

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

██████████, Parent on behalf of
██████████ Student

PETITIONER

VS.

CASE NO. H-18-29

LAWRENCE COUNTY SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUE PRESENTED:

Whether the Lawrence County School District (hereinafter "District" or "Respondent") denied ██████████ (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between November 10, 2016 and May 10, 2018, 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 failing to conduct appropriate evaluations and identify Student as eligible for special education programming pursuant to the IDEA.¹

PROCEDURAL HISTORY:

On May 10, 2018, the Arkansas Department of Education (hereinafter "Department") received a written request from Parent, through counsel, to initiate due process hearing procedures on behalf of Student. Based on Parent's complaint, Parent requested a due process hearing because he believed that District failed to comply with the IDEA by failing to

¹ See Due Process Complaint and Parent's Post-Hearing Brief.

conduct appropriate evaluations and identify Student as eligible for special education programming pursuant to the IDEA.²

In response to Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of June 20, 2018 was set as the date on which a hearing would commence if the Parent and District failed to reach resolution prior to that time.³ On June 18, 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 June 20, 2018, the closed hearing of this matter commenced. Testimony was heard on June 20, 2018, June 21, 2018, and August 3, 2018.⁴ All testimony was heard in person at Walnut Ridge High School. The hearing concluded on August 3, 2018.

The following witnesses testified in this matter: Parent, [REDACTED] (hereinafter "Brand"), Nedra Nichols Colby (hereinafter "Nichols"), Hollie Thielemier (hereinafter "Thielemier"), Malessie Lamb (hereinafter "Lamb"), Kellie Letbetter (hereinafter "Letbetter"), and Susanne Belk (hereinafter "Belk").⁵ Parent had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education,

² See Due Process Complaint and Parent's Post-Hearing Brief.

³ See Hearing Transcript, Vol. I.

⁴ See Hearing Transcript, Vols. I-III.

⁵ *Id.*

conducted a closed impartial hearing. Parent was represented by Theresa L. Caldwell (Little Rock, Arkansas) and the District was represented by Donn Mixon (Jonesboro, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs. Counsel for both parties timely submitted a brief for consideration by this Hearing Officer.

FINDINGS OF FACT:

Student is a eleven-year-old male (DOB 09/18/2006) who is enrolled in the Lawrence County School District. Between November 10, 2016, and May 10, 2018, the time period statutorily covered in this action, Student was specifically enrolled at Walnut Ridge Middle School.⁶ Student, as of the date of this decision, is in the sixth grade.

Previous Litigation Between Parties

On November 10, 2016, Hearing Officer Michael McCauley issued a decision following a due process hearing between the parties to this action.⁷ The issue before Hearing Officer McCauley was whether the educational placements provided to Student by District were reasonably calculated to provide FAPE to Student.⁸ Ultimately, Hearing Officer McCauley ruled in favor of Parent and ordered that District conduct a speech language evaluation, an assistive technology evaluation, and a functional behavior assessment within twenty school days of the date of the decision, so as to provide additional information for District to

⁶ Exhibit Vol. I, Parent Exhibit, p. 2. The parties to this matter were previously parties to a due process hearing in the year 2016. The issue raised by Parent in 2016, specifically in Case H-16-44, was identical to that raised in the current matter. Hearing Officer Michael McCauley issued a decision on November 10, 2016, ordering District to obtain additional evaluations regarding Student for the purpose of determining eligibility for services pursuant to the IDEA. As such, only events occurring after November 10, 2016 will be considered by this Hearing Officer on the basis of res judicata. Considering events going back two years from the date of this action, specifically back to May 10, 2016, would result in re-litigation of the events occurring between May 10, 2016 and November 10, 2016.

⁷ Exhibit Vol. I, Parent Exhibit, pp. 266-94A.

⁸ *Id.*

consider in determining whether Student was eligible for special education programming and related services pursuant to the IDEA.⁹ District appealed this decision and did not act on Hearing Officer McCauley's Order as a result of the pending appeal. Thereafter, Parent filed a request for a preliminary injunction, and the Honorable Brian Miller of the United States District Court for the Eastern District of Arkansas, Jonesboro Division, entered an order on October 26, 2017 in favor of Parent and granting Parent's request.¹⁰ Pursuant to the October 26, 2017 Order, District was required to comply with and implement Hearing Officer McCauley's November 10, 2016 Order, despite the fact that District's appeal was still pending.¹¹ As a result of the grant of preliminary injunction, District commenced with obtaining the evaluations ordered by Hearing Officer McCauley. These evaluations are discussed in detail below.

Student's Diagnoses and 504 Accommodations

Student has a diagnosis of autism spectrum disorder (ASD), as well as obsessive compulsive disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder.¹² Student was placed on a Section 504 Accommodation Plan (hereinafter "504 plan") during his elementary school years on account of his diagnosis of ASD, and has remained on a 504 plan since that time.¹³ The most recent 504 plan in the record is dated April 17, 2018 and appears to address the current academic year, specifically academic year

⁹ *Id.*

¹⁰ Exhibit Vol. II, District Exhibit, pp. 163-67.

¹¹ *Id.*

¹² Exhibit Vol. I, Parent Exhibit, pp. 148-154.

¹³ Exhibit Vol. I, Parent Exhibit, p. 75. This Hearing Officer lacks jurisdiction to adjudicate 504 issues. All information regarding Student's 504 plans, both past and present, is provided for the purpose of providing history and determining whether Student should have been identified as eligible for special education programming pursuant to the IDEA. This Hearing Officer will not make any determinations as to whether Student's 504 plans were appropriate for Student.

2018-2019, Student's sixth grade year at District.¹⁴ Student's April 17, 2018 504 plan includes sixteen accommodations for Student, including the following: (1) seat Student near the teacher; (2) stand near Student when giving directions or presenting lessons; (3) avoid distracting stimuli; (4) make sure directions are understood; (5) allow extra time to complete tasks; (6) break work into smaller segments; (7) allow extra time; (8) allow small group testing for state-mandated testing; (9) allow extended time for state-mandated testing; (10) prime before transitions such as hallway behavior, bus behavior, and cafeteria behavior; (11) praise specific behaviors; (12) use clear and simple classroom rules; (13) cue Student to stay on task with nonverbal signals; (14) allow for legitimate movement; (15) monitor Student closely on field trips; and (16) provide weekly notes to Parent detailing positive and negative comments for the week, as well as challenges and accomplishments.¹⁵ In addition, there is an attached plan addressing Student's use of a therapeutic vest to address sensory issues.¹⁶ Student's prior 504 plan, dated October 20, 2017 and applicable to academic year 2017-2018, was nearly identical to the April 17, 2018 504 plan. The only difference between the two 504 plans was that the October 20, 2017 plan had two fewer accommodations, specifically the accommodations of monitoring Student on field trips and providing weekly updates to Parent.¹⁷

Student's School Performance

Regarding Student's grades, between November 10, 2016 and May 10, 2018, Student received above-average grades in his academic classes. A review of Student's grade report

¹⁴ Exhibit Vol. I, Parent Exhibit, pp. 2-5; Exhibit Vol. II, District Exhibit, pp. 3-6.

¹⁵ Exhibit Vol. I, Parent Exhibit, pp. 2-5; Exhibit Vol. II, District Exhibit, pp. 3-6.

¹⁶ Exhibit Vol. I, Parent Exhibit, pp. 2-5; Exhibit Vol. II, District Exhibit, pp. 3-6.

¹⁷ Exhibit Vol. I, Parent Exhibit, pp. 6-10.

for the 2017-2018 school year, Student's fifth grade year, indicates that Student's first semester grades were as follows: A for pre-AP math, B for social studies, C for pre-AP literacy, and A for science.¹⁸ Student's second semester grades for the same year, spring 2018, were as follows: B for pre-AP math, B for social studies, B for pre-AP literacy, and A for science.¹⁹ Student's most recent ACT Aspire test indicates that Student scored in the 99th percentile for English, the 87th percentile for reading, the 22nd percentile for writing, the 64th percentile for science, and the 54th percentile for math.²⁰ Student's English and reading scores indicated an ACT readiness level of "exceeding," and his science and math scores indicated an ACT readiness level of "ready."²¹ Student's writing level, the lowest of Student's scores, indicated an ACT readiness level of "close."²²

Regarding Student's disciplinary history, the record contains some disciplinary records for Student within the period of November 10, 2016 to May 10, 2018. On January 25, 2017, pursuant to a memo in the record, a classmate stepped on Student's backpack, and Student responded by saying "if you step on my backpack again I am going to kill you."²³ On January 8, 2018, a discipline report was issued to Student for hitting other students with the zipper of his jacket and attempting to stab another student with a pencil.²⁴ The disciplinary report indicates that a conference with Student was held regarding the incident. There was no conference with Parent per the disciplinary report.²⁵ Three days later, on January 11,

¹⁸ Exhibit Vol. II, District Exhibit, p. 81.

¹⁹ *Id.*

²⁰ Exhibit Vol. II, District Exhibit, p. 83.

²¹ *Id.*

²² *Id.*

²³ Exhibit Vol. I, Parent Exhibit, p. 216.

²⁴ Exhibit Vol. II, District Exhibit, p. 96.

²⁵ *Id.*

2018, Student received a discipline report for horseplay in the hallway, and a conference with Student was held regarding the incident.²⁶ An email dated January 15, 2018, from Principal Derek Bramlett (hereinafter "Principal Bramlett"), states that Student was hitting another student with his jacket during class on Thursday, January 11, 2018, and Friday, January 12, 2018.²⁷ The email further states that Student had a verbal altercation with a classmate before school, noting that Student "was the aggressor."²⁸ On March 26, 2018, Student was involved in an altercation wherein he pushed another classmate, prompting the classmate to squeeze Student's arm.²⁹

Regarding Student's classroom performance, testimony was heard from two of Student's teachers. Brand, the Gifted and Talented Coordinator, testified that Student had participated in the Gifted and Talented Program (hereinafter "GT") in both fourth and fifth grades.³⁰ GT is a class that meets 150 minutes per week, with each class meeting approximately 50 minutes.³¹ Activities available to Student through GT included activities such as Quiz Bowl and *Odyssey of the Mind* (Regional and State Competition).³² During his fourth grade year, academic year 2016-2017, Student participated in, amongst other activities, Quiz Bowl.³³ However, during Student's fifth grade year, academic year 2017-2018, Student was not on the Quiz Bowl team because fifth and sixth grade students were

²⁶ Exhibit Vol. II, District Exhibit, p. 95.

²⁷ Exhibit Vol. I, Parent Exhibit, p.214.

²⁸ *Id.*

²⁹ Exhibit Vol. I, Parent Exhibit, p. 219.

³⁰ Hearing Transcript, Vol. I, pp. 31-32.

³¹ Hearing Transcript, Vol. I, p. 32.

³² Exhibit Vol. I, Parent Exhibit, p. 37A.

³³ Hearing Transcript, Vol. I, p. 40-46.

selected for the team based on tryouts, a requirement that was not imposed on fourth grade students.³⁴ Brand explained that Student did well, but did not make the team.³⁵

Regarding GT activity Odyssey of the Mind, Student fully participated during his fourth-grade year, academic year 2016-2017.³⁶ Odyssey of the Mind was described by Brand as a creative problem-solving activity, with a competition on the regional, state, and world levels.³⁷ There are five problems from which the GT team can choose, and they create a skit to address the chosen problem. This skit is then presented by the GT team at a regional competition.³⁸ A video of the 2016-2017 skit was viewed during the due process hearing of this matter. Student participated in the skit, but he appeared disengaged at times. At one point, he was faced with an unexpected situation when a confetti popper being used by Student did not fire. Student continued to work until the confetti popper fired, becoming more and more frustrated with each attempt. Student appeared frustrated and was inflexible in dealing with this unexpected situation. Brand rated Student's performance in the skit as "poor."³⁹

Brand testified that, in addition to the skit portion of Odyssey of the Mind (referred to as the long program), there was a spontaneous portion of the competition. Student did not perform well on the spontaneous portion of the activity because of delayed processing time.⁴⁰ Brand could not recall if Student participated in the spontaneous portion of the

³⁴ *Id.*

³⁵ Hearing Transcript, Vol. I, p. 99.

³⁶ *Id.*

³⁷ Hearing Transcript, Vol. I, p. 46.

³⁸ Hearing Transcript, Vol. I, p. 47.

³⁹ Hearing Transcript, Vol. 1, p. 81.

⁴⁰ Hearing Transcript, Vol. 1, pp. 60-66.

activity, but stated that, had she been the coach, she would not have selected Student for this portion of the competition.⁴¹

Although Student fully participated in Odyssey of the Mind during the 2016-2017 academic year, he did not participate during academic year 2017-2018, when he was in the fifth grade.⁴² Parent gave permission for Student to participate in the activity; however, Parent was not notified by the Odyssey of the Mind coach about practices pertaining to the activity.⁴³ Practices began in November 2017, and Parent did not learn that the GT team had been practicing their skit until February 2018.⁴⁴ As a result, and with only one month until the regional competition, Parent withdrew Student from the activity because Student had not been able to participate and practice with the GT team.⁴⁵ A memo dated February 5, 2018, and written by Principal Bramlett, indicates that Brand learned in early January 2018 that the assigned coaches for Odyssey of the Mind had been practicing with the GT group since November 2017 and had not contacted Parent to notify him of the practices.⁴⁶ Principal Bramlett stated in the memo that he explained to Brand that this was not acceptable.⁴⁷

The GT team, during the 2016-2017 academic year, did not win the state competition. The following year, the 2017-2018 academic year, when Student did not participate, the GT team ranked first place at the state competition and advanced to the world competition.⁴⁸

⁴¹ Hearing Transcript, Vol. 1, p. 83.

⁴² Hearing Transcript, Vol. I, p. 48.

⁴³ Hearing Transcript, Vol. I, pp. 50-56.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Exhibit Vol. I, Parent Exhibit, p. 218.

⁴⁷ *Id.*

⁴⁸ Hearing Transcript, Vol. 1, pp. 84-85.

Brand testified that, although she had no issues with Student when he was in fourth grade (academic year 2016-2017), Student had refused to participate in some GT activities while in the fifth grade.⁴⁹ These activities included, but were not limited to, the tower of power STEAM project and the NEAC project fair.⁵⁰ Brand contacted Principal Bramlett when Student refused to participate and was told not to force Student's participation.⁵¹ Student refused to participate in GT activities at least once per week.⁵²

Thielemier, Student's fifth grade math teacher, also testified in the hearing of this matter.⁵³ In first-period math, Student was one of ten students.⁵⁴ Thielemier testified that her class was highly structured, and that the only issues that she had with Student happened during unstructured class time at the beginning of the class period.⁵⁵ She explained that Student would enter class, walk around the room, and talk to other kids, as opposed to coming into the classroom and beginning his work.⁵⁶ To address issues at unstructured class times, Thielemier began placing a sticky note on Student's desk which provided the tasks that she wanted him to perform when he entered the classroom.⁵⁷ Thielemier did not witness Student having angry outbursts, interrupting others, or having melt downs in her class; however, she testified that she had heard of Student having some of these issues in other classes.⁵⁸

⁴⁹ Exhibit Vol. I, Parent Exhibit, p. 218.

⁵⁰ Hearing Transcript, Vol. I, p. 62.

⁵¹ Hearing Transcript, Vol. I, p. 64.

⁵² Hearing Transcript, Vol. I, pp. 65-66.

⁵³ Hearing Transcript, Vol. I, pp. 210-269.

⁵⁴ Hearing Transcript, Vol. I, p. 215.

⁵⁵ Hearing Transcript, Vol. I, p. 220.

⁵⁶ Hearing Transcript, Vol. I, pp. 221-222.

⁵⁷ *Id.*

⁵⁸ Hearing Transcript, Vol. I, pp. 228-229.

Meetings, Conferences, and Correspondence During Relevant Time Period

On October 20, 2017, District held a 504 meeting to address needed accommodations for Student's fifth grade year, specifically academic year 2017-2018.⁵⁹ Present at that meeting were Parent, the 504 Coordinator (Penny Sloan), Principal Bramlett, and two classroom teachers.⁶⁰

On November 9, 2017, Nichols sent an email to Belk indicating that District was under court order to have a BCBA conduct an evaluation of Student.⁶¹ Following inquiry by Belk, Nichols sent an email on November 10, 2017, stating that Student was not currently receiving special education, that Student "had no adverse effect," that he had all As and Bs, was in GT, and that Student's behavior was not an issue at school.⁶² Nichols further stated that a "very effective 504 plan" was in place.⁶³ Nichols and Belk corresponded via email for the following two weeks, addressing needed information. On November 30, 2018, after Belk learned that Parent's counsel was Theresa Caldwell, Belk sent an email to Nichols which stated the following:

Just an FYI . . . [C]aldwell absolutely hates me! We won the cases in Mountain Home [a]nd she had the mom sue me personally in federal court. We also won that one when she appealed it as well. She is liable to give you some headache over it being me. She brought in a guy from Kansas that wrote a 400 page report and Howie Knoff for \$12,500 and still lost twice. She is a bit resentful. I will also send you the hearing officers report on her tardiness in other parts of the state. Following the federal complaint that she lost, the judge called her out on her inability to make deadlines. I did not realize you were working with her, or I would have warned you previously. I'm not concerned that she does not

⁵⁹ Exhibit Vol. I, Parent Exhibit, pp. 6-9.

⁶⁰ *Id.*

⁶¹ Exhibit Vol. II, District Exhibit, p. 129.

⁶² Exhibit Vol. II, District Exhibit, p. 130.

⁶³ *Id.*

like me, it just may make it a little difficult for you [w]hen she learns that it is me.⁶⁴

Nichols responded to Belk's email by stating that she knew Belk would "do right by the student," adding that Parent's attorney was "hard to work with" and had "misinformed the parent."⁶⁵ All remaining correspondence between Nichols and Belk addressed only requests for information, requests for scheduling, and logistics regarding Belk's observation of Student.

On December 5, 2018, a Notice of Conference was sent to Parent, providing notice of a meeting on December 14, 2017 to address additional evaluations for Student, as ordered on November 10, 2016 by Hearing Officer McCauley.⁶⁶ A Notice of Action dated December 14, 2017, addressed three evaluations to be conducted. Parent provided signed consent for these evaluations to be conducted.⁶⁷

On Monday, March 5, 2018, Nichols sent an email to several individuals, including Melanie Hicks (hereinafter "Hicks") and Belk.⁶⁸ Hicks had conducted Student's speech evaluation and Belk had conducted a functional behavior assessment regarding Student. Nichols' email stated the following:

There will be a meeting Wednesday morning in the Board Room at 9:00 a.m. Susanne Belk will go over the results of her findings, as well as Melanie Hicks the language assessment and Amy Privett will share the Easter Seals assessment. None of the assessments found a need for an IEP. The team will look at ways to implement any change with the 504 plan. After this meeting the next step will be to present these findings to Mr. McDaniel and his attorney.⁶⁹

⁶⁴ Exhibit Vol. II, District Exhibit, pp 131-32.

⁶⁵ Exhibit Vol. II, District Exhibit, p. 132.

⁶⁶ Exhibit Vol. II, District Exhibit, p. 40.

⁶⁷ Exhibit Vol. I, Parent Exhibit, pp. 11-13.

⁶⁸ Exhibit Vol. II, District Exhibit, p. 139.

⁶⁹ *Id.*

On March 7, 2018, a Notice of Conference was sent to Parent, providing notice of a March 28, 2018 meeting to determine Student's eligibility for special education and related services.⁷⁰ Subsequently, on March 28, 2018, Parent and his attorney attended a meeting at District.⁷¹ Also present at the meeting were the following IEP team members: Amy Privett, special education teacher and LEA, Kristy Bateman, general education teacher, Principal Bramlett, Nichols, special education supervisor, Robin Munn, SLP, Hicks, SLP, and attorney for District.⁷² Pursuant to a Notice of Action and an Evaluation/Programming Notice of Decision, three evaluations pertaining to Student were considered by the team.⁷³ Specifically, an assistive technology evaluation, a functional behavior assessment, and a speech language evaluation were discussed.⁷⁴ The team decided that Student was not eligible for special education and related services pursuant to the IDEA.⁷⁵ The March 28, 2018 Notice of Action states that Student's "needs can be met through his current 504."⁷⁶ Nichols testified that, without an academic deficit, there would be no need for special education.⁷⁷ She further stated that Student must have a need that cannot be met pursuant to a 504 plan to qualify for special education pursuant to the IDEA.⁷⁸

Having determined that Student was ineligible for special education programming, District held a 504 meeting on April 17, 2018 to address needed accommodations for Student

⁷⁰ Exhibit Vol. II, pp. 10-11.

⁷¹ Exhibit Vol. II, p. 16.

⁷² *Id.*

⁷³ Exhibit Vol. II, pp. 12-16.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Hearing Transcript, Vol. I, pp. 109, 116-17.

⁷⁸ Hearing Transcript, Vol. I, pp. 121-22.

in the sixth grade, specifically academic year 2018-2019.⁷⁹ Present at that meeting were Parent, the 504 Coordinator (Penny Sloan), Principal Bramlett, and two classroom teachers.⁸⁰

Evaluations and Other Information Considered in Determining IDEA Eligibility

As of March 28, 2018, the date that Student was last considered for IDEA eligibility, there were several previously-completed evaluations for consideration. Pursuant to the November 10, 2016 Order of Hearing Officer McCauley, a Speech-Language Evaluation Report was conducted in late 2017, early 2018. Specifically, Student was evaluated on December 18, 2017, December 19, 2017, January 12, 2018, and January 19, 2018. The evaluation report indicated that Student was administered the Test of Pragmatic Language – Second Edition (TOPL-2) for the purpose of assessing his effective use of language in social situations.⁸¹ Hicks, who conducted the evaluation, reported that Student received a score of 112, which was 12 points higher than the mean for the test administered.⁸² She further noted that Student fell within the 79th percentile based on this score.⁸³ Student was also administered the Social Language Development Test, which assesses social language functioning by focusing on social interpretation and interaction with friends.⁸⁴ Student's scores, with the exception of one, were at or above the mean score for the test, and the percentile ranks on the various subtests ranged from the 37th percentile to the 77th

⁷⁹ Exhibit Vol. II, District Exhibit, pp. 3-6.

⁸⁰ *Id.*

⁸¹ Exhibit Vol. I, Parent Exhibit, pp. 24-26.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

percentile.⁸⁵ Hicks reported that Student's scores fell in the average range indicating age appropriate social language skills.⁸⁶ Finally, Hicks administered the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) for the purpose of addressing pragmatic language.⁸⁷ As with previous tests administered, Student's scores fell in the average range and it was concluded that Student was exhibiting pragmatic language skills appropriate for his age.⁸⁸ Hicks concluded that Student did not need speech-language therapy as of the date of the report.⁸⁹

Also pursuant to the November 16, 2018 Order of Hearing Officer McCauley, District requested that Easter Seals of Arkansas conduct an assistive technology evaluation. This evaluation, dated January 11, 2018, indicated that Student's IEP team was consulted, so as to better understand his assistive technology needs.⁹⁰ The report noted Student's strengths as reading, following a schedule, writing (good handwriting), and remembering steps for math.⁹¹ Regarding Student's barriers, the report noted that Student "does not do well in groups" and "sometimes gets in arguments with peers."⁹² Student was asked to participate in several writing tests and exercises, and was also provided the opportunity to use a laptop computer and a tablet to determine whether assistive technology would be beneficial. Ultimately, Easter Seals made no recommendations for additional assistive technology tools

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Exhibit Vol. I, Parent Exhibit, pp. 28-30.

⁹¹ *Id.*

⁹² *Id.*

because no area of need was identified by Student's teachers and performance on alternative methods of writing yielded similar performance results.⁹³

Finally, in response to Hearing Officer McCauley's November 10, 2016 Order, District requested that Belk conduct a functional behavior assessment.⁹⁴ In the February 9, 2018 report, Belk stated that she observed Student in multiple settings over a period of three days, specifically January 17, 2018, January 25, 2018, and January 29, 2018.⁹⁵ These settings included four different classes, specifically social studies, math, science, and literacy.⁹⁶ In addition, Belk indicated that she observed Student's transitions between classes, to and from lunch, and exiting the school building.⁹⁷ Belk also conducted individual interviews with Student's teachers and Principal Bramlett.⁹⁸ Belk did not conduct an interview or consult with Parent regarding Student.⁹⁹ Belk also did not speak with Brand, Student's GT teacher, testifying that she did not see pull-outs for GT while she was observing Student.¹⁰⁰ Belk concluded that Student was doing well in the school environment and was not in need of intervention for specific target behaviors as of the date of the report.¹⁰¹ She further added that an appropriate behavior intervention plan could be written by the team to implement replacement behaviors and document progress.¹⁰² Belk reported that changes in Student's

⁹³ *Id.*

⁹⁴ Exhibit Vol. I, Parent Exhibit, pp. 31-35.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Hearing Transcript, Vol. III, pp. 66-68.

¹⁰⁰ Hearing Transcript, Vol. III, pp. 58-59.

¹⁰¹ Exhibit Vol. I, Parent Exhibit, pp. 31-35.

¹⁰² *Id.*

programming, placement or current routine/environment were not necessary, and that Student was being served in the least restrictive environment.¹⁰³

In addition to the speech language, assistive technology and functional behavior evaluations that were ordered by Hearing Officer McCauley, there were several other reports or doctor's notes available to District for consideration in March 2018.

An evaluation provided by Dayspring Behavioral Health, dated March 27, 2018, indicated that Student had the following diagnoses: obsessive-compulsive disorder, oppositional defiant disorder, autism spectrum disorder, attention-deficit/hyperactivity disorder, tic disorder, myopia, and neurological issues.¹⁰⁴ This report included various goals for Student, including to decrease anger outbursts, decrease interrupting, decrease hitting, decrease defiance, decrease getting out of seat excessively during conversations, decrease fidgeting excessively, and decrease arguing.¹⁰⁵ Student's therapist, Letbetter, indicated on the report that Student would benefit from individual therapy six times per quarter, as well as family therapy, to work on these issues.¹⁰⁶

Student's record contained medical information in the form of a doctor's note and a physician's report. Dr. Conrad B. Cox, MD, Le Bonheur Children's Hospital, issued a note dated September 3, 2017 that indicated that Student needed to be supervised with any activity at school that would put him in a situation wherein he was alone, further specifying that Student should be supervised during bathroom breaks and during independent classroom changes (transitions from class to physical therapy, occupational therapy, or

¹⁰³ *Id.*

¹⁰⁴ Exhibit Vol. I, Parent Exhibit, pp. 148-54.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

speech therapy).¹⁰⁷ The note indicated that this accommodation was needed based on Student's prior medical history.¹⁰⁸ A separate physician's report, dated April 25, 2014 and electronically signed by Dr. Warren A. Skaug, M.D., indicated that Student was showing an increase in "abnormal behaviors" as of the date of the report.¹⁰⁹ There was a notation that Student was getting extremely upset and angry with redirection and changes in routine, was perseverating on details, was exhibiting poor social skills and sensory issues, and was showing disinterest in reciprocal play and conversation.¹¹⁰ The report further noted that Student's IQ was "very good" and that he was able to cope most days in a regular classroom with the help of a 504 plan.¹¹¹

Student's record contained a psycho-educational evaluation dated June 27, 2014. Ashley Bateman (hereinafter "Bateman"), School Psychologist, conducted the following assessments of Student: (1) record review; (2) Kaufman Assessment Battery for Children, 2nd Edition (KABC-II); (3) Kaufman Test of Educational Achievement, 2nd Edition (KTEA-II); (4) Clinical Evaluation of Language Fundamentals, 4th Edition (CELF-4 Screener); (5) Beery Buktenica Developmental Test of Visual-Motor Integration, 5th Edition (Beery VMI); and (6) Autism Spectrum Rating Scale (ASRS).¹¹² In addition, school personnel conducted several assessments that were considered by Bateman, including: (1) hearing and vision screenings; (2) social history; (3) classroom/curriculum based assessment; (4) observations; and

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Exhibit Vol. I, Parent Exhibit, pp. 105-109.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Exhibit Vol. I, Parent Exhibit, pp. 166-78.

(5) Adaptive Behavior Evaluation Scales – Revised – 2nd Edition (ABES-R2).¹¹³ At the time that the evaluation was conducted, Student was entering the second grade at District.¹¹⁴ Bateman made fifteen recommendations for Student, which are largely mirrored on Student’s current 504 plan.¹¹⁵

Student’s record also contained occupational and physical therapy evaluations. The occupational therapy evaluation, dated May 8, 2014, indicated that Student had been issued the Developmental Test of Visual Motor Integration (VMI), the Bruninks-Oseretsky Test of Motor Proficiency-2 (BOT-2), and the sensory profile.¹¹⁶ In addition, Student was clinically observed for neuromuscular, behavioral, and sensorimotor issues.¹¹⁷ Student’s strengths were determined to be intelligence, as well as cooperation with the evaluation process.¹¹⁸ Occupational Therapist, Jessica King (hereinafter “King”), reported that Student enjoyed gross motor play and was motivated to perform tasks to the best of his ability.¹¹⁹ Student’s deficits included fine motor coordination, ball handling skills, eye hand coordination, and sensory processing.¹²⁰ In addition, his handwriting was “noted to be legible but inefficient.”¹²¹ King further reported that Student lacked joint stability needed to maintain posture and safely engage in gross motor activity.¹²² King recommended that Student initiate occupational therapy treatment for up to 120 minutes per week, with treatment to focus on

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Exhibit Vol. I, Parent Exhibit, pp. 192-200.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Exhibit Vol. I, Parent Exhibit, p. 200.

¹²² *Id.*

“implementation of sensory strategies, facilitation of improved multi-sensory processing and self-regulation, fine motor precision, efficient documentation, ball skills, social skills, strength, joint stability, and posture.”¹²³ This recommendation was amended via memo dated November 17, 2014, and it was recommended that Student receive 60 minutes per week of direct occupational therapy services at school.¹²⁴

Regarding physical therapy, Student was evaluated by Megan Hausman (hereinafter “Hausman”) of Integrated Therapy Services on November 26, 2013.¹²⁵ Student’s deficits were determined to be poor static balance, poor dynamic balance, difficulty with running speed, difficulty with agility activities, and home program.¹²⁶ Hausman noted that Student showed deficits in body coordination and that he would benefit from direct physical therapy intervention to address such deficits.¹²⁷ Hausman recommended physical therapy one time per week, for 60 minutes.¹²⁸

Student has been receiving private counseling since the year 2015, occupational therapy since the year 2014, and physical therapy since the year 2013.

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

¹²³ *Id.*

¹²⁴ Exhibit Vol. I, Parent Exhibit, p. 231.

¹²⁵ Exhibit Vol. I, Parent Exhibit, pp. 261-63.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

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 whether the student's education was reasonably calculated to provide the student educational benefit. *Id.*

Procedural Violations of FAPE – Child Find

It must first be determined whether District complied with the procedures set forth in the IDEA between November 10, 2016 and May 10, 2018. In the present case, Parent alleged that District failed to find Student eligible for special education services. Although Parent did not specifically reference a “child find” violation, that is the essence of his 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. First, it is problematic that District reviewed only three evaluations on March 28, 2018 in determining Student’s eligibility for services pursuant to the IDEA. District argued that Hearing Officer McCauley had been satisfied with previous evaluations and sought only the three additional evaluations from District. This

Hearing Officer agrees with that assertion. However, it is necessary to consider timeframes. On November 10, 2016, when Hearing Officer McCauley ordered District to obtain a speech language evaluation, an assistive technology evaluation, and a functional behavior assessment, he was considering these evaluations to be supplemental to those already in existence. The evaluations in existence, specifically an occupational therapy evaluation, a physical therapy evaluation, a psycho-educational assessment, a report from Daysprings Behavioral regarding Student's counseling needs, and Student's medical reports, were all less than three years old on the date of Hearing Officer McCauley's November 10, 2016 decision. Because District did not conduct the ordered evaluations while appealing Hearing Officer McCauley's decision, significant time elapsed. By the time the United States District Court for the Eastern District granted Parent's motion for preliminary injunction, ordering District to comply with Hearing Officer McCauley's November 10, 2016 decision, approximately one year had passed.

As of March 28, 2018, when the IEP team met to discuss whether Student was eligible for special education programming pursuant to the IDEA, only four evaluations fell within a three-year time period prior thereto. Specifically, these evaluations included Student's speech language evaluation, assistive technology evaluation, functional behavior assessment, and evaluation from Daysprings Behavioral. Student's occupational therapy evaluation, physical therapy evaluation, psycho-educational evaluation, and medical reports were dated prior to March 28, 2015 and, thus, not current. There is nothing in the law to indicate that District's obligations pursuant to identification and evaluation of a child for IDEA services were absolved because it had appealed Hearing Officer McCauley's November

10, 2016 decision. Essentially, District made its decision to deny services to Student on March 28, 2018, without considering a full battery of current evaluations. That constituted a procedural violation of the IDEA. This violation was particularly problematic given that there was conflicting information in the record as to Student's needs. For example, Thielemier testified that Student did not have issues in her structured class, but she had heard of Student having angry outbursts and tantrums in other classes. The report from Daysprings Behavioral supported this testimony as well. Also, there was testimony from Student's GT teacher that Student had struggled much more in fifth grade than he had in fourth grade. Given that the data in Student's record was nearly four years old, it is quite possible that Student could have been in need of different accommodations and services as of March 28, 2018. Certainly, updated information would have been required to determine if Student's needs had changed since the year 2014. Finally, there are disciplinary reports in the file for the period in question that indicate that Student was continuing to have social issues with his peers. This is potentially counter to the testimony of Nichols that his 504 accommodations are meeting his needs. The only way to resolve these conflicts is to consider current evaluations.

Second, and also in regard to Student's evaluations, it appears that the functional behavior assessment obtained as a result of Hearing Officer McCauley's November 10, 2016 Order might possibly have been biased and incomplete. Concerning to this Hearing Officer is email correspondence between Nichols, District's special education supervisor, and Belk, the BCBA conducting the functional behavior assessment. In one email, Belk references a previous case from Mountain Home, explaining how Parent's attorney had not prevailed.

There is mention of Parent's attorney having been part of a personal lawsuit against Belk. Nichols replies to Belk's email by indicating that Parent's attorney was misleading Parent. This email exchange could possibly have nothing to do with the outcome of Student's functional behavior assessment; however, the appearance of impropriety is unsettling. Also concerning is that Belk testified that she was not aware that Student was being pulled out of classes for GT. Either this information was not made known to Belk, or she did not seek this information, but the fact that Student's GT teacher had reported Student's refusal to work, delayed processing, and difficulty with unstructured time, it seems that Belk should have had an opportunity to observe Student in this environment as well. It should also be noted that Parent was not interviewed by Belk, or any other individuals conducting evaluations pursuant to Hearing Officer McCauley's November 10, 2016 Order. Although the focus was on Student in the school setting, it seems inappropriate to avoid seeking information from Student's Parent.

Third, the evidence in the record clearly established that Nichols, on March 5, 2018, predetermined that Student was not eligible for special education programming pursuant to the IDEA. Nichols stated so in an email to several individuals, including the evaluators that were to explain the results of their evaluations to the IEP team and Parent on March 28, 2018. Specifically, Nichols stated that Student did not qualify under the IDEA and that the team needed to meet to discuss the issue before notifying Parent. Two days later, on March 7, 2018, Nichols sent a notice to Parent notifying him up the upcoming IEP meeting, specifically on March 28, 2018, wherein Student's eligibility would be discussed. District's actions in this

regard resulted in District making a unilateral decision without parental input, which is a procedural violation of the IDEA.

Finally, it should be noted that Nichols testified that Student was not eligible for special education programming and related services, so long as his needs could be met by a 504 plan. There is nothing in the IDEA that requires such. The issue for District is not whether Student's needs can be met by a 504 plan, but, instead, whether Student qualified for special education programming and related services pursuant to the IDEA. If Student meets the eligibility criteria set forth in the IDEA, he is entitled to special education programming and related services thereunder. In that instance, whether a 504 plan is or would be effective is wholly irrelevant.

Substantive Violations of FAPE

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District failed to appropriately evaluate Student and engage in child find activities pursuant to the IDEA, it is now necessary to consider whether the District's actions resulted in a substantive denial of a FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the child a FAPE. *K.E. v. Indep. Sch. Dist. 15*, 647 F.3d 795, 804 (8th Cir. 2011). Rather, a school district's educational plan for a given student will only be set aside for IDEA procedural violations "if the procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Id.* at 804-05.

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.*, 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), 137 S.Ct. 988 (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.*, 137 S. Ct. 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., 137 S.Ct. 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.*

In the present case, it is the opinion of this Hearing Officer that District’s failure to properly evaluate Student and properly consider him for special education programming and related services between November 10, 2016 and May 10, 2018 resulted in a substantive denial of a FAPE. During the period in question, Student potentially lost more than a year of

special education services. In addition, Student's Parent was prohibited from participating in Student's education and evaluations, in that he was not consulted or interviewed as part of any evaluations conducted by District. District made its decision to deny Student services pursuant to the IDEA based on potentially biased evaluations and without allowing parental participation of Parent.

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 10, 2016 and May 10, 2018 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 10, 2016 and May 10, 2018 by failing to engage in appropriate child find activities for the purpose of determining whether Student was eligible for special education programming and related services pursuant to the IDEA. District is hereby ordered to take the following actions regarding Student:

- (1) By or before September 21, 2018, District shall seek out and schedule all necessary evaluations for the purpose of obtaining current information so as to determine Student's eligibility for special education programming and related services pursuant to the IDEA. The required evaluations must include, but are not

limited to, the following: (a) psycho-educational evaluation; (b) speech and language evaluation; (c) occupational therapy evaluation; (d) physical therapy evaluation; (e) psychological evaluation; (f) functional behavior assessment; and (g) comprehensive medical examination, addressing any neurological issues still at issue.

- (2) All evaluations ordered in the preceding paragraph, specifically paragraph (1) in this section, must be completed by October 19, 2018.
- (3) District is required to hold an IEP meeting by or before November 2, 2018, for the purpose of discussing all evaluation results and determining, with Parent's participation, whether Student is eligible for special education programming and related services pursuant to the IDEA.
- (4) Because this is the second time that District has been found to have violated FAPE with regard to Student, Parent may choose the evaluators for each of the evaluations addressed in paragraph (1) of this section.
- (5) District is required to pay for all evaluations required in paragraph (1) of this section.

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

HEARING OFFICER

09/4/2018

DATE