

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXXXXXXXXXXXXX, Parents on behalf of  
XXXXXXXXXXXXXXXXXX, Student**

**PETITIONERS**

**VS.**

**CASE NO. H-19-06**

**HAAS HALL ACADEMY CHARTER SCHOOL**

**RESPONDENT**

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

**ISSUE PRESENTED:**

Whether the Haas Hall Academy Charter School (hereinafter “Respondent”) denied XXXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between August 10, 2017 and October 22, 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.<sup>1</sup>

**PROCEDURAL HISTORY:**

On October 22, 2018, the Arkansas Department of Education (hereinafter “Department”) received a written request from Petitioners, through counsel, to initiate due process hearing procedures on behalf of Student. Based on Petitioners’ complaint,

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<sup>1</sup> See Due Process Complaint and Petitioners’ Post-Hearing Brief. The complaint stated that alleged violations began during the 2017-2018 school year. No violations prior to Fall 2017 were alleged by Petitioners.

Petitioners requested a due process hearing because they believed that Respondent failed to comply with the IDEA by failing to conduct appropriate evaluations and identify Student as eligible for special education programming pursuant to the IDEA.<sup>2</sup>

In response to Petitioners' request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of December 4, 2018 was set as the date on which a hearing would commence if Petitioners and Respondent failed to reach resolution prior to that time. On November 26, 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.<sup>3</sup> On December 4, 2018, the date the due process hearing of this matter was set to commence, a second prehearing conference was held at Respondent's location on account of the fact that Petitioners' counsel withdrew from this case on December 3, 2018.<sup>4</sup> Petitioners requested additional time to find new counsel, a request that received no objection from Respondent. Petitioner's request was granted, and the hearing of this matter was continued to December 20, 2018.<sup>5</sup>

On December 20, 2018, the closed hearing of this matter commenced, and testimony was heard.<sup>6</sup> All testimony was heard in person at Haas Hall Academy Charter School. The hearing concluded on December 20, 2018.

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<sup>2</sup> See Due Process Complaint and Petitioners' Post-Hearing Brief.

<sup>3</sup> See Telephonic Prehearing Conf. Tr.

<sup>4</sup> See Prehearing Conf. Tr.

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

<sup>6</sup> See Hrg. Tr., Vol. 1.

The following witnesses testified in this matter: XXXXXXXXXX (“hereinafter “Parent” or “Mother”), XXXX XXXX (hereinafter “XXXX”), XXXX XXXX (hereinafter “XXXX”), XXXX XXXX (hereinafter “XXXX”), and XXXX XXXX XXXX (hereinafter “XXXX”).<sup>7</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. Petitioners were represented by Ben Brockert (Springfield, Missouri), and the Respondent was represented by Mark Henry (Fayetteville, Arkansas) and Victoria H. Jones (Fayetteville, 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 XX-year-old female (DOB XX/XX/XXXX) who is in the X grade.<sup>8</sup> Between August 10, 2017 and October 22, 2018, the time period statutorily covered in this action, Student was enrolled at Haas Hall Academy Charter School.<sup>9</sup> Following the hearing of this matter, Petitioners withdrew Student from Haas Hall.<sup>10</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Dist. Ex. Vol., Tab 12.

<sup>9</sup> *Id.*

<sup>10</sup> See Respondent’s Post-Hearing Brief.

### **Student's Section 504 Disability Accommodation Plans**

Student was placed on a Section 504 Accommodation Plan (hereinafter "504 plan") on March 8, 2017.<sup>11</sup> Pursuant to this plan, Student's disabilities included XX, XX, and XX.<sup>12</sup> The plan further stated that Student's school attendance was impacted on account of the fact that she missed school "due to vomiting and fatigue."<sup>13</sup> The accommodations addressed in the 504 plan included a modified attendance policy, permission to eat snacks if necessary, and permission to make up work missed on account of absences.<sup>14</sup> Student's mother attended the 504 meeting wherein this plan was devised, and signed the 504 plan document.<sup>15</sup> Petitioners brought a student advocate with them to this 504 meeting, and neither Petitioners nor their advocate requested that Student be evaluated for special education programming.<sup>16</sup>

On January 25, 2018, Student's 504 plan was modified to include "back/joint-related disabilities (slipped discs)."<sup>17</sup> The modified plan included a statement that Student was not able to sit for long periods, as well as additional accommodations as a result thereof.<sup>18</sup> Specifically, Student's accommodations were modified to include permission to go to the school nurse's office to do physical therapy stretches, permission to change position for comfort as needed, access to a portable recliner as needed, and access to a "safe space."<sup>19</sup> Student's mother attended the 504 meeting wherein modifications to Student's 504 plan

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<sup>11</sup> Dist. Ex. Vol., Tab 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Hrg. Tr., Vol. 1, p. 30.

<sup>15</sup> Dist. Ex. Vol., Tab 4.

<sup>16</sup> Hrg. Tr., Vol. 1, p. 33.

<sup>17</sup> Dist. Ex. Vol., Tab 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

were made, and signed the 504 plan document.<sup>20</sup> Petitioners once again brought a student advocate with them to the 504 meeting, and neither Petitioners nor their advocate requested that Student be evaluated for special education programming.<sup>21</sup>

On April 18, 2018, Respondent issued a letter to Petitioners stating that Student could access her education at home, via internet, and provided additional guidance on the parameters for this accommodation.<sup>22</sup> Specifically, the letter stated that Student was required to check in daily with each teacher, via email, as proof of attendance and participation in “school by home” and that Student was responsible for turning in all assignments.<sup>23</sup> The letter further stated that Student was required to provide medical documentation for each absence.<sup>24</sup> Respondent issued a laptop to Student so that she would be able to access the internet and complete her assignments.<sup>25</sup>

Petitioners requested that Student be evaluated for special education services, however, this request was submitted on November 14, 2018, approximately three weeks following the filing of Petitioners’ due process complaint in this case.<sup>26</sup> Prior to this date, no request was made by Petitioners or their student advocate for evaluations.<sup>27</sup>

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

<sup>21</sup> Hrg. Tr., Vol. 1, p. 33.

<sup>22</sup> Dist. Ex. Vol., Tab 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Hrg. Tr., Vol. 1, pp. 38-39.

<sup>26</sup> Dist. Ex. Vol., Tab 8. Because Petitioners’ request was submitted after the due process complaint was filed in this case, Petitioners’ request and Respondent’s response do not fall within the time period applicable to this case.

<sup>27</sup> Hrg. Tr., Vol. 1, pp. 200-02.

### **Information Considered in Determining IDEA Eligibility**

**Medical Documentation.** The record in this case includes numerous medical notes which address various medical conditions.<sup>28</sup> Petitioners provided the majority of these medical notes on May 22, 2018, despite the fact that Student had missed school throughout the entire 2017-2018 school year.<sup>29</sup> The majority of medical notes dated December 2017 and after reference Student's treatment for a back injury.<sup>30</sup> In January 2018, Student was officially diagnosed by Dr. George BJ W. Deimel, M.D. as having (1) back, buttock and right leg pain, lumbosacral radicular syndrome; (2) acute onset of pain following fall with initial response to physical therapy; and (3) reaggravation of pain status post recent MRI.<sup>31</sup> These diagnoses were based on the results of an MRI that was conducted in December 2017.<sup>32</sup> Pursuant to a January 26, 2018 clinic note, Dr. Deimel noted that Student had previously been treated with opioids to address her back pain and made the decision to change Student's medication.<sup>33</sup> On February 6, 2018, pursuant to a clinic note entered by Dr. Deimel, Petitioners reported, via telephone, that Student's new medication was not adequately controlling pain, prompting Dr. Deimel to revert back to Student's previous opioid pain medication.<sup>34</sup> On March 21, 2018, Student underwent an epidural steroid injection to address the pain resulting from her condition.<sup>35</sup> On April 9, 2018, post-procedure, Student returned to Dr. Deimel's office for a follow up visit. Dr. Deimel noted that Student had ceased

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<sup>28</sup> Dist. Ex. Vol., Tabs 11, 12, 13, 14.

<sup>29</sup> Hrg. Tr., Vol. 1, pp. 74-75, 192.

<sup>30</sup> Dist. Ex. Vol., Tab 12; Hrg. Tr., Vol. 1, p. 17.

<sup>31</sup> Dist. Ex. Vol., Tab 12.

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

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

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

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

using all previously-prescribed medications since the March 21, 2018 procedure, but that she had reported continuing back pain.<sup>36</sup> On May 17, 2018, Student again returned to Dr Deimel's office for a follow up visit.<sup>37</sup> Dr. Deimel modified Student's diagnoses to add obesity, chronic opioid use, and excessive school absences due to ongoing pain.<sup>38</sup> The clinic note stated that Student's mother reported that Student was being schooled at home and appeared "to be doing well."<sup>39</sup> Dr. Deimel noted his concern about performing spinal surgery on Student, given her age, noting that the alternative treatment of prescribing opioids was not preferable either.<sup>40</sup> When the 2018-2019 school year began, Petitioners corresponded with Respondent and continued to provide numerous medical notes related to Student's continued back issues, as well as other illnesses.<sup>41</sup>

**Attendance.** Respondent's Scholar/Parent Handbook includes an attendance policy which outlines minimum days of attendance.<sup>42</sup> The policy provides a procedure by which students are required to make up missed work in the event of an absence. Specifically, students are required to "contact faculty by email for missed assignments by 8:30 a.m. on the day of the absence."<sup>43</sup> Student frequently failed to contact her instructors pursuant to Student's attendance modification. In addition, Student frequently failed to submit makeup work in a timely manner.<sup>44</sup>

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<sup>36</sup> Dist. Ex. Vol, Tab 12.

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

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

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

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

<sup>41</sup> Dist. Ex. Vol., Tab 11.

<sup>42</sup> Dist. Ex. Vol., Tab 2.

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

<sup>44</sup> Dist. Ex. Vol., Tabs 9-10.

During the 2017-2018 school year, Student was absent 110 total days, with 27 of those absences occurring in the first semester and 83 occurring in the second semester. Student's mother provided medical notes for some of the absences, with reasons for absences including back pain, as well as various other illnesses.<sup>45</sup> Following the January 25, 2018 meeting to modify Student's 504 plan, Student stopped coming to school altogether.<sup>46</sup>

**Academic Performance.** Regarding Student's grades, during the 2016-2017 school year, Student received above-average grades in her academic classes. A review of Student's grade report for the 2016-2017 school year, Student's XX grade year, indicates that Student received all As and Bs in her classes, with the exception of one class wherein she received a C.<sup>47</sup> During the 2017-2018 school year, Student's XX grade year, Student's grades began strong, but dropped as the semesters progressed. During her first semester, Student received As and Bs in all of her classes, which included XX<sup>th</sup> Grade Literature, XX<sup>th</sup> Grade Language and Composition, Algebra 1, Art 2, Biology, Spanish 1, and Spanish 2.<sup>48</sup> Student's grades ranged from Cs to Fs for the remainder of the semesters during the 2017-2018 school year.<sup>49</sup> Student's decrease in grades occurred at the same time that Student's attendance began to suffer and Student was failing to turn in all required makeup work for her absences.<sup>50</sup> Student's mother testified, however, that ultimately Student made up all work and received all As and Bs during the time that she missed, noting that Student was smart and "doing

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<sup>45</sup> Dist. Ex. Vol., Tabs 11-12.

<sup>46</sup> Hrg. Tr., Vol. 1, p. 41.

<sup>47</sup> Dist. Ex. Vol., Tabs 11-12.

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

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

<sup>50</sup> Hrg. Tr., Vol. 1, p. 83.



great” in school.<sup>51</sup> Northcutt, Respondent’s academic advisor, stated that Student was performing well, with high grades.<sup>52</sup>

Student’s 2017 ACT Aspire test indicates that Student scored in the 90<sup>th</sup> percentile for English, the 93<sup>rd</sup> percentile for reading, the 97<sup>th</sup> percentile for writing, the 87<sup>th</sup> percentile for science, and the 78<sup>th</sup> percentile for math.<sup>53</sup> Student’s English, reading, and writing scores indicated an ACT readiness level of “exceeding,” and her science and math scores indicated an ACT readiness level of “ready.”<sup>54</sup> Student’s 2016 ACT Aspire test indicates that Student scored in the 94<sup>th</sup> percentile for English, the 81<sup>st</sup> percentile for reading, the 93<sup>rd</sup> percentile for writing, the 77<sup>th</sup> percentile for science, and the 69<sup>th</sup> percentile for math.<sup>55</sup> Student’s English score indicated an ACT readiness level of “exceeding,” and her reading, writing, science, and math scores indicated an ACT readiness level of “ready.”<sup>56</sup> With the exception of one subject, Student’s percentile ranks increased on the 2017 ACT Aspire, as compared to her scores on the previous year’s test.

### **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

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<sup>51</sup> *Id.* at pp. 202-03.

<sup>52</sup> Hrg. Tr., Vol. 1, p. 258; *See also* testimony of Schacter, Hrg. Tr. Vol. 1, pp. 279-80.

<sup>53</sup> Dist. Ex. Vol., Tab 6.

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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 Respondent complied with the procedures set forth in the IDEA between August 10, 2017 and October 22, 2018. In the present case, Petitioners alleged that Respondent failed to find Student eligible for special education services. Essentially, Petitioners have alleged a “child find” violation on the part of Respondent. 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).

It should be noted that there is nothing in the IDEA that indicates that a student whose needs are being met by a 504 plan is ineligible for special education programming and related services. On the contrary, it is quite possible that a student's disabilities could qualify him or her for either, depending on the circumstances. Therefore, the prevailing question for school districts in determining IDEA eligibility is not that of whether a student's needs can be met by a 504 plan, but, instead, notwithstanding 504 eligibility, whether a student qualifies for special education programming and related services pursuant to the IDEA. If a

student meets the eligibility criteria set forth in the IDEA, he or she 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.

In the present case, it is the opinion of this Hearing Officer that Respondent did not fail to fulfill its child find obligations with regard to Student. Here, there is no question that Student's chronic back issue, which was diagnosed in January 2018 and continues to date, is a qualifying disability pursuant to the IDEA. Student underwent an MRI, which revealed that she had protruding discs in her back. Student's physician, Dr. Deimel regularly saw Student for follow up visits beginning on January 26, 2018 and continuing throughout the year, with the goal of treating Student's condition and pain. At one point, Student underwent a procedure wherein she received an epidural steroid injection in her spine to address pain. Based on these facts, Student clearly has a disability that would fall within the stated IDEA category of Other Health Impairment (OHI).

Identification of a qualifying disability, however, is not the end of the inquiry. In order to qualify for special education programming and related services pursuant to the IDEA, Student must also have a specific need for services. Here, despite her disability, Student was academically succeeding. Student had an accommodation that allowed her to have daily access to each of her teachers. Respondent provided a laptop to Student to further assist in this endeavor. Although Student did not consistently turn in her make up work in a timely manner, the work submitted received high grades, typically As or Bs. Student's academic success on classroom work was also confirmed by her scores on the ACT Aspire standardized test. Although Student's 2016 ACT Aspire scores were indicative of academic success,

Student exceeded those scores on the 2017 ACT Aspire. On the 2017 ACT Aspire, Student's percentile ranks significantly increased on all subjects with the exception of one, which stayed constant. Student's scores indicate that she had an ACT readiness level of "exceeding" in a majority of subjects tested. Despite Student's qualifying disability and related absences, she was able to demonstrate academic success at school. As such, there is insufficient evidence to establish that Student had an actual need for special education programming and related services. In addition, neither Petitioners nor their student advocate requested that Student be evaluated for special education needs. Considering Student's academic performance, and the fact that there was no specific request for evaluations prior to the filing of this action, Respondent did not have a duty to evaluate Student for special education programming and related services.

### **Substantive Violations of FAPE**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and finding no violation on the part of Respondent, it is unnecessary to consider the issue of whether Student was substantively denied FAPE.

### **Conclusion**

Having considered Petitioners' 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 not denied FAPE between August 10, 2017 and October 22, 2018 as a result of procedural and substantive violations of the IDEA.

**ORDER:**

The results of the testimony and evidence require a finding for Respondent. There is insufficient evidence to warrant a denial of FAPE, as alleged by Petitioners. This case is hereby dismissed with prejudice.

**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**

01/21/2019

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**DATE**