60-68.

<sup>27</sup> Hearing Transcript, Vol. IV, p. 30.

<sup>28</sup> Exhibit Volume, Ex. 16, p. 170.

<sup>29</sup> *Id.* at 169.

<sup>30</sup> *Id.*

“RIAS”), the Wide Range Achievement Test – Fourth Edition (hereinafter “WRAT-4”), the Kaufman Test of Educational Achievement – Third Edition (hereinafter “KTEA-III”), the Conners Third Edition (hereinafter “Conners 3”), the Clinical Evaluation of Language Fundamentals Screening Test – Fifth Edition (hereinafter “CELF-5”), the Clinical Evaluation of Language Fundamentals – Processing Speech Sounds, and The Beery-Buktenica Development Test of Visual-Motor Integration (hereinafter “VMI”).<sup>31</sup>

On the RIAS, Student scored in the 13<sup>th</sup> percentile on the Verbal Intelligence Index, the 50<sup>th</sup> percentile on the Nonverbal Intelligence Index, and the 23<sup>rd</sup> percentile on the Composite Intelligence Index.<sup>32</sup> Student’s scores fell in the low average category, with the exception of the Nonverbal Intelligence Index which was described as average. On the WRAT-4, Student’s scores on the various modules were below average or low, with percentiles ranging from the 6<sup>th</sup> percentile in sentence comprehension to the 19<sup>th</sup> percentile on spelling.<sup>33</sup> On the KTEA-III, Student’s performance generally fell in the low, very low, or below average categories, with percentile ranks of subjects in those categories ranging from less than the 1<sup>st</sup> percentile in written expression to the 23<sup>rd</sup> percentile in object naming facility.<sup>34</sup> Student scored in the average category in writing fluency and associational fluency, ranking at the 45<sup>th</sup> and 50<sup>th</sup> percentile, respectively.<sup>35</sup> On the Conners-3, a test that indicates symptoms of ADHD, several of the content scales were high average, elevated, or very elevated, indicating that Student’s responses were more similar to other youth with ADHD.<sup>36</sup>

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<sup>31</sup> Exhibit Volume, Ex 16, p. 171.

<sup>32</sup> *Id.* at 172.

<sup>33</sup> *Id.* at 173.

<sup>34</sup> *Id.* at 173-74.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 175-76.

On the CELF-5, Student received a passing score and was not considered for further speech or language evaluation as a result.<sup>37</sup> Finally, on the VMI, which was utilized to evaluate Student's learning processes, Student scored below average.<sup>38</sup>

In addition to administering the above-referenced tests to Student, XXXXX also reviewed teacher reports, attendance records, and discipline records.<sup>39</sup> Teachers reported to XXXXX that Student was skipping classes (or attending classes and leaving).<sup>40</sup> He was observed by one teacher sneaking out of class on his hands and knees. It was noted that Student was engaging in disruptive behaviors, getting out of his seat, and distracting other students.<sup>41</sup> At one point, XXXXX personally observed Student sleeping for thirty minutes in class.<sup>42</sup> Regarding Student's attendance reports, during the 2016-2017 school year, Student missed sixteen days or partial days due to illness, fourteen days due to out-of-school suspensions, five days due to in-school suspension, and had eighty-five days where he missed four or fewer classes due to skipping.<sup>43</sup> From a disciplinary standpoint, XXXXX noted that Student had numerous disciplinary sanctions for skipping class, leaving class without permission, profanity, fighting, disrupting class by talking excessively, and refusing to comply with teacher requests.<sup>44</sup>

XXXXX's conclusion, based on test results and other relevant data, was that Student functions within the low average to average range of intellectual ability, with weakness in

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<sup>37</sup> Exhibit Volume, Ex. 16, p. 170.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



verbal intelligence (verbal reasoning, verbal analytical skills).<sup>45</sup> Regarding Student's academic skills and weaknesses, Student demonstrated severe, significant deficits in the areas of reading comprehension, written expression, and math problem solving, as well as weaknesses in basic reading areas such as phonics and word reading fluency.<sup>46</sup> On the Conners-3, Student met the criteria for a diagnosis of ADHD Inattentive Type, confirming Student's diagnosis from previous years.<sup>47</sup> XXXXX found that Student demonstrated characteristics of dyslexia stemming from a lack of phonological processing skills, letter-naming facility, decoding skills, and spelling skills.<sup>48</sup>

On June 19, 2017, Student was evaluated by Stacey Mahurin, M.S. (hereinafter "Mahurin"), who is a contract speech-language pathologist for the District. Student was administered the Comprehensive Test of Phonological Processing – Second Edition.<sup>49</sup> Student's percentile ranks on the various subtests ranged from less than the 1<sup>st</sup> percentile to the 25<sup>th</sup> percentile. Student began receiving individual literacy instruction in June 2017 and, subsequently, was retested by Mahurin. Student's scores during a post-test in November 2017 were significantly higher than previously recorded.<sup>50</sup>

### **Student's IEPs and Services During 2017-2018 School Year**

On May 26, 2017, after completing Student's psychoeducational and dyslexia testing, XXXXX recommended during an evaluation conference that Student begin receiving special

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<sup>45</sup> Exhibit Volume, Ex. 16, p. 177.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 178.

<sup>49</sup> Exhibit Volume, Ex. 17, p. 181.

<sup>50</sup> *Id.* at 182.

education services.<sup>51</sup> Student was classified pursuant to the IDEA under the category of specific learning disability. XXXXX testified, however, that she did not believe that Student had a learning disability but, instead, should be classified under the category of other health impairment.<sup>52</sup> XXXXX explained that the team did not consider exclusionary factors, such as attendance and behavior, when determining Student's category of disability because it wanted to do what was best for Student and get him services as quickly as possible.<sup>53</sup> The decision to categorize Student as having a specific learning disability was based solely on the fact that Student's achievement score was significantly below his IQ score.<sup>54</sup> XXXXX opined that, regardless of category, Student was getting the services that he needed to help him graduate from high school, adding that smaller classes had addressed issues previously noted in the general education setting, such as sleeping in class and getting distracted.<sup>55</sup>

During the 2017-2018 school year, Student's senior year, he has received special education and related services pursuant to an IEP developed on June 14, 2017 (duration of services from June 15, 2017 through May 31, 2018).<sup>56</sup> A Notice of Conference was sent to Parent on June 7, 2017. On June 13, 2017, an IEP meeting was held, with Parent and Student in attendance.<sup>57</sup> In addition, a special education teacher, the local education agency representative, a dyslexia therapist, dyslexia advocate, and XXXXX were present.<sup>58</sup> The June 14, 2017 IEP was an amended IEP, and was a follow up to the temporary IEP previously

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<sup>51</sup> Hearing Transcript, Vol. IV, p. 39.

<sup>52</sup> *Id.* at 53-55.

<sup>53</sup> *Id.* at 57.

<sup>54</sup> *Id.* at 62.

<sup>55</sup> *Id.* at 57-58.

<sup>56</sup> It is noted that Student's initial IEP was developed on May 24, 2017 and had a duration of one week. The initial IEP was nearly identical to the IEP dated June 14, 2017.

<sup>57</sup> Exhibit Volume, Ex. 6, p. 31.

<sup>58</sup> *Id.*

provided to Student in May 2017.<sup>59</sup> The IEP noted that Student was in the tenth grade, which was inaccurate.<sup>60</sup>

Regarding the content of the June 14, 2017 IEP, in the portion of the present level of academic achievement devoted to Student's strengths, the IEP states that Student previously did not attend class most days, was written up for defiant and disruptive behavior, and skipped class often.<sup>61</sup> The IEP includes a summary of data from Student's psychoeducational and dyslexia evaluations, and indicates that Student has deficits in written expression, reading comprehension and math problem solving.<sup>62</sup> There is no indication of Student's reading level on the IEP. The page of the IEP pertaining to post-secondary transition goals and services is blank.<sup>63</sup> The IEP indicates that Student will be provided positive behavioral interventions, to include a behavior intervention plan beginning in August 2017.<sup>64</sup> The IEP further provides for program modifications to include preferential seating, study guides, short instructions, and opportunity to repeat and explain instructions.<sup>65</sup>

Student's June 14, 2017 IEP provides that Student is to receive 225 minutes of direct English instruction in the special education classroom, 113 minutes of co-taught algebra instruction in the regular classroom, and 113 minutes of co-taught chemistry instruction in the regular classroom.<sup>66</sup> The related services portion of the IEP is marked "none."<sup>67</sup> The IEP further contains goals for Student. Specifically, there are three "English Language Arts"

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<sup>59</sup> Exhibit Volume, Ex. 6, p. 25.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.* at 27.

<sup>64</sup> *Id.* at 29.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 32.

<sup>67</sup> *Id.*

goals, three “English – History, Social Studies, Science, Tech Subjects” goals, and three “Mathematics” goals.<sup>68</sup> Student’s English Language Arts goals state that Student will comprehend text, read text, and confirm understanding of vocabulary with 75% accuracy by the end of the school year.<sup>69</sup> Student’s English – History, Social Studies, Science, Tech Subjects goals state that Student will identify and define terms, comprehend text, and confirm understanding of text with 75% accuracy by the end of the school year.<sup>70</sup> Student’s Mathematics goals state that Student will solve math problems, confirm understanding of math problems, and analyze math problems with 75% accuracy by the end of the school year.<sup>71</sup> All goals have a place for progress to be indicated. No progress is noted for any goal.<sup>72</sup> A Notice of Action attached to the IEP indicated that Student would receive “dyslexia interventions” during the summer of 2017 and into the fall semester of 2017.<sup>73</sup>

A Notice of Conference was sent to Parent on August 14, 2017.<sup>74</sup> A Notice of Action was completed on this same day.<sup>75</sup> The purpose of the conference was for Student’s IEP team to address a schedule change for Student. Specifically, Student was being moved from co-taught algebra to resource math.<sup>76</sup> It is unclear who attended the meeting, as there is no documentation to indicate same.<sup>77</sup> The Notice of Action indicates that Student is in the tenth grade, which is inaccurate.<sup>78</sup>

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<sup>68</sup> Exhibit Volume, Ex. 6, pp. 34-36.

<sup>69</sup> *Id.* at 34.

<sup>70</sup> *Id.* at 35.

<sup>71</sup> *Id.* at 36.

<sup>72</sup> *Id.* at 34-36.

<sup>73</sup> *Id.* at 37.

<sup>74</sup> Exhibit Volume, Ex. 5, pp. 19-20.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

A Notice of Conference was sent to Parent on October 17, 2017.<sup>79</sup> On October 31, 2017, an IEP meeting was held for the purpose of updating Parent on Student's progress.<sup>80</sup> It is unclear who attended the meeting, as there is no documentation to indicate same.<sup>81</sup> The Notice of Action indicates that Student is in the eleventh grade, which is inaccurate, and states that Student's grades at that time included three As, two Cs, and one D. The team determined that Student would continue his reading therapy.<sup>82</sup>

XXXXX, a special education teacher at J.A. Fair, is responsible for Student's IEP and due process folder.<sup>83</sup> She is responsible for ensuring that Student is on target in all of his classes and holding failure conferences if Student fails a class.<sup>84</sup> XXXXX receives information from the registrar regarding the students on her responsibility list. This information includes semester grades and nine-weeks grades.<sup>85</sup>

XXXXX is trained in the Orton Gillingham method, which is commonly used with dyslexic students.<sup>86</sup> At the beginning of the 2017-2018 school year, Student was in XXXXX's special education classroom; however, XXXXX requested that Student be moved to another special education teacher because she felt that he was disruptive to her class.<sup>87</sup> XXXXX described Student as capable, but in need of redirection to stay focused.<sup>88</sup> XXXXX testified that she was unsure of Student's reading level, estimating that he was reading on a fourth or

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<sup>79</sup> Exhibit Volume, Ex. 4, pp. 13-15.

<sup>80</sup> *Id.* at 11-12.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Hearing Transcript, Vol. III, pp. 18, 20.

<sup>84</sup> *Id.* at 55-56.

<sup>85</sup> *Id.* at 71.

<sup>86</sup> *Id.* at 14.

<sup>87</sup> *Id.* at 18-20.

<sup>88</sup> *Id.* at 20.

fifth grade level.<sup>89</sup> XXXXX was unable to state what the acronym FAPE stood for when questioned.<sup>90</sup> XXXXX stated that although Student was a senior during the 2017-2018 school year, he had been a sophomore the previous school year.<sup>91</sup> There is no evidence in the record indicating that Student skipped a grade. XXXXX stated that she could not explain this discrepancy, adding that she “did not know all the details.”<sup>92</sup> XXXXX testified that it is not uncommon to have students be identified as needing services pursuant to the IDEA in their last couple of years of school, adding that “[w]e have students I’m sure that fall through the cracks.”<sup>93</sup>

### **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. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the United States 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. 458 U.S. 176, 206-07 (1982); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). 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

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<sup>89</sup> Hearing Transcript, Vol. III, p. 42.

<sup>90</sup> *Id.* at 49.

<sup>91</sup> *Id.* at 50-51.

<sup>92</sup> *Id.* at 51.

<sup>93</sup> *Id.* at 66.

whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits. *Id.*; *K.E. ex rel. K.E.*, 647 F.3d at 804.

**Procedural Violations of FAPE – Child Find and Failure to Evaluate**

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Parent alleged that District failed to timely evaluate Student for the purpose of determining whether he was eligible for special education services. Although Parent did not specifically reference a “child find” violation, that is the essence of her allegation. Some circuits have expressly stated that child find and failure to evaluate claims are procedural in nature and, therefore, must be analyzed prior to determining whether there was a substantive violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-250 (3d Cir. 2012); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

Congress enacted the IDEA for the purpose of ensuring that all children with disabilities have access to a “free appropriate public education.” 20 U.S.C. § 1400(d)(1)(A). In order to ensure that all children with disabilities receive a FAPE, school districts are required to satisfy a “child find” obligation. 20 U.S.C. § 1412(a)(3). Specifically, districts must ensure that:

All children with disabilities residing in the States, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A).

Child find extends to children who are suspected of having a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. §300.111(c)(1). Once a child is identified as potentially having a disability, the child's school district is required to conduct a full and individual evaluation to determine whether the child has a disability. The IDEA requires that initial evaluations and reevaluations meet certain requirements. 34 C.F.R. § 300.304. Specifically, a public agency must utilize a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child." *Id.* at § 300.304(b)(1). In addition, evaluations and reevaluations must assess all areas related to Student's suspected disability, "including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. *Id.* at § 300.304 (c)(4).

In the present case, it is the opinion of this Hearing Officer that District did not fulfill its child find obligations with regard to Student and, therefore, failed to timely evaluate Student. Student had a history of ADHD and had been on a 504 plan for some time. Student was missing numerous days of class, receiving disciplinary infractions for serious misconduct, and roaming around the classroom or leaving in the middle of instruction. Notwithstanding any other factors, Student's diagnosis of ADHD, coupled with his attendance infractions and behavioral issues, should have put District on notice that Student was in need of an evaluation, if for no other reason than to determine whether his disability of ADHD warranted special education services. Add to this the fact that, prior to November



2, 2015, Parent had requested on two occasions that Student be evaluated for dyslexia.<sup>94</sup> In addition, Student's standardized test scores were abysmal, and he was failing several classes. Finally, Student had received reading intervention at some point earlier in his education. Given all of these factors, Student should have been evaluated for IDEA eligibility long before the spring of 2017. Considering the statutory period covered in this case, this, in essence, means that between November 2, 2015 and December 5, 2016, when District began the process to evaluate Student, District failed to fulfill its child find obligations.

It is noted that District argued throughout the hearing of this matter that Student's attendance was the reason that an evaluation was not conducted. Specifically, because Student was missing so much school, District argued that he had not given his 504 plan a chance to work. This argument fails. First, Student's 504 plan was specific to Student's diagnosis of ADHD. Even if Student had been in school every single day of every single year, the 504 plan was not equipped to address Student's reading deficits. Second, there is no evidence in the record that Student was ever issued a truancy notice for attendance issues. District recorded Student's attendance infractions but failed to address them in any meaningful way. District cannot fail to address Student's attendance and then use Student's absences as justification for its decision not to evaluate Student for potential disabilities. Third, Student's performance on standardized tests should not have been solely attributed to Student missing class, hence the need for an evaluation to determine the root of Student's poor performance at school. If Student was struggling to read the various exam questions

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<sup>94</sup> Events that occurred prior to November 2, 2015 are referenced for background purposes only. Here, this fact illustrates that District had knowledge prior to the statutory period addressed in this matter that Student might need to be evaluated for reading deficits.

administered to him, that would explain the consistently low scores on all tests and test subjects across the board.

Please note that this Hearing Officer is in no way stating that school attendance is not important. Certainly, it is. However, this factor, standing alone, is not sufficient to deny student an evaluation, particularly in a case where there are so many other factors that could indicate a qualifying disability under the IDEA.

Regarding the sufficiency of Student's psychoeducational evaluation in the Spring of 2017, this Hearing Officer finds that the evaluation was insufficient as well. The evaluation covered many different psychoeducational tests, which was appropriate. The evaluation, however, did not go far enough in determining the extent of Student's reading disability. Specifically, there is nothing to indicate Student's true reading level. In fact, XXXXX repeatedly stated that she was uncertain whether Student had a specific learning disability in reading, even though she had recommended services pursuant to this IDEA category. Given that Student showed characteristics of dyslexia, further testing should have been done to obtain a clear picture of Student's abilities. In addition, the evaluation had only one test that addressed Student's diagnosis of ADHD. Student was not referred for any other testing regarding ADHD. Given the various behavioral issues of Student, more evaluation was needed to determine whether Student's ADHD was impacting his educational performance.

**Substantive Violations of FAPE - Appropriateness of IEP**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District failed to engage in child find activities and timely evaluate Student, it is now necessary to consider whether the District's actions resulted in a

substantive denial of a FAPE to Student. Prior to March 22, 2017, Eighth Circuit law provided that if a student received “slight” or “de minimis” progress, then he or she was not denied educational benefit. *K.E. ex rel. K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court “rejected the ‘merely more than *de minimis*’ standard that had previously been the law of the Eighth Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. \_\_\_ (2017)).

In *Endrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Endrew F.*, 2017 WL 1066260, at \*1000. The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

*Endrew F.*, 2017 WL 1066260, at \*1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at \*5

(citing *Andrew F.*, 2017 WL 1066260, at \*1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student's "present levels of achievement, disability, and potential for growth." *Id.* (citations omitted). Pursuant to *Andrew F.*, a district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 2017 WL 1066260, at \*1000. For most students, to comply with this standard, providing FAPE "will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be "appropriately ambitious" in light of a student's individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student's present levels of academic achievement and functional performance; (2) a description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

In the present case, first and foremost, it is the opinion of this Hearing Officer that District's failure to identify Student and initiate an evaluation resulted in a substantive denial of a FAPE. Between November 2, 2015 and December 5, 2016, the date on which an evaluation was initiated, Student lost more than a year of special education services. Student is nearing high school graduation and, as best anyone can tell, is reading on a fourth or fifth grade level. A year of additional services could have greatly benefited Student.

In addition, Student's June 14, 2017 IEP, under which Student is currently operating, is not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances. Student's IEP does not include an adequate statement of Student's present levels of academic and functional performance. For example, the IEP does not list Student's strengths, but instead uses that portion of the form to address statements by teachers regarding Student's behavior and attendance. In addition, the IEP does not adequately address how Student's disability affects his progress in the general education classroom. It is likely that these two areas of the IEP are deficient because Student's evaluation did not result in sufficient information. It is also noted that Student's IEP does not identify Student's appropriate grade level, and it is simply incomplete in many regards. For example, no transition plan is included with the IEP, and although Student is receiving dyslexia therapy services, that is not noted on the portion of the form devoted to that purpose.

In addition to failing to address Student's present levels of academic and functional performance, as well as failing to include pertinent information, Student's June 14, 2017 IEP lists goals that are non-descript. All of Student's goals reference an action that Student must achieve "as measured with 75% accuracy by the end of the school year." For example, Student's three language arts goals require Student to comprehend text, read text, and confirm understanding of vocabulary with 75% accuracy by the end of the school year. Although the action is listed, there is no indication of what type or level of text that Student is required to comprehend and read. The fact that District does not know Student's current reading level likely contributes to the vagueness of his goals. The remaining six goals, for

both English – History, Social Study, Science, Tech Subjects and for Mathematics, are identical. All list an action, such as analyze math problems, and specify that Student must achieve 75% accuracy. None include detail about the level of work or content of material to be covered. Last, there is no progress recorded on Student’s IEP for any stated goal.

Student’s IEP does have a statement of special education minutes that Student is to be provided. Specifically, Student is receiving direct English instruction in the special education classroom for 225 minutes per week. He is also receiving 113 minutes of both algebra and chemistry, with co-teaching in the general education classroom. Student’s IEP, however, states that no related services are being provided. Pursuant to testimony, Student is receiving dyslexia therapy services on a weekly basis. All services should be apparent on the face of the IEP.

Finally, Student’s June 14, 2017 IEP references a behavior plan. Specifically, Student’s IEP states that a behavior intervention plan would be implemented during the 2017-2018 school year. There was no testimony or record introduced by District as evidence that Student had received a behavior intervention plan, or that his behavior had been addressed in any way. District witnesses continually stated that Student was skipping classes and engaging in disciplinary infractions, yet District has taken no action to address these issues as required by Student’s IEP.

In light of the information in the record, Student’s IEP should be based on a more exhaustive evaluation and include more detail regarding Student’s present levels of performance and Student’s deficits. Student’s IEP should include detailed, measurable goals in all special education subjects, progress reports pertaining to those goals, and an

appropriate behavior intervention plan. Only then will Students IEP be considered appropriately ambitious in light of his individual circumstances. As such, Parent has met her burden in regard to establishing that Student's 2017-2018 IEP is not reasonably calculated to enable Student to receive educational benefit.

It is particularly concerning to this Hearing Officer that the teacher responsible for Student's IEP and due process folder appears to have no detailed information pertaining to Student. XXXXX had Student moved to another class because of disruptive classroom behaviors, yet there is no indication in the record that XXXXX addressed these behaviors with Student and Parent or considered implementing a behavior intervention plan before removing him from her class. XXXXX remains responsible for Student's educational progress, but seems to know very little about Student and his present levels of performance. For example, XXXXX did not know student's reading level and instead estimated it to be at approximately the fourth or fifth grade level. XXXXX further testified that Student had been a sophomore in high school last year. Student is currently a senior in high school and has never skipped a grade. When questioned about this discrepancy, XXXXX testified that she "did not know all the details." This is unacceptable. Student's case is not one that should be set aside and revisited on a yearly basis. Student is severely deficient in many academic subjects on account of his reading deficit and his behavior. XXXXX's lack of knowledge regarding Student is indicative of the fact that Student has not been a priority to District.

Considering these deficits in totality, it is the conclusion of this Hearing Officer that Student's June 14, 2017 IEP is inappropriate in that it is not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances. It is uncertain at this time the extent to which Student will be academically successful in the future. What is certain, however, is that Student has not been provided all of the procedural and substantive rights that he was due under the IDEA. Had that happened, Student's current situation might be very different.

**Conclusion.** Having considered Parent's allegations of procedural and 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 November 2, 2015 and November 2, 2017 as a result of procedural and substantive violations of the IDEA.

**ORDER:**

The results of the testimony and evidence warrant a finding for Parent. Specifically, Parent introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between November 2, 2015 and November 2, 2018 by failing to evaluate Student for purposes of determining special education eligibility, as well as failing to provide an IEP reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances. It is noted that Student will be graduating from high school in approximately one month from the date of this decision. Considering this fact, and in light of this Hearing Officer's findings above, District is hereby ordered to take the following actions regarding Student:



(1) By or before May 15, 2018, District shall seek all necessary evaluations, including, but not limited to, a psychoeducational evaluation and a speech and language evaluation, for the purpose of obtaining a comprehensive understanding of Student's disabilities and how they affect his academic functioning. As part of this evaluation process, District will ensure that Student is evaluated by the appropriate physician or clinician for the purpose of determining the extent that Student's ADHD affects his academic performance. Although Student will be leaving the District upon graduation in May 2018, these evaluations will assist Student and Parent in determining Student's academic needs going forward. All evaluations are to be paid for by District.

(2) Beginning June 1, 2018, District shall provide to Student, at District's expense, continued dyslexia therapy sessions, specifically 120 minutes per week, with Student's current therapist, Stacey Mahurin, M.S. In Mahurin's absence, Student may choose another therapist with the same educational qualifications and credentials for the purposes of receiving these services. The duration of these services will be one year. Student, as opposed to District, will be financially responsible for any therapy session that he fails to attend without proper cancellation, assuming that there is a fee for such.

(3) If Student applies for and is accepted to college for the 2018-2019 academic school year, District shall provide to Student, at District's expense, tutoring services in any or all subjects, as requested by Student, to assist Student with college studies. Student shall choose the tutoring services referenced in this

paragraph. The duration of these services will be one academic year, beginning August 15, 2018 and terminating May 15, 2019. Should Student choose not to attend college in August 2018, District is not responsible for providing such services to Student.

**FINALITY OF ORDER AND RIGHT TO APPEAL:**

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to 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.**

/s/ Danna J. Young

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**HEARING OFFICER**

04/21/2018

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**DATE**