

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXX,**

Parent on behalf of **XXXXXXX**, Student

**PETITIONER**

VS.

**CASE NO. H-19-15**

**Atkins School District**

**RESPONDENT**

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

**ISSUES PRESENTED:**

Whether the Atkins School District (hereinafter “District” or “Respondent”) denied XXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between January 23, 2017 and January 23, 2019 in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) failing to timely identify Student as eligible for special education programming; and (2) failing to provide an individualized educational program (hereinafter “IEP”) reasonably calculated to provide educational benefit.

**PROCEDURAL HISTORY:**

On January 23, 2019, the Arkansas Department of Education (hereinafter “Department”) received a written request from Parent to initiate due process hearing procedures on behalf of Student. Parent requested a due process hearing because she believed that the District failed to comply with the IDEA, as well as the regulations set forth

by the Department, by failing to timely identify Student as eligible for special education programming and, also, failing to provide an IEP reasonably calculated to provide educational benefit to Student during the statutory period.

At the time that Parent filed her request for a due process hearing, Student (male) was nine years old and receiving two hours per day of special education programming, all in a one-on-one setting wherein Student was with an aide at all times. Because of the two-year statute of limitations, this case pertains only to issues going back to January 23, 2017.

In response to the Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of March 5, 2019 was set as the date on which a hearing would commence if the Parent and District failed to reach resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on January 24, 2019.

On February 27, 2019, 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 addressed at the hearing, as well as the witnesses and evidence necessary to address same. Thereafter, following the grant of a continuance due to illness of counsel, the closed hearing in the above-referenced matter began on April 9, 2019. Testimony was heard on April 9, 2019 and April 10, 2019. The hearing was then continued to April 14, 2019 and was concluded on the same date.<sup>1</sup> The following witnesses testified in this matter: James Larue, Kay Barber, Stacey Webb, Dr. Kim

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<sup>1</sup> See generally Tr. Vols. I-III.

Dielmann, Shelia Smith, Jackie Rooke, Susan Ward, and Parent. 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 Ben Brockert (Bryant, Arkansas) and the District was represented by Sharon Streett (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>2</sup>

#### **FINDINGS OF FACT:**

Student is a nine-year-old male who, at the time of the due process hearing in this matter, was enrolled in the third grade in the District. At the time of the due process hearing in this matter, Student was on a reduced school day and was receiving two hours per day of special education instruction in a one-on-one setting. The history of Student's time at District is provided below.

#### **Student's 2015-2016 School Year (Kindergarten)**

In August 2015, Student's kindergarten year of school, Student was identified as having a disability pursuant to Section 504 of the Rehabilitation Act.<sup>3</sup> Student's qualifying

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<sup>2</sup> See Hearing Officer Binder of Pleadings and Orders. It is noted that counsel for District requested a one-day extension on the deadline for submitting post-hearing briefs. This Hearing Officer granted same and both parties were aware that they had one additional day to submit briefs for review.

<sup>3</sup> Ex. Vol. II, District Ex., p. 1-29; Ex. Vol. I, Parent Ex., pp. 117-120. Events occurring prior to January 23, 2017 cannot be considered in determining whether District violated the IDEA, as they do not fall within the statute of limitations for this case. However, these events provide historical context to understand incidents that do fall

conditions at the time of creation of his 504 plan were fine motor and sensory processing delays.<sup>4</sup> District and Parent became aware of these deficits as a result of an occupational therapy evaluation that was conducted on April 13, 2015 and indicated that Student's fine motor skills were moderately delayed compared to his chronological age and, also, that his visual perception motor coordination was mildly delayed.<sup>5</sup> Student's initial 504 plan provided that Student would receive sixty (60) minutes of occupational therapy each week.<sup>6</sup>

A few months following the creation and implementation of a 504 plan for Student, Student began to exhibit behavioral issues, specifically Student resisted task demands and, in response, would act out in a disruptive manner.<sup>7</sup> A functional behavior assessment (hereinafter "FBA") conducted regarding Student in January 2016 states the following:

XXXXX gets upset when he is asked to do a task he [sic] does not want to do. If he does not want to work in class, he will start causing a disturbance such as making noises, moving around, touch other students or do something to draw attention. When he is told to do the work, he will begin to cry and say [sic] he can't do it and then pushing things off his desk, flip his chair or move his desk. Then he will often stand up and appear to challenge the teacher. If he is approached, he will run. He will kick at other students if he thinks they are bothering him XXXXX has had behavior incidents in the classroom, cafeteria, hallway and on the bus but are most frequent in the classroom when asked to begin a task.<sup>8</sup>

Pursuant to this FBA, it was determined that Student was likely exhibiting disruptive behaviors for the purpose of gaining a desired activity or escaping a non-preferred activity. Replacement behaviors and strategies for teaching replacement behaviors, modifying

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within the statutory period. It is also noted that this Hearing Officer does not have authority to adjudicate Section 504 claims. Any information regarding Student's 504 plan is included for the purpose of providing historical context.

<sup>4</sup> Ex. Vol. II, District Ex., p. 1-01, 1-29.

<sup>5</sup> Ex. Vol. II, District Ex., pp. 1-02 – 1-04.

<sup>6</sup> Ex. Vol. II, District Ex., p. 1-29.

<sup>7</sup> Ex. Vol. II, District Ex., pp. 1-29 – 1-32.

<sup>8</sup> *Id.*

consequences, and reinforcement were addressed.<sup>9</sup> On February 8, 2016, Student's 504 plan was amended to address these behavioral issues through the addition of a behavior plan.<sup>10</sup> Within that same week, Student's plan was amended once again to add specialized transportation for Student.<sup>11</sup> The only other amendment to Student's 504 plan during his kindergarten year was to reduce the amount of occupational therapy Student was receiving each week from sixty (60) minutes to thirty (30) minutes.<sup>12</sup> This amendment was based on a subsequent occupational therapy evaluation conducted by the District.<sup>13</sup>

**Student's 2016-2017 School Year (First Grade)**

Toward the beginning of Student's first grade year, specifically on August 31, 2016, Student's 504 committee convened for the purpose of reviewing Student's 504 plan. Student's first grade teacher, having observed Student for the first few weeks of school, recommended that student be moved to the alternative learning environment classroom (hereinafter "ALE").<sup>14</sup> In the referral form completed by Student's teacher, it was noted that Student refused to do work, but was on grade level academically.<sup>15</sup> It also noted that several strategies and accommodations had been utilized in the regular classroom, to include allowing Student additional time to reread instructions, providing Student with a high school mentor, allowing extra time for assignment completion, conferencing with parent, consulting Student's counselor and case manager, implementing behavioral plan, moving desk close to

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

<sup>10</sup> Ex. Vol. II, District Ex., pp. 1-29, 2-14 – 2-17.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also Ex. Vol. II, District Ex., pp. 2-20 – 2-23.

<sup>13</sup> Ex. Vol. II, District Ex., pp. 1-33 – 1-38.

<sup>14</sup> Ex. Vol. II, District Ex., pp. 2-2 – 2-11; Ex. Vol. I, Parent Ex., pp. 121-130.

<sup>15</sup> *Id.*

the teacher, and utilizing a daily behavior calendar; however, these strategies had not been wholly effective.<sup>16</sup>

The record contains a 504 plan dated August 31, 2016 which indicates that Student was “doing well academically” but was “still struggling with behavior concerns.”<sup>17</sup> The 504 committee discussed moving Student to the ALE classroom and agreed that this move would better meet Student’s needs.<sup>18</sup> The committee felt that Student’s behaviors were a result of his being overwhelmed and overstimulated in the regular first grade classroom.<sup>19</sup> The ALE classroom provided grade level academic instruction, smaller class sizes, structured programming, and a reward system.<sup>20</sup> It was determined that, in addition to being moved to the ALE classroom, Student’s existing behavior plan, occupational therapy sessions, and specialized transportation would continue.<sup>21</sup> Parent agreed to these proposed changes and signed the ALE paperwork, as well as the 504 paperwork addressing these changes.<sup>22</sup>

Student’s behavior began to improve in the ALE classroom, yet Student was still struggling. His ALE teacher completed a behavior progress report on December 14, 2016, which indicated that Student was less destructive than when he entered the ALE classroom. There was notation, however, that Student still threw objects, ran, and broke pencils at times.<sup>23</sup>

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

<sup>17</sup> Ex. Vol. I, Parent Ex., pp. 131-32.

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

<sup>19</sup> Hrg. Tr. Vol. II, p. 55-56.

<sup>20</sup> Hrg. Tr., Vol. II, p. 56.

<sup>21</sup> Ex. Vol. II, District Ex. 2-18 – 2-19.

<sup>22</sup> *Id.*

<sup>23</sup> Ex. Vol. II, District Ex. 2-19.

In December 2016, Parent had student evaluated by the Arkansas Vision Development Center. Based on this evaluation, it was recommended that Student be seated toward the front of class and that he be provided more time with instructional material if needed.<sup>24</sup> There was testimony in the record indicating that these recommendations were followed.<sup>25</sup>

Toward the end of Student's first grade year, he was again evaluated for the purpose of determining whether he still needed occupational therapy services. Student was administered the Test of Visual Perceptual Skills Revised (TVSPS-R) and reported to have average or above average skills in the areas of visual discrimination, visual memory, visual figure control, visual spatial relationship, visual form consistency, and visual closure.<sup>26</sup> In addition, the evaluation indicated that Student's handwriting was good. Noted weaknesses for Student included completing tasks with background noise and tying shoes. Student had seven goals, five of which he had met.<sup>27</sup> It was recommended that Student be dismissed from occupational therapy.<sup>28</sup> Student's 504 plan was amended pursuant to this recommendation.<sup>29</sup>

Also, in April 2017, District obtained information regarding Student's behavioral progress in the ALE. Student's ALE teacher once again reported that student continued to be very destructive, to include throwing objects, breaking pencils, running, hitting other kids, and screaming. Essentially, Student's reported behaviors were nearly identical to those as

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<sup>24</sup> Ex. Vol. II, District Ex., p. 5-20; Ex. Vol. I, Parent Ex., pp. 135-44.

<sup>25</sup> Tr. Vol. I, pp. 19, 171; Tr. Vol. III, p. 129.

<sup>26</sup> Ex. Vol. II, District Ex., p. 2-20; Ex. Vol. I, Parent Ex., pp. 150-54.

<sup>27</sup> Ex. Vol. II, District Ex., p. 1-39; Ex. Vol. I, Parent Ex., pp. 150-54.

<sup>28</sup> *Id.*

<sup>29</sup> Ex. Vol. II, District Ex., p. 2-26.

reported in December 2016. Student's 504 committee met to discuss these issues and, at that same time, devised an action plan to address continued deficits. The student action plan indicated that Student would work on taking turns, refraining from bossing other children, and following directions.<sup>30</sup> The student action plan also noted educational goals for Student, noting that Student would do grade-level work during the upcoming year.<sup>31</sup> The student action plan further stated that Student would remain in ALE during second grade with the goal of transitioning Student to a regular classroom.<sup>32</sup> Parent agreed to these recommendations and signed the plan on April 17, 2017.<sup>33</sup> Parent had a mentor attend this meeting with her, and the mentor, XXXXXXXXXXXX, signed the plan also.<sup>34</sup>

**Student's 2017-2018 School Year (Second Grade)**

Near the beginning of Student's second grade year, specifically on August 21, 2017, Student's 504 committee met for the purpose of reviewing Student's 504 plan.<sup>35</sup> When the committee met on August 21, 2017, Parent provided a note from the University of Arkansas for Medical Sciences (hereinafter "UAMS") which stated that Student was scheduled for a Rehabilitative Services for Persons with Mental Illness Evaluation (hereinafter "RSPMI"). The note further provided a section for "issues addressed" with parent. This section of the note indicated that UAMS had addressed attention deficit hyperactivity disorder and disruptive behavior disorder with Parent.<sup>36</sup> The committee considered these potential

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<sup>30</sup> Ex. Vol. II, District Ex., p. 2-28.

<sup>31</sup> *Id.*

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

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

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

<sup>35</sup> Ex. Vol. II, District Ex., p. 3-01 – 3-03; Ex. Vol. I, Parent Ex., pp. 155-56.

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



diagnoses but determined that there was no need to amend Student's 504 plan. Parent was in agreement with this conclusion, as well as the mentor that Parent had attend the meeting with her.<sup>37</sup>

Approximately three weeks later, on September 14, 2017, Student's ALE teacher completed a progress report for Student. The report indicated that Student's behavior was significantly improved as compared to his behaviors as documented in April 2017. The report stated: "XXXXX is doing a great job. He is a talker. We are working on understanding boundaries. It won't be long until more transitions for him."<sup>38</sup> On October 11, 2017, Student's ALE teacher once again provided a progress report on Student's behavior. She stated: "Since his last progress check, XXXXX has improved greatly. If he continues this progression then I do believe a complete transition into a regular education 2<sup>nd</sup> grade classroom should take place by the beginning of the 2<sup>nd</sup> semester."<sup>39</sup>

On October 12, 2017, Student's 504 committee reconvened to discuss Student's progress. The purpose of this meeting was to discuss whether specialized transportation was still necessary. The committee agreed to allow Student a one-week trial period on the regular bus.<sup>40</sup> One week later, on October 19, 2017, Student's 504 plan was amended for the purpose of removing the requirement of specialized transportation.<sup>41</sup>

On October 25, 2017, in response to Student's significant progress, his ALE teacher developed an alternative classroom transition plan for Student.<sup>42</sup> The ALE teacher testified

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<sup>37</sup> Ex. Vol. II, District Ex., p. 3-04.

<sup>38</sup> Ex. Vol. II, District Ex., p. 3-06; Ex. Vol. I, Parent Ex., p. 159.

<sup>39</sup> Ex. Vol. II, District Ex. p. 3-07; Ex. Vol. I, Parent Ex., p. 160.

<sup>40</sup> Ex. Vol. II, District Ex., p. 3-08.

<sup>41</sup> Ex. Vol. II, District Ex., p. 3-09.

<sup>42</sup> Ex. Vol. II, District Ex., pp. 3-10 – 3-11.

that she had intended to transition Student more slowly, but that Parent had required a quicker transition, prompting this plan.<sup>43</sup> Her plan was to transition Student completely to the regular classroom by the time Student returned from Christmas break.<sup>44</sup> Pursuant to this plan, Student would attend regular class during the morning, and then return to the ALE classroom during the afternoon.<sup>45</sup> By November 28, 2017, transitioning had ceased and Student was placed once again in the ALE classroom for the entire day.<sup>46</sup> Student had to stop the transition plan because he had reverted back to tipping over chairs, throwing things off of kids' desks, and assaulting other students.<sup>47</sup> When Student returned to the ALE classroom, which Parent agreed to, Parent did not want Student to receive reward time any longer. Parent believed that Student was refusing to transition because he liked his ALE teacher and the reward time.<sup>48</sup>

For approximately two weeks after returning to the ALE classroom, things seemed to improve. However, Student soon became very aggressive. The ALE teacher made a referral for special education at that point, January 22, 2018, noting that she “could not service him anymore” because Student was hitting other kids and the ALE teacher because he was so angry about the removal of reward time.<sup>49</sup> The special education referral stated that Student had become aggressive and unsafe for other students to be around, despite being in the ALE and having many modifications.<sup>50</sup>

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<sup>43</sup> Hrg. Tr., Vol. I, p. 199.

<sup>44</sup> *Id.* at p. 197.

<sup>45</sup> Ex. Vol. II, District Ex., pp. 3-10 – 3-11.

<sup>46</sup> Hrg. Tr., Vol. I, p. 199.

<sup>47</sup> *Id.* at p. 200.

<sup>48</sup> *Id.* at p. 201.

<sup>49</sup> *Id.* at 202.

<sup>50</sup> Ex. Vol. II, District Ex., p. 3-27.

Two days after the referral, on January 24, 2018, Parent admitted Student to Pinnacle Point Hospital. The reason for the admission was that Student ran away while he was at home, running into the woods and away from Parent.<sup>51</sup>

By the time of referral and hospitalization, Parent had also obtained a psychological evaluation conducted by UAMS.<sup>52</sup> UAMS administered the following assessments to Student on January 11, 2018: (1) Wechsler Intelligence Test for Children, Fifth Edition (WISC-V); (2) Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV); (3) Sensory Profile, Second Edition – Short (Short Sensory Profile-2); (4) Behavior Assessment System for Children, Third Edition (BASC-3); (5) Conners, Third Edition (Conners 3-Short); (6) Children’s Depression Inventory, Second Edition (CDI-2); (7) Multidimensional Anxiety Scale for Children, Second Edition (MASC-2); and (8) Children’s Interview for Psychiatric Syndromes, Parent Version (P-ChIPS).<sup>53</sup>

Pursuant to the evaluation, Student had an intellectual functioning score in the “low average” range, however, his verbal comprehension, visual-spatial processing, nonverbal problem solving, and nonverbal processing speed were all within the “average” range.<sup>54</sup> Student’s attention, concentration, and mental control were within the “very low” range.<sup>55</sup> Academic achievement scores indicated that Student’s scores for basic reading, reading comprehension, reading fluency, math problem solving, and writing skills were within the “average” range, but his scores for spelling and math calculation were within the “low

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<sup>51</sup> Hrg. Tr., Vol. II, pp. 159-60.

<sup>52</sup> Ex. Vol. II, District Ex., pp. 3-35 – 3-52; Ex. Vol. I, Parent Ex., pp. 25-43.

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

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

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

average” and “very low” ranges.<sup>56</sup> The evaluator determined that Student did not have a specific learning disability.<sup>57</sup> It was reported, however, that Student likely had ADHD and was exhibiting aggression, conduct problems, defiance, and moodiness at home and school.<sup>58</sup> The evaluator recommended that Student continue receiving educational interventions at school to deal with academic and behavioral difficulties, with the goal of returning Student to the regular classroom.<sup>59</sup> The report further stated that ALE accommodations, such as more individual attention and rewards, should also be incorporated into the regular classroom at the point that Student is able to fully transition.<sup>60</sup> It was also recommended that District consult with a BCBA for the purpose of determining how to support Student, that Student continue with psychotherapy services, that Parent and Student undergo family therapy, that Student’s condition be managed with medication, and that District consider administration of additional psychoeducational tests.<sup>61</sup> This evaluation was considered at the referral conference for Student.

Student was discharged from Pinnacle Point Hospital on February 3, 2018.<sup>62</sup> Parent decided upon his discharge that she would keep Student at home and have a friend provide home school services.<sup>63</sup> According to Parent, that lasted approximately seven (7) days.<sup>64</sup>

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

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

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

<sup>59</sup> *Id.*

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

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

<sup>62</sup> Ex. Vol. II, District Ex., p. 3-106.

<sup>63</sup> Hrg Tr., Vol. II, p. 119.

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

On February 12, 2018, District held a referral conference to determine if Student was eligible for special education programming pursuant to the IDEA.<sup>65</sup> The IEP team decided at the referral conference that Student needed additional testing, above that already provided, to determine eligibility and necessary services.<sup>66</sup>

On February 15, 2018, Student returned to school and, the following day, an IEP conference was held. At the February 16, 2018 meeting, Student was temporarily placed on an IEP pending the completion of additional evaluations.<sup>67</sup> Approximately a month later, on March 12, 2018, a CIRCUIT<sup>68</sup> referral was made by the District. The purpose of this was for a BCBA to conduct a new functional behavior assessment of Student.

During the evaluation period, District had Student evaluated by a school psychology specialist. The dates of evaluation were March 1, 2018 and March 15, 2018.<sup>69</sup> The following assessments were administered to Student: (1) Kaufman Test of Educational Achievement 3; (2) Visual Aural Digit Span; and (3) Bender Gestalt II.<sup>70</sup> The results of this evaluation were nearly identical to the results of the UAMS assessment conducted two months earlier.<sup>71</sup> The functional behavior assessment, which was conducted on April 6, 2018, indicated that Student became physically and verbally aggressive by “yelling, kicking, hitting, head butting or biting adults” when instructed to perform a task.<sup>72</sup> There was a notation that Student was also aggressive toward other children.<sup>73</sup> The FBA indicated that Student becomes agitated

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<sup>65</sup> Ex. Vol. II, District Ex., p. 3-54.

<sup>66</sup> Ex. Vol. II, District Ex., p. 3-28.

<sup>67</sup> Ex. Vol. II, District Ex., p. 3-60; Ex. Vol. I, Parent Ex., pp. 12-24.

<sup>68</sup> CIRCUIT refers to Centralized Intake and Referral/Consultant Unified Intervention Team.

<sup>69</sup> Ex. Vol. II, District Ex., pp. 3-72 – 3-78; Ex. Vol. I, Parent Ex., pp. 44-51.

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

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

<sup>72</sup> Ex. Vol. II, District Ex., p. 3-85.

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

when presented work, and that Student's objective was escape or avoidance of the assigned task.<sup>74</sup> The report addressed strategies necessary to modify the antecedent to aggressive behavior, as well as strategies to modify consequences. The report further referenced the creation of a behavior plan.<sup>75</sup>

On April 5, 2018, a developmental visual evaluation was completed for Student. The evaluation was sought by Parent based on her concern about Student's visual system.<sup>76</sup> Student was administered numerous tests or exams pertaining to his visual abilities.<sup>77</sup> The evaluation stated that Student had binocular dysfunction, accommodative dysfunction, convergence excess, and oculomotor dysfunction in pursuits and saccades.<sup>78</sup> It was recommended that Student be provided an individualized program of optometric vision therapy, with a minimum of sixteen (16) to twenty-four (24) units of therapy each week. The report has a specific section for classroom recommendations, which include seating Student at the front of class or close to where material is being presented, as well as providing more time for Student to work on tasks or tests.<sup>79</sup>

On April 6, 2018, after completion of all outstanding evaluations, District held a programming conference.<sup>80</sup> The notice of decision states that Student was eligible for services pursuant to the IDEA under the eligibility category of "other health impairment" on account of his diagnosis of ADHD and oppositional defiance disorder (ODD).<sup>81</sup> An IEP was

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<sup>74</sup> *Id.*

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

<sup>76</sup> Ex. Vol. I, Parent Ex., pp. 1-11.

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

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

<sup>79</sup> *Id.*

<sup>80</sup> Ex. Vol. II, District Ex., p. 3-87.

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

developed, with duration of services from April 6, 2018 to April 6, 2019. The IEP provided that Student needed positive behavioral interventions, specifically a behavior plan and sensory supports in the classroom.<sup>82</sup> In addition, he needed accommodations for the general education setting, including a home/school communication system for behavior monitoring, established rules, social reinforcers for appropriate behavior, tangible reinforcers, training in self-monitoring, and positive reinforcements. Finally, it was indicated that Student needed adult supervision at all times while at school.<sup>83</sup>

The April 6, 2018 IEP contained goals in the areas of reading, literacy, math, and interpersonal behavior, to include the following: (1) read grade-level text with sufficient accuracy and fluency to support comprehension with 80% accuracy by the end of the 2018-2019 school year; (2) demonstrate command of the conventions of standard English . . . as appropriate for Grade 2 when writing with 80% accuracy by the end of the school year; (3) represent and solve problems involving addition and subtraction with 80% accuracy by the end of the school year; and (4) display productive school behavior on a daily basis with 60% accuracy by the end of the school year.<sup>84</sup> The IEP shows that Student's progress on each of these goals was documented on a quarterly basis, with Student meeting all goals the majority of the time.<sup>85</sup> Also, the April 6, 2018 IEP indicated that Student was to receive 500 minutes per week of direct instruction in math, 600 minutes per week of direct instruction in literacy, 300 minutes per week of direct instruction in science (regular classroom), 120 minutes per week of direct instruction in science (special education classroom), and 80 minutes per week

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<sup>82</sup> Ex. Vol. II, District Ex., pp. 3-91 – 3-103; Ex. Vol. I, Parent Ex., pp. 64-76.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

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

of direct instruction in social studies.<sup>86</sup> Specialized bus transportation was indicated as a related service to be provided to Student.<sup>87</sup> Finally, the IEP included a new behavior support plan.<sup>88</sup> In addition, the behavior support plan included goals pertaining to calming down and monitoring conduct.<sup>89</sup>

On April 29, 2018, there was a situation on school property that resulted in Student being hospitalized again. Specifically, Student had been taken off all medications so that he could start new ADHD medications.<sup>90</sup> At the end of the day, Student refused to leave school and became combative with school staff, police, and at one point his grandmother, who had been called to the school to help.<sup>91</sup> As a result of this incident, Student was hospitalized at Methodist Behavioral Hospital.<sup>92</sup> Student's IEP team held a manifestation determination review and concluded that Student's behavior on April 29, 2018 was related to his disability.<sup>93</sup> After Student was discharged from the hospital, District and Parent participated in a facilitated mediation.<sup>94</sup> This mediation was held on May 14, 2018 and District and Parent agreed that Student's remaining school days during the 2017-2018 school year should be shortened to 3.5 hours per day.<sup>95</sup>

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

<sup>87</sup> *Id.*

<sup>88</sup> Ex. Vol. II, District Ex., p. 3-85; Ex. Vol. I, Parent Ex., pp. 77-80.

<sup>89</sup> *Id.*

<sup>90</sup> Ex. Vol. II, District Ex., p. 3-111; Ex. Vol. I, Parent Ex., pp. 81-84.

<sup>91</sup> *Id.*

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

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

<sup>94</sup> Ex. Vol. II, District Ex., p. 3-112.

<sup>95</sup> *Id.*



### **Student's 2018-2019 School Year (Third Grade)**

At the beginning of Student's third grade school year, specifically on August 16, 2018, Student's IEP team met to review Student's April 6, 2018 IEP.<sup>96</sup> The IEP team discussed the possibility of returning Student to a full school day.<sup>97</sup> After consideration, the team decided that Student should remain on a 3.5 hour school day until the issue could be reconsidered on September 10, 2018 at a subsequent IEP meeting.<sup>98</sup> Student was later hospitalized on account of an incident at school. Specifically, Student swung a broom handle at staff and children at school.<sup>99</sup> Parent testified that she had been called to the school because Student had left the quiet room and obtained a broom from the supply closet and was swinging it at others.<sup>100</sup> Parent picked him up from school and Student was hospitalized at Methodist Behavioral Hospital.<sup>101</sup>

Student was discharged from the hospital on September 4, 2018, and less than a week later, on September 10, 2018 District held another IEP meeting to review Student's IEP.<sup>102</sup> No changes were made to Student's IEP at that time, and the team determined to review the situation once again on September 17, 2018.<sup>103</sup>

On September 17, 2018, the IEP team reconvened to discuss Student's IEP. The committee determined that Student's behavior had improved some and, as a result, decided to extend Student's school day by one hour, to 4.5 hours a day, so that Student could begin

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<sup>96</sup> Ex. Vol. II, District Ex., p. 4-03.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Hrg. Tr., Vol. II, p. 167.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Ex. Vol. II, District Ex., p. 4-07.

<sup>103</sup> *Id.*

to adjust to a longer school day.<sup>104</sup> Approximately a month later, on October 29, 2018, Student's IEP team met again to review Student's IEP. The team considered Student's behavior and, given recent aggressive behaviors toward staff, determined that no change should be made to Student's IEP.<sup>105</sup> The IEP team decided to meet again after three weeks for the purpose of reviewing Student's IEP.<sup>106</sup>

On November 2, 2018, the IEP team met to conduct a manifestation determination following a 9-day suspension of Student.<sup>107</sup> Student was suspended for threatening a student with a fork and, later that day, punching his one-on-one aide in the stomach repeatedly.<sup>108</sup> Student also threw a broom at the bus driver when entering the bus.<sup>109</sup> The IEP team determined that Student's actions were not a result of his disability.<sup>110</sup> Parent notified the District on November 5, 2018, via email, that she did not agree with the committee's decision.<sup>111</sup>

On November 28, 2018, Student's IEP team met again for a manifestation determination review conference.<sup>112</sup> The incident prompting this conference occurred when Student took another student's chair and refused to return it.<sup>113</sup> Student was convinced to return the chair, but upon doing so, grabbed another child's chair.<sup>114</sup> Student's teacher sat in the chair that Student was seeking, at which point Student began pushing and pulling on him

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<sup>104</sup> Ex. Vol. II, District Ex., p. 4-09.

<sup>105</sup> Ex. Vol. II, District Ex., p. 4-17.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Ex. Vol. II, District Ex., p. 4-30.

<sup>112</sup> Ex. Vol. II, District Ex., pp. 4-33 – 4-34.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

in an attempt to get the chair.<sup>115</sup> The teacher then removed the chair from the classroom altogether, which upset Student.<sup>116</sup> The teacher had to send all other children out of the classroom and call for assistance.<sup>117</sup> Student then began kicking and hitting the office door and, when a staff member arrived, he rammed her with his shoulder and knocked her to the floor, causing a back injury.<sup>118</sup> Student also threw folders and books out of other children's desks, and knocked supplies off a shelf.<sup>119</sup> The police had to be called to assist with the situation.<sup>120</sup> At the manifestation determination review conference, Student's IEP committee determined, in alignment with opinion of Student's mental health provider, that Student's actions were not a result of his disability.<sup>121</sup> As such, Student was subject to the regular disciplinary policies, and was being recommended for expulsion.<sup>122</sup> District and Parent discussed the issued and came to the agreement that Student could remain in school as long as, for safety reasons, his placement did not expose other students to him.<sup>123</sup> Parent and District agreed that Student's placement at District would be two hours per day, and that such placement would be in the ALE classroom with a teacher and a one-on-one aide.<sup>124</sup>

Approximately two weeks later, Student's IEP team met to request consent from Parent for a new FBA.<sup>125</sup> Parent gave consent and Dr. Shelia Smith (hereinafter "Dr. Smith"),

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Ex. Vol. II, p. 4-43.

a BCBA with the Arch Ford Educational Cooperative, was asked to conduct the new FBA.<sup>126</sup> Smith conducted an evaluation on December 19, 2018, January 8, 2018, and January 14, 2019.<sup>127</sup> Parent filed a due process complaint on January 23, 2019. The results of Student's FBA were subsequently provided in a report dated February 22, 2019.<sup>128</sup> An IEP meeting was held on March 14, 2019, wherein Dr. Smith discussed her report and recommended a program called "Rage to Reason" for Student. Parent, however, did not consent to such program. Student was then referred by the District to the Conway Psychological Assessment Center so that Student could be evaluated for behavior and mood issues.<sup>129</sup> Dr. Kim Dielmann (hereinafter "Dr. Dielmann") evaluated Student and completed a report outlining her findings on March 1, 2019. Dr. Dielmann diagnosed Student with ADHD and severe oppositional defiant disorder.<sup>130</sup> Dr. Dielmann also recommended the Rage to Reason program for Student.<sup>131</sup>

**Student's Academic Achievement during the 2018-2019 School Year (Third Grade)**

Student took the third grade Benchmark Assessment on August 22, 2018, as well as January 18, 2019.<sup>132</sup> Student exceeded his goals, scoring at or above the third-grade benchmarks on both test administrations.<sup>133</sup> The record contains a STAR math report for Student, which indicates that Student was tested on February 1, 2019.<sup>134</sup> Student's scores on this assessment placed Student at a grade equivalent of fourth grade, above grade level, and

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<sup>126</sup> Ex. Vol. II, p. 4-45 – 4-55.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ex. Vol. II, p. 5-34.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Ex. Vol. II, District Ex., p. 5-01.

<sup>133</sup> *Id.*

<sup>134</sup> Ex. Vol. II, District Ex., p. 5-02.

at the 70<sup>th</sup> percentile. The record also contains a STAR reading report for Student, which indicates that Student was tested on February 22, 2019.<sup>135</sup> Student's scores on this assessment placed Student at a grade equivalent of 3.7 (third grade, seventh month), and at the 49<sup>th</sup> percentile.<sup>136</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 whether the student's education was reasonably calculated to provide the student educational benefit. *Id.*

### **Allegations of Procedural Violations of IDEA – Child Find**

It must first be determined whether District complied with the procedures set forth in the IDEA between January 23, 2017 and January 23, 2019. In the present case, Parent alleged that the District failed to timely find Student eligible for special education services.

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<sup>135</sup> Ex. Vol. II, District Ex., p. 5-03.

<sup>136</sup> *Id.*

Some circuits have expressly stated that child find 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.

In the present case, Parent alleges in her due process complaint, as well as in her post-hearing brief, that District should have suspected that Student had a qualifying disability pursuant to the IDEA as early as February 2017. Specifically, Parent argues that District

should have suspected that Student had visual impairment, emotional disturbance, or autism based on the various pieces of information that District had at that point. This Hearing Officer agrees, in part.

As of February 2017, Student was performing on grade level. Certainly, nothing about Student's academic performance would have put District on notice that Student might have a qualifying disability pursuant to the IDEA. Student's behavior, however, was sufficient to put District on notice that Student needed a comprehensive evaluation. As of February 2017, Student had been in the ALE classroom for approximately six (6) months. Despite his time in ALE, Student was still exhibiting serious and problematic behaviors. As of February 2017, the most recent progress report regarding Student referenced some improvement, but noted that Student was continuing to throw objects, run, and break pencils. Given that Student had been in the ALE for six (6) months and there had been no significant change in his behavior, despite the fact that a behavior support plan was in place, District was sufficiently on notice that Student's behavioral problems might be indicative of a disability that would fall under one of the eligibility categories pursuant to the IDEA.

It is noted that Student's behavior improved in the fall of 2017 to the point that District attempted to transition Student from the ALE classroom to the regular classroom, indicating that the District's behavioral supports at that time were successful. However, as of February 2017, Student's behavior was still severe, so much so that District should have been on notice that Student might qualify for services pursuant to the IDEA.

This Hearing Officer disagrees with Parent's assertion that District should have been on notice that Student might be eligible for special education services as a result of visual

impairment or autism. While it is true that Student had been evaluated for visual impairment two months earlier, in December 2016, the recommendations that resulted from that evaluation were that Student be allowed to sit close to the front of the room, or close to the material he was learning, and that he be allowed more time to complete tasks. The diagnoses and recommendations in the visual evaluation did not indicate a visual impairment so significant that District would have been prompted to conduct a comprehensive evaluation regarding Student. This is particularly true given that Student was performing well academically. As for autism, there was nothing in the record to suggest that Student had symptoms of autism. Certainly, autistic children can have significant behavioral issues; however, behavioral issues without other symptoms would not likely have put District on notice that Student might be autistic.

Having considered Parent's allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not timely referred for special education consideration and, therefore, District procedurally violated the IDEA.

**Allegations of Substantive Violations of the IDEA**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District committed a procedural child find violation, the only remaining issues are (1) whether District's failure to timely refer Student for a comprehensive evaluation resulted in a substantive denial of FAPE; and (2) whether District, following Student's identification for services in February 2018, failed to develop and implement an appropriate IEP for 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 *Andrew 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 *Andrew F.*, the standard set forth by the Court is "markedly more demanding" as compared to the "merely *de minimis*" test outlined in *Rowley*. *Andrew 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."

*Andrew 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.*

Regarding behavioral issues, it should be noted that “[w]hen a child’s learning is impeded by behavioral issues, the IDEA requires that the IEP team ‘consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.’”<sup>137</sup> A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student.<sup>138</sup> The Eighth Circuit Court of Appeals has stated that “it is ‘largely irrelevant’ if the school district could have employed ‘more positive behavior interventions’ as long as it made a ‘good faith effort’ to help the student achieve the educational goals outlined in his IEP.”<sup>139</sup>

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

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<sup>137</sup>*M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

<sup>138</sup>*Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

<sup>139</sup>*M.M.*, 702 F.2d at 479 (citing *CIN*, 323 F.3d at 639).

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).

Regarding the issue of whether District’s failure to timely refer Student for a comprehensive evaluation and, thus, identify Student for IDEA services, resulted in a substantive denial of FAPE, it is the opinion of this Hearing Officer that there was no violation. Despite the fact that Student was on a 504 plan prior to February 2018, as opposed to receiving services pursuant to an IEP, the District’s actions regarding Student’s behavioral issues were sufficient to ensure that Student was provided FAPE. Between January 23, 2017 and January 23, 2019, Student was on a behavior support plan at all times. District conducted two FBAs during this period of time, with the goal of ensuring that Student was receiving an appropriate behavior plan to address his problem behaviors. Essentially, District, in good faith, attempted throughout the statutory period to find the best combination of behavioral and academic supports for Student. As a result of the various behavioral modifications and plans, District was able to provide academic instruction to Student, and Student remained

on grade level. Had Student been identified for IDEA services prior to February 2018, these same actions would have been required. The only difference would have been that District would have had a more comprehensive picture of what was causing Student's behavior, which could have enhanced the District's efforts.

Regarding the second issue, specifically whether District failed to develop and implement an appropriate IEP for Student following identification in February 2018, it is the opinion of this Hearing Officer that there is no violation. Student's current IEP includes a statement of his present levels of academic achievement and functional performance. In addition, there is a description of how Student's disability affects his ability to participate in the general education curriculum. The IEP contains four annual goals, one each for reading, literacy, math, and behavior. All of these goals are appropriate in light of Student's circumstances and are measurable. In addition, Student's goals have been tracked quarterly by District to determine whether Student has made progress toward them. Last, but not least, there is a description of related services to be provided to Student.

It is noted that, at the time of the due process hearing in this matter, Student was not able to attend school for a full day on account of his severe and unsafe behaviors. Certainly, it could be argued that District's IEP was insufficient to address Student's deficits given that Student was unable to be at school for the same duration as other children. The evidence in the record, however, supports that a partial school day was appropriate for Student. Student's behavior was so severe that he was hospitalized in September 2018, as well as November 2018. The ALE teacher, who had been successful in modifying Student's behavior for a short time in the second grade, was no longer able to keep Student from having

outbursts and hurting other staff and children in the ALE classroom. At one point, Parent considered home schooling Student as a result of his inability to remain in school without severe behavioral outbursts. It seems logical that District reduced the amount of time that Student was at school so that Student's behavior could be adequately addressed and modified, but without extended risk to other children and staff. This does not appear to be a situation in which District reduced Student's school day to avoid its responsibilities pursuant to the IDEA. Instead, District balanced the needs of Student with the safety of all other children and staff in the school. As such, District's plan to slowly increase the time that Student is at school, until such time that Student can maintain his behavior for a full school day, is logical and appropriate.

Finally, Student's academic progress indicates that Student was not denied FAPE between January 23, 2017 and January 23, 2019. Despite everything, Student is still performing at or above grade level in reading and math, and Student was successful on his third-grade benchmark exam. Academically, Student has remained comparable to his nondisabled peers.

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 not denied FAPE, as required by IDEA, between January 23, 2017 and January 23, 2019.

**ORDER:**

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by Parent. 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**

05/16/2019

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**DATE**