

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXXXX,

Parent on behalf of **XXXXXXX**, Student

PETITIONER

VS.

CASE NO. H-20-09

RUSSELLVILLE SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Russellville School District (hereinafter “District” or “Respondent”) denied Student a free, appropriate, public education (hereinafter referred to as “FAPE”) during the 2019-2020 school year, 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 conduct an appropriate speech evaluation for Student; (2) failing to consider outside evaluations provided by Parent; (3) failing to afford Parent meaningful participation in Student’s education; and (4) failing to provide individualized educational programs (hereinafter “IEP”) reasonably calculated to provide educational benefit in that they failed to properly address Student’s ongoing behavior issues, provide for a functional behavior assessment (hereinafter “FBA”) and include a behavior intervention plan (hereinafter “BIP”).¹

¹ See Due Process Complaint.

PROCEDURAL HISTORY:

On September 23, 2019, the Arkansas Department of Education (hereinafter referred to as “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 conduct an appropriate speech evaluation for Student, failing to consider outside evaluations provided by Parent, failing to afford Parent meaningful participation in Student’s education, and failing to provide individualized educational programs (hereinafter “IEP”) reasonably calculated to provide educational benefit in that they lacked measures to address Student’s severe behavioral issues.

In response to Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of October 29, 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. On October 29, 2019, a joint request for continuance was made by the parties, and this Hearing Officer continued the due process hearing of this matter to November 19, 2019.

On November 15, 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.² Thereafter, the open hearing of this matter began as scheduled on November 19, 2019. Testimony was heard on November

19, 2019, November 20, 2019, November 21, 2019, December 12, 2019, December 13, 2019, January 9, 2020, January 29, 2020, and March 9, 2020.³ The following witnesses testified in this matter: Laura Bine, Luann Colling, Celia Wortham, Megan Koenigseder, Calvin Jones, Barbara McShane, Bridget Smith, Sheila Barnes, Amy Barley, Kyla Warnick, Renee King, Brittany Turner, and XXXXXXXXX.⁴ 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 an open impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, 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.⁵

FINDINGS OF FACT:

Student is a six-year-old male who currently attends school in the District, specifically at Sequoyah Elementary, and is in kindergarten. Parent testified that Student had many health issues as an infant and was developmentally delayed in many respects. Student was largely nonverbal until he was three years old and, even now, has difficulty expressing himself verbally when he is upset.⁶ Student has a history of behavioral issues, with behaviors

³ There were numerous continuances in this matter, which are reflected in the record.

⁴ See Hrg. Tr., Vols. I-VIII.

⁵ See Hearing Officer Binder of Pleadings and Orders.

⁶ Hrg. Tr., Vol. II, pp. 246, 250-51.

to include hitting, kicking, attacking other children, arguing excessively, throwing items, temper tantrums, and resisting authority.⁷ On March 20, 2018, Student was diagnosed with unspecified disruptive, impulse control, and conduct disorder and unspecified symptoms and signs involving the nervous system.⁸ More recently, in August 2019, Student was diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”).⁹

During the 2018-2019 school year, Parent declined three to five-year-old services from the district and instead enrolled Student in Pediatrics Plus Developmental Preschool (hereinafter “Peds Plus”).¹⁰ While attending Peds Plus, Student was evaluated on June 6, 2018 for speech deficits. Student had previously been discharged from speech therapy services prior to entering preschool at Peds Plus. Student was administered the Clinical Evaluation of Language Fundamentals Preschool – Second Edition (CELF-P2), the Goldman Fristoe Test of Articulation – (GFTA-3), and the Clinical Assessment of Articulation and Phonology – Second Edition (CAAP-2).¹¹ Student was also given oral peripheral and hearing exams and was informally assessed for voice and fluency.¹² The results of these tests indicated that Student presented with a mild delay for language development and a severe delay for articulation skills.¹³ As a result of this evaluation, it was recommended, and Student did in fact receive, ninety minutes of speech therapy (hereinafter “ST”) weekly.¹⁴

⁷ Ex. Vol. I, p. 60.

⁸ Ex. Vol. I, p. 61.

⁹ Ex. Vol. I, p. 107.

¹⁰ Ex. Vol. I, p. 34; Ex. Vol. II, p. 361.

¹¹ Ex. Vol. II, pp. 72-78.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

In addition, on May 2, 2018, Student was evaluated for occupational therapy (hereinafter “OT”). Student was administered the Peabody Developmental Motor Scales – 2 (PDMS-2 fine motor section), the Sensory Processing Measure – Preschool (SPM-P), and the Pediatric Evaluation of Disability Inventory (PEDI).¹⁵ In addition, he was clinically observed by the occupational therapist conducting the evaluation.¹⁶ It was determined that Student had difficulty processing sensory information, which resulted in difficulty “modulating responses to input.” As a result, Student engaged in seeking behaviors that ultimately interfered with his ability to function and learn in the classroom. Student was found eligible for OT services in the amount of 135 minutes per week.¹⁷

From a behavioral standpoint, Student engaged in inappropriate behaviors while at Peds Plus, specifically exhibiting aggressive behaviors such as hitting others and throwing objects.¹⁸ He also struggled with transitions between activities. Peds Plus developed a BIP to address student’s inappropriate behaviors and minimize Student’s angry outbursts.¹⁹ By the time that Student left Peds Plus, he was on the lowest level of the behavioral program offered by the facility, and Parent reported that Student’s aggressive behaviors has been significantly reduced.²⁰

In the spring of 2019, Peds Plus developed a plan to transition Student from preschool to kindergarten at the District. A special education referral dated February 28, 2019 indicated that Student had developmental delays and was receiving services at Peds Plus for

¹⁵ Ex. Vol. II, p. 65.

¹⁶ *Id.*

¹⁷ Ex. Vol. II, pp. 65-71.

¹⁸ Ex. Vol. I, p. 56.

¹⁹ Hrg. Tr., Vol. IV, pp. 201-02.

²⁰ *Id.*

“fine motor, sensory, and communication deficits,” noting that these deficits affected Student’s abilities in the classroom.²¹ The special education referral also stated that Student’s language skills at that time were “average.”²²

A Notice of Conference dated February 28, 2019 and scheduling a meeting for March 14, 2019 was sent to Parent by District.²³ The purpose of this meeting was to consider the Peds Plus special education referral and also to conduct an existing data review.²⁴ Parent provided a social history for District to review which included information about Student’s aggressive behaviors. Specifically, Parent noted on the social history that Student was “quick to anger” and would hit, yell, and throw objects when he was angry.²⁵ The referral conference was held, as scheduled, on March 14, 2019 and Parent, as well as individuals from Peds Plus and District attended the meeting.²⁶ Regarding Student’s behavior, there were varying opinions discussed at the meeting. Parent reported that Student’s behavior continued to be aggressive, while the Peds Plus staff member that was present in the meeting indicated that there had been an improvement in Student’s behavioral issues.²⁷ In addition to discussing Student’s behavioral issues, the team reviewed a developmental evaluation conducted by Peds Plus and a psychological evaluation conducted by Dr. Kim Dielman.²⁸

The Peds Plus developmental evaluation was conducted on February 5, 2019, approximately three weeks prior to the referral conference. This evaluation indicated that

²¹ Ex. Vol. I, pp. 35-37; Ex. Vol. II, p. 8.

²² Ex. Vol. I, p. 37.

²³ Ex. Vol. I, p. 38.

²⁴ *Id.*

²⁵ Ex. Vol. I, p. 47.

²⁶ Ex. Vol. II, pp. 22-24.

²⁷ Ex. Vol. II, p. 13.

²⁸ Ex. Vol. II, pp. 22-24, 85-90, 62-63.

student had a 38% delay with regard to adaptive skills, a 25% delay with regard to personal social and communication skills, between a 27% and 30% delay on various motor skills, and a 24% delay with regard to cognitive skills.²⁹ The psychological evaluation performed by Dr. Kim Dielman was dated March 20, 2018.³⁰ This report indicated that, as of the date of evaluation Student had a history of aggressive behavior toward others, did not like to share, typically preferred to play alone, and became easily frustrated.³¹ It was further noted that Student was sensitive to noise and textures, and that he was able to obtain sensory input by hitting others, throwing objects, and kicking others.³² Dr. Dielman diagnosed Student with unspecified disruptive, impulse control, and conduct disorder, and also noted that Student exhibited many characteristics of sensory processing disorder.³³ She noted that children with sensory processing disorder “crave” input and love activities such as jumping, bumping and crashing activities, deep pressure touch.³⁴ In Dr. Dielman’s opinion, Student did not meet the criteria for Autism because he was able to engage socially if he chose to do so and enjoyed at times playing with other peers.³⁵

A Notice of Action dated March 14, 2019 states that Parent and District agreed that additional testing was needed to determine whether Student was eligible for special education services with District.³⁶ Parent signed consent for additional evaluations at the meeting.³⁷

²⁹ Ex. Vol. II, p. 86.

³⁰ Ex. Vol. II, pp. 62-63.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ex. Vol. II, p. 13; Ex. Vol. I, p. 42.

³⁷ *Id.*

Following March 14, 2019, District began the process of conducting necessary evaluations. District first obtained Student's audiological evaluation and swallow study from Student's primary care physician, Dr. Robin Kirby, as well as records from Student's gastroenterologist, Dr. Van Lanthum.³⁸ Dr. Kirby's report was dated November 19, 2018 and indicated that Student's body systems were within normal limits.³⁹ In addition, Dr. Kirby indicated that, developmentally, Student had social and speech language skills within normal limits and fine and gross motors skills below normal limits.⁴⁰

On April 14, 2019, Parent completed a medical history form for Student, indicating that Student suffered from numerous conditions, including asthma, impulse control issues, sensory processing disorder, and oppositional defiant disorder.⁴¹ Parent further indicated that Student was undergoing additional testing for other conditions.⁴² Parent reported that Student took several medications including Zantac, Zyrtec, Singulair, Hydroxyzine, and Albuterol.⁴³ Parent stated on the medical history form that Student had undergone a laryngeal cleft repair approximately a year earlier, and that Student no longer required the use of thickened liquids.⁴⁴

District obtained numerous documents and evaluations from Peds Plus, including a document entitled "Classroom Treatment Plan Objectives," as well as speech and OT evaluations.⁴⁵ Regarding evaluation of Student for speech, District's speech language

³⁸ Ex. Vol. II, pp. 81-83.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Ex. Vol. II, p. 15.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Ex. Vol. II, p. 64.

⁴⁵ Ex. Vol. II, pp. 88, 72-80.

pathologist reviewed Student's June 6, 2018 speech evaluation from Peds Plus. Thereafter, on April 5, 2019, she administered two language assessments to Student, specifically the Arizona Articulation Proficiency Scale – Third, which was administered to determine whether Student had articulation deficits, and the Oral and Written Language Scales – Second, which was administered to determine if Student had listening comprehension and oral expression deficits.⁴⁶ In addition, District's speech therapist conducted an oral peripheral examination, assessed fluency and voice, and observed Student from a behavioral perspective.⁴⁷ District's speech evaluation indicated that Student had age appropriate articulation, and that Student's language skills were within normal limits. In addition, the evaluation indicated that Student's oral mechanism was adequate, and his voice and fluency was average.⁴⁸

The speech evaluation provided data collected entitled "Curriculum/Classroom Based Assessment." In the category of language, the report indicated that Student was unable to speak in complete sentences, answer questions appropriately, ask clear and relevant questions to gain information, use appropriate grammar for age, use vocabulary appropriate for age, understand new curriculum vocabulary, and use appropriate social language.⁴⁹ Of the ten observable behaviors on the language portion of the checklist, Student was observed to do only three skills.⁵⁰ Regarding the category of articulation, the report indicates that

⁴⁶ Ex. Vol. II, pp. 95-101.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Ex. Vol. I, p. 87.

⁵⁰ *Id.*

Student omitted sounds, substituted sounds, failed to speak at a rate that others could understand, and failed to speak with good nasal quality.⁵¹

The District's speech language pathologist did not recommend direct speech-language therapy, noting that articulation and language abilities were within normal limits.⁵² She stated, however, that the classroom assessment completed by Student's teacher showed that Student did not consistently demonstrate his language abilities in the academic setting.⁵³ It was also noted that there were "behavioral concerns" which could impact Student's speech.⁵⁴ Finally, the report noted that continued monitoring should be implemented.⁵⁵

Regarding evaluation of Student for OT, District's occupational therapist reviewed prior OT evaluations and also observed Student at Pediatrics Plus. She further spoke with Student's occupational therapist, who indicated that Student would likely continue to need occupational therapy at school.⁵⁶ District's occupational therapist conducted an evaluation on April 5, 2019.⁵⁷ District administered one assessment, specifically the Developmental Test of Visual-Motor Integration (VMI), to assess Student's visual motor integration.⁵⁸ Test results indicated that Student had mildly delayed visual motor integration, mildly delayed motor coordination skills, and normal visual perceptual skills as compared to his chronological age.⁵⁹ The evaluation report also stated the following: "Examination of all

⁵¹ *Id.*

⁵² Ex. Vol. I, p. 88.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Ex. Vol. II, p. 91.

⁵⁷ Ex. Vol. II, p. 92.

⁵⁸ *Id.*

⁵⁹ *Id.*

instruments administered indicates an overall functioning level of 4 years 6 months for visual motor abilities and 4 years 4 months for visual perceptual abilities and 4 years 0 months for visual motor coordination as compared to [Student's] chronological age of 5 years 4 months.”⁶⁰ The District's occupational therapist considered the results of the VMI, as well as the results of the May 2, 2018 Peds Plus OT evaluation, and recommended 60 minutes per week of OT. In addition, eleven goals were provided for Student.⁶¹ The goals address sensory modulation, tactile awareness, handwriting skills, visual motor skills, fine motor skills, fine motor precision, visual perception skills, and eye-hand coordination.⁶²

On May 3, 2019, District's school psychologist completed a School Psychological report regarding Student. As part of this evaluation, Student was administered the Wide Range Achievement Test – 4 (WRAT-4) and scored in the borderline range for the category of word reading (2nd percentile), in the deficit range for the category of spelling (1st percentile), and the low average range for math computation (19th percentile).⁶³ Student was unable to complete the Reynolds Intellectual Assessment Scale, but was able to respond to the Wechsler Nonverbal Scale of Ability. Student's IQ pursuant to the Wechsler is 81, which is in the low average range. It was noted that Student scored lowest on the portion of the test that was timed and called for Student's constant attention.⁶⁴

Student's teacher from Peds Plus also completed an Adaptive Behavior Evaluation Scale, and Student scored in the range of low average with regard to overall adaptive

⁶⁰ *Id.*

⁶¹ Ex. Vol. II, pp. 93-94.

⁶² Ex. Vol. II, p. 94.

⁶³ Ex. Vol. II, pp. 114-16; Ex. Vol. I, p. 73.

⁶⁴ *Id.*

behavior.⁶⁵ Student's conceptional domain quotient, which describes Student's communication skills, was in the average range. Student's social domain, which consists of social, leisure, and self-direction, as well as Student's practical domain, which describes self-care, health, safety, home living, and community, were in the low average range.⁶⁶

Based on the evaluations that were considered and also conducted by District, it was determined that Student qualified for special education services pursuant to the category of Other Health Impairment.⁶⁷

Student was reevaluated by Peds Plus for speech services on May 31, 2019.⁶⁸ The reevaluation report noted that Student had mastered 4 objectives since the previous evaluation a year earlier, and that Student had made significant progress toward some of the other goals and objectives.⁶⁹ Student's articulation skills were improved, but it was found that Student had a moderate-severe delay in his language development. It was recommended that Student continue receiving 90 minutes of ST per week.⁷⁰ In addition, Student was reevaluated for OT services by Ped Plus on April 24, 2019.⁷¹ It was noted that, since evaluation one year earlier, Student had accomplished 8 of 15 goals, but that Student still had areas of need to include fine motor coordination, social functioning, and sensory processing.⁷² The recommendation based on this OT reevaluation was for Student to continue receiving 135 minutes per week of OT.⁷³ Neither of these reevaluations were

⁶⁵ Ex. Vol. I, p. 39;

⁶⁶ Ex. Vol. II, pp. 117-119.

⁶⁷ *Id.*

⁶⁸ Ex. Vol. I, pp. 133-35.

⁶⁹ Ex. Vol. I, p. 133.

⁷⁰ Ex. Vol. I, p. 134.

⁷¹ Ex. Vol. I, pp. 145-47.

⁷² *Id.*

⁷³ *Id.*

available to District on March 14, 2019 or, subsequently, on May 20, 2019, when Student's IEP team was meeting in preparation of Student's transition to District.

On May 6, 2019, a Notice of Conference was sent to Parent scheduling a meeting to consider initial eligibility for special education services for Student, as well as to conduct an evaluation and transition conference.⁷⁴ A second Notice of Conference referencing this same meeting date was sent to Parent on May 13, 2019.⁷⁵ At the May 20, 2019 conference, Parent, a special education teacher, a general education teacher, the local education agency representative, the District's school psychologist, the District's speech language pathologist, and the District's nurse were present.⁷⁶

During the meeting, the team discussed the OT, speech, and psychoeducational evaluations that were conducted by District. Regarding OT, it was noted that Student's scores on the VMI did not qualify him for OT services; however, the District's occupational therapist used the 2018 Peds Plus evaluation and the recommendation of Student's Ped Plus occupational therapist to qualify Student for services. It was recommended that Student receive 60 minutes per week of OT for the purpose of addressing sensory and fine motor issues that Student was having.⁷⁷

In addition, the team discussed Student's speech evaluations. District's speech language pathologist explained the results of the District's speech evaluation and why, in her opinion, Student did not qualify for speech therapy services. She noted that Student's speech-

⁷⁴ Ex. Vol. II, p. 16.

⁷⁵ Ex. Vol. II, p. 18.

⁷⁶ Ex. Vol. II, p. 21; Ex. Vol. I, p. 101.

⁷⁷ Ex. Vol. II, pp. 91-92.

language skills were not “anticipated to interfere with his [Student’s] educational performance.”⁷⁸

District’s school psychologist explained the psychoeducational evaluation that she conducted. She recommended identifying student under the Other Health Impairment category based on the diagnoses appearing in the psychological report prepared by Dr. Dielman on March 20, 2018. She further explained the continuum of placements and accommodations that she recommended for Student.⁷⁹ The team subsequently discussed programming for Student and decided that he should receive 30 minutes per day direct instruction for reading, and 30 minutes per day direct instruction for writing.⁸⁰

Parent raised the issue of Student’s behavioral issues at the meeting. Parent relayed to the team some of the behaviors that Student had exhibited in the past. Student’s classroom teacher recalled Parent discussing that Student ran out of his previous daycare and into traffic and that Student had aggressive tendencies and would harm other children and adults. Parent asked that Student be placed in a small classroom and have a 1:1 aide.⁸¹ Parent also offered the team a behavior plan which consisted of info that she obtained from various sources on the internet. The school psychologist acknowledged Parent’s concerns and, thereafter, it was determined that District and Parent would meet again prior to the start of school to discuss behavioral concerns relating to the classroom.⁸² In the interim, certain items from Parent’s

⁷⁸ Ex. Vol. I, p. 101.

⁷⁹ Ex. Vol. II, p. 120.

⁸⁰ Ex. Vol. II, p. 36.

⁸¹ Ex. Vol. I, p. 168.

⁸² Ex. Vol. I, p. 104.

suggested behavior plan were added to Student's IEP, including giving Student the option to go to a safe place, a visual schedule, noise reduction headphones, and access to sensory items.⁸³ It was also noted that Student would be evaluated by Dennis Development Center in June 2019.⁸⁴

Student's May 20, 2019 IEP indicated a duration of services from August 14, 2019 to May 27, 2020. The form box labeled "parent/guardian input" included a notation which stated that parent brought numerous items for consideration and felt comfortable about the placement decisions made for Student.⁸⁵ The IEP included a statement of Student's present level of academic achievement and functional performance, which included the results of all evaluations considered by District.⁸⁶ In addition to a visual schedule, noise reduction headphones, and access to sensory items, Student's IEP included other supplementary aids, program modifications, and accommodations. Specifically, Student's IEP provided that Student would have the following additional accommodations: (1) reduced assignments; (2) extra time for completing assignments; (3) preferential seating; (4) frequent feedback; (5) frequent opportunities for breaks; and (6) transition warnings.⁸⁷

Student's May 20, 2019 IEP contained two goals, both specific to English language arts.⁸⁸ The first goal provided that Student would ⁸⁹improve written expression through and increased ability to write letters and words with 80% accuracy when given materials and

⁸³ Ex. Vol. II, pp. 128-29.

⁸⁴ *Id.*

⁸⁵ Ex. Vol. I, p. 17.

⁸⁶ Ex. Vol. I, p. 18.

⁸⁷ Ex. Vol. I, p. 21.

⁸⁸ Ex. Vol. I, pp. 24-27.

⁸⁹ Ex. Vol. I, p. 24.

instruction. This goal included four objectives which focused on writing uppercase letters, writing lowercase letters, using a combination of drawing, labeling, and written words to compose a written message, and reference and sort pictures of contact to answer questions.⁹⁰ Student's second goal provided that Student would follow instructions and demonstrate knowledge of phonics and grade level word analysis in decoding words.⁹¹ The second goal also included four objectives which focused on identifying alphabet letter sounds, isolating and producing initial, medial, and final sounds in words, and demonstrating mastery of grade appropriate sight words.⁹²

Student's IEP also included a form addressing least restrictive environment considerations. The IEP team noted on this form that Student would not participate 100% of the time with non-disabled peers because: (1) Student's acquisition of academic/developmental skills could not be addressed by modifying the general curriculum; (2) small group instruction was necessary for Student to acquire skills specified in his IEP; (3) behavior intervention strategies could not be implemented in a large group setting; (4) the Student's behavior significantly impeded his ability to learn; and (5) additional individualized instruction was required for Student to learn.⁹³ Thereafter it was noted that Student would spend 82% of his time in the general education setting.⁹⁴

Finally, the May 20, 2019 IEP provided for special education services in the academic areas of reading and writing. Specifically, Student was to receive 150 minutes per week of

⁹⁰ *Id.*

⁹¹ Ex. Vol. I, p. 26.

⁹² *Id.*

⁹³ Ex Vol. I, p. 29.

⁹⁴ *Id.*

direct instruction in reading, and 150 minutes per week of direct instruction in writing. This was in addition to the OT services that were determined appropriate by the team, specifically 60 minutes per week.⁹⁵

District and Parent did not meet again prior to the start of the school year. On June 6, 2019, Student was evaluated by UAMS Dennis Developmental Center (hereinafter “DDC”).⁹⁶ This report noted that Student exhibited “aggressive behaviors, atypical use of toys (spinning or lining up or stacking), delayed self-care skills, delayed sleep onset . . .” and that student had a poor attention span, preference for solitary play, and engaged in repetitive sounds and noises.⁹⁷ It was noted that Student mostly uses complete sentences, but also that he often utilizes short phrases.⁹⁸ The results of Student’s physical examination indicated that Student was hyperactive, inattentive, impulsive, had inconsistent eye contact and response to his own name, engaged in “back and forth conversation about topics of his choice,” demonstrated articulation errors, and intruded into others’ personal space.⁹⁹

DDC determined that Student met the criteria for ADHD, combined type. The DDC report further stated that Student “has some symptoms [] suggestive of Autism Spectrum Disorder” but noted that further evaluation was warranted.¹⁰⁰ It was recommended that Student be considered for special education eligibility pursuant to the category of OHI and that the following classroom modifications be considered: (1) preferential seating; (2) frequent prompts and cues; (3) use of multiple modalities when presenting directions,

⁹⁵ Ex Vol. I, p. 28.

⁹⁶ Ex. Vol. I, p. 117.

⁹⁷ Ex. Vol. I, p. 118.

⁹⁸ *Id.*

⁹⁹ Ex. Vol. I, p. 119.

¹⁰⁰ *Id.*

explanations, and instructional content; (4) division of large tasks into smaller subparts; (5) use of concise instructions; (6) breaks for Student as necessary; (7) modified grading system; and (8) extra test and assignment time.¹⁰¹ In addition, several interventions were recommended including, but not limited to, teaching child to stop and think about behavior, limiting opportunities for unproductive behavior, setting clear behavioral limits, providing child with a schedule on desk, limiting auditory distractions, monitoring the completion of tasks, providing opportunities for purposeful movement around the class, and providing for transitions.¹⁰²

On August 5, 2019, DDC conducted a second evaluation of Student to look specifically at the issue of Autism Spectrum Disorder.¹⁰³ The evaluator noted that student tended to use sentences in the correct way, but had flat intonation, used words and phrases repetitively, talked only about his thoughts, feelings, and interests, and sustained very little reciprocal conversation.¹⁰⁴ In addition, Student showed limited insight into typical social relationships, had inconsistent eye contact, showed minimal pleasure in interacting with examiner, and limited and awkward social interactions.¹⁰⁵ Student was ultimately diagnosed with Autism Spectrum Diagnosis based on his behavioral and development history, direct assessment, and observations of the DDC evaluator.¹⁰⁶ It was recommended that Parent contact District and notify them of this diagnosis so as to allow District to engage in additional programming

¹⁰¹ *Id.*

¹⁰² Ex. Vol. I, p. 120.

¹⁰³ Ex. Vol. I, p. 114.

¹⁰⁴ Ex. Vol. I, p. 115.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

as necessary.¹⁰⁷ Several other recommendations were made, including ensuring that child was able to comprehend language being used, incorporating use of “social stories” to describe social situations that are difficult and/or confusion for Student, pursuing Applied Behavior Analysis (ABA) therapy to address maladaptive and atypical behavior, and closely communication between District and Parent.¹⁰⁸

On the same day as this second evaluation, specifically August 5, 2019, DDC provided a letter to Parent which stated that it appeared that Student met the criteria for Autism Spectrum Disorder and that detailed reports would be forthcoming.¹⁰⁹ This letter was provided to Parent on August 7, 2019 and Parent delivered a copy of this letter to the school nurse on this same day.¹¹⁰

District contacted Parent to schedule another IEP meeting on August 8, 2019, and Parent responded to that call the following day.¹¹¹ Parent had undergone knee surgery on August 8, 2019 and indicated that she was unable to meet prior to the start of school on August 14, 2019.¹¹² As a result, Parent did not attend any meetings with District prior to Student beginning school on August 14, 2019. The District, however, did hold a meeting on August 9, 2019 without the Parent present. The Record of Access for District shows that seven teachers met on this date, including Student’s kindergarten classroom teachers and other teachers responsible for specialized subjects such as art, library, music, physical

¹⁰⁷ Ex. Vol. I, p. 116.

¹⁰⁸ *Id.*

¹⁰⁹ Ex. Vol. I, p. 105.

¹¹⁰ Hrg. Tr., Vol. III, p. 326.

¹¹¹ Hrg. Tr., Vol. I, p. 230.

¹¹² *Id.*

education, and science.¹¹³ Parent learned of this meeting on “Meet the Teacher Night,” specifically on August 12, 2019, when she asked Student’s assigned classroom teachers whether they had been made aware that Student had been diagnosed with Autism Spectrum Disorder and they indicated that District had met to discuss that issue.¹¹⁴

Student began school on August 14, 2019, and two days later, on August 16, 2019, District obtained a signed release from Parent to obtain information about the two evaluations conducted over the summer by DDC. Student began having behavioral difficulties at school three days into the school year, specifically on August 19, 2019. Student’s assigned teacher later wrote a statement outlining issues with Student throughout the first week of school. That statement provided the following information regarding Student’s actions on August 19, 2019:

On Monday, August 19th at 8:15 a.m. (25 minutes after his official placement into my classroom) I observed [Student] kicking two students during our morning meeting time. When Vicki Brimm, my paraprofessional, attempted to pull him away from the two students, he began kicking her. At 8:20 a.m., [Student] attempted to flip a table. Vicki Brimm sat on the top of the table to prevent it from flipping and landing on a nearby student. [Student] then continued to repeatedly and violently kick her legs. When he couldn’t flip the table, he proceeded to run around the classroom throwing items off desks, looking inside of desks for pencil boxes, grabbing them, and emptying them onto the floor. When [Student] began throwing the items at the other students in the classroom, I removed my students from the classroom (room clear) and we went into the hallway while Laura Binz, Principal, was called to remove [Student] from class. [Student] returned to class around 11:30 a.m. At 11:50 a.m. [Student] left the whole group that was on the rug for a math lesson, ran to the calm down center, grabbed a few items, and began throwing them at me. [Student] hit another student with a calm down center item (a pineapple shaped pillow). I warned him that the item would be taken away if he continued to use it to hit friends. He looked at me and immediately hit her again. I took the item and he began angrily knocking items from desks, ripping students’ name tags off the desks where they were taped, and ripping them in

¹¹³ Ex. Vol. I, p. 32.

¹¹⁴ Hrg. Tr., Vol. III, p. 335.

half, causing students to cry at seeing their name tags being destroyed. Debbie Keeling entered the classroom to assist and [Student] began violently scratching her hands and arms. We did a room clear to protect the students and [Student] was removed from the classroom.¹¹⁵

The following day, Tuesday, August 20, 2019, Student had additional behavioral issues. Student's classroom teacher described the events of the day as follows:

On Tuesday, August 20th, [Student's] second day with me, at 8:30 a.m. [Student] became restless 2-3 minutes into our morning phonemic awareness lesson, left the rug where the students were sitting, and proceeded around the room knocking chairs onto the floor. Vicki Brimm and I chose to ignore him which caused his violence to escalate when he noticed we were not reacting. He grabbed a handful of recently sharpened pencils and began throwing them at students. Students began to scream and were scared. Vicki Brimm protected the students while I tried to get [Student] to stop throwing pencils and not hurt himself or anyone else. While trying to get to him and take the sharp pencils to keep students safe, [Student] scratched my hand so deeply that it drew blood. He then removed his shoes, threw them at me, and ran out of the classroom. I ran after him concerned that he would run out of our building into the street per his history at the daycare. He was intercepted by Laura Binz at the end of the hallway. I returned to class and she kept [Student] in the office.¹¹⁶

The following day, Wednesday, August 21, 2019, Student's teacher noted the following events:

On Wednesday, August 21st at 9:15 a.m. on Tuesday [Student] was upset because we had to leave the computer lab after our 30-minute session. He crawled under his computer desk refusing to leave. I lined my class up and proceeded to leave. I asked my aide that day (Charlotte Magee) to assist with [Student]. He kicked Charlotte Magee hard in the shin. She was able to get him back to class after several minutes. After returning to class, he was still angry, and he emptied all the contents of the calm down box and began kicking the wooden student lockers repeatedly. Concerned that he would injure himself on the lockers, Laura Binz was called to intervene. She removed him from the classroom. [Student] rejoined the class at recess at 9:50 a.m. At 10:00 a.m. [Student] did not want to line up from recess. In the line, he slapped another student in the back twice before I could get to him causing the student to cry. Laura Binz was called to take [Student]. He was refusing to reenter the

¹¹⁵ Ex. Vol. I, p. 168.

¹¹⁶ Ex. Vol. I, pp. 168-69.

building after recess. At 10:30 a.m. [Student] was in the hallway on the floor kicking and screaming with Laura Binz and the school psychologist. Hearing the noise in the hallway, I glanced out of my glass window, noticed it was [Student], and continued my lesson. My students asked if it was [Student], told me that he is scaring them, and asked me not to let him in.¹¹⁷

Again, on Thursday, August 22, 2019, there were additional behavioral incidents.

These were described as follows:

On Thursday, August 22nd, I continued more of the ideas and suggestions offered by the school psychologist. I am also implementing suggestions brought to me by our school counselor, Jennifer Fuller. At this point, [Student] has a visual schedule on his desk outlining our whole school day from breakfast to dismissal. He has a sticker chart taped to his desk that coincides with the visual schedule. For each item on the schedule where [Student] is not violent or physically aggressive towards any teacher or student, he gets a sticker on his chart. I am shortening the amount of work that he must do compared to his peers. I implemented a timer system where [Student] gets to take a two-minute break for every 1 minute of classwork that he does. Additionally, I am giving [Student] more hands-on manipulatives in lieu of the same classwork that his classmates are completing. I have [Student] doing a variety of classroom jobs, including sorting papers, picking up trash, putting folders and papers into students' lockers, and more. Because he doesn't know how to do these jobs, I must do them with him. At 9:30 a.m. the school psychologist visits [Student] and we are passing out papers. All the things that I am implementing have completely taken me away from my other 19 students. Keeping [Student] busy, engaged, and not violent has completely deprived 19 other students of their teacher for this entire day. I have no paraprofessional today and no help. She was pulled to do 2nd grade Heggerty testing in the cafeteria. I have not done anything from my lesson plans today as 100% of my time has been dedicated to [Student] and his full care of resetting timers, explaining his sticker chart and adding stickers to it, working with manipulatives, engaging him in classroom jobs, redirecting him when I see he is getting agitated, etc. I have been informed that the original meeting to discuss [Student's] placement that was on September 4th has been moved up to Monday, August 26th at 8:30 a.m.¹¹⁸

¹¹⁷Ex. Vol. I, p. 169.

¹¹⁸*Id.*

Finally, Student's classroom teacher described an unfortunate set of events that occurred on Friday, August 23, 2019. She stated the following:

On the morning of Friday, August 23rd, [Student] became upset at 9:00 a.m. during calendar time and began yelling. My paraprofessional who is scheduled to be in my room from 8:30 – 9:30 a.m. was pulled out to test other students again. There were no other adults in my classroom at that time assisting. [Student] was not yelling any words, just yelling loud noises to cause the class to become distracted and limit my ability to teach. When the student on the rug next to [Student] turned to him, put her fingers on her lips and said "Shhhh," he began violently kicking her. She immediately began screaming and crying. He managed to kick her several times before I could get over to where they were. I got him to stand and began to walk with him towards the classroom door to call for help. When he realized he was going to have to leave the classroom, he threw himself on the ground and started kicking me. He then began to grab items off my bookshelf and throw them at me and the students (books, pencils, and other items). I bent down to take the items and he kicked my arm so badly that I left a bruise and a knot that is very tender to the touch. With this kick, his shoe came off and he started hitting me with it. I kept saying "No! We don't do this at school. This is bad! Do not do that again!" Amid being violently and repeatedly hit, I attempted to block his right leg from kicking me again by swatting it slightly above his knee over the denim shorts that he was wearing. As part of a knee-jerk reaction, I said "Do you want a spanking? You are going to get a spanking." I had no intention of spanking [Student] and in the moment, I am not sure why I said that . . . [Student] continued to hit and kick me. I was trying to hold his arms so that he would stop hurting me. He scratched my left arm and my right knee, drawing blood. This is the point in which Laura Binz entered the classroom. She tried to take him, but after I let go of his hand, he jumped up and ran to the back of the classroom, knocking over pencil caddies, throwing items at my computer nearly knocking it off of my desk, and kicking student desks. She finally managed to get him and remove him from the classroom.¹¹⁹

During the week of August 19-23, 2019, Principal for District communicated with Parent daily, before and after school, about Student's behavioral issues.¹²⁰ A Notice of

¹¹⁹ Ex. Vol. I, pp. 169-70. Student's classroom teacher was disciplined for striking Student following this altercation. The events that followed this altercation, specifically related to the discipline of Student's teacher, are not relevant to this due process hearing.

¹²⁰ Hrg. Tr., Vol. I, p. 111.

Conference was sent to Parent on August 20, 2019, scheduling an IEP meeting for September 3, 2019.¹²¹ The purpose of the meeting was to review existing data, review and revise Student's IEP, and review outside evaluation reports provided by Parent.¹²² Individuals invited to attend this meeting included the director for the District's alternative learning environment, specifically Josh Edgin.¹²³ Parent requested that this meeting be moved to an earlier date and, thereafter, this IEP meeting was moved to August 26, 2019. Prior to this meeting, specifically on August 22, 2019, Parent provided additional evaluations to District, specifically the evaluations conducted by DDC on June 6, 2019 and August 5, 2019.¹²⁴

On August 26, 2019, Student's IEP team met and Parent was present in the meeting. The team reviewed all new evaluations provided by Parent and declined to change Student's eligibility criteria until additional evaluations were obtained.¹²⁵ Specifically, the IEP team had a partial report from DDC and wanted to wait until they received a copy of the full report before changing eligibility categories.¹²⁶ The team decided that an additional speech evaluation was needed to determine whether Student had pragmatic language deficits.¹²⁷ In addition, Student's behavior over the first few days of school was discussed, and it was determined by the team that an FBA should be conducted.¹²⁸ The IEP team determined that no change to OT was needed, although District's occupational therapist agreed to create a sensory diet and additional recommendations for Student.¹²⁹ The sensory diet included

¹²¹ Ex. Vol. II., p. 121.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Hrg. Tr., Vol. III, pp. 327-28.

¹²⁵ Ex. Vol. II, p. 128.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Ex. Vol. II, pp. 128, 135.

multiple activities for calming and organization, and also specific recommendations for Student's classroom.¹³⁰

Finally, the team made the decision to place Student in the district's alternative learning environment (hereinafter "ALE"), a general education placement with behavioral supports. This required Student to be moved from Dwight Elementary School to Sequoyah Elementary School. The ALE initial referral form completed by the IEP team states that Student runs frequently from authority, hits, kicks, scratches, flips furniture, and throws objects.¹³¹ The initial referral form also stated that the problem behavior began the "first day of school," noting that this same behavior occurred at Peds Plus when Student was in preschool.¹³² Parent requested an FBA, a BIP, a 1:1 aide, and ABA therapy, but ultimately agreed to the ALE when the team indicated that ALE was the best option for Student.¹³³ Although the IEP team agreed that the ALE would be ideal for Student, it did not have authority to place Student in that setting without approval by the ALE team.

On August 27, 2019, Parent met with District officials responsible for operating the ALE. It was noted by the principal at Student's current placement that Student's IQ was too high for the self-contained room at Dwight Elementary.¹³⁴ Parent consented to the ALE.¹³⁵ Student began attending school in the ALE at Sequoyah Elementary on September 4, 2019. Between September 4, 2019, and September 23, 2019, when Parent filed her due process complaint in this matter, Student continued to struggle behaviorally. Student was placed in

¹³⁰ Ex. Vol. II, pp. 135-36.

¹³¹ Ex. Vol. I, p. 197.

¹³² *Id.*

¹³³ Hrg. Tr., Vol. IV, pp. 152-53; Hrg. Tr., Vol. VI, p. 107.

¹³⁴ Hrg. Tr., Vol. IV, p. 152; Hrg. Tr., Vol. VI, p. 110.

¹³⁵ Ex. Vol. I, p. 199.

the time out room, which is within the ALE room, on September 4, 9, and 12, 2019.¹³⁶ On September 6, 2019, the District's school psychologist did her first observation for purposes of conducting an FBA.¹³⁷ No other observations took place between September 6, 2019 and the date that Parent filed for due process and withdrew consent on September 23, 2019.

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 the IDEA

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District procedurally violated the IDEA by failing to secure an adequate speech evaluation, failing to consider outside

¹³⁶ Ex. Vol. I, pp. 204, 207-08, 213-14.

¹³⁷ Ex. Vol. III, p. 336.

evaluations provided by Parent, and denying Parent the opportunity to meaningfully participate in the development of Student's IEPs and, in general, his education.

Speech Evaluation. Parent alleges that District failed to properly evaluate Student for speech therapy in the spring of 2019, in preparation for Student to begin school in District. The Arkansas Department of Education eligibility guidelines for speech and language impairment require that a student be evaluated using two or more tests and/or procedures which delineate the nature and extent of the disorder, oral-peripheral speech mechanism examination, and other descriptive assessments as necessary to ensure collection of student-centered, contextualized, performance-based, and functional information about Student's communicative abilities and needs.

In the present case, on April 5, 2019, District's speech language pathologist reviewed an evaluation that was conducted by Peds Plus on June 6, 2018, less than one year prior to the date of District's evaluation. That evaluation included three tests, specifically the CELF-P2 and the GFTA-3, and the CAAP-2 and indicated mild delay for language and a severe delay for articulation. The District's speech language pathologist then administered two more language assessments, specifically the Arizona Articulation Proficiency Scale - Third and the Oral and Written Language Scales - Second. She also conducted an oral peripheral examination and assessed fluency and voice. She determined that Student's language and articulation was within normal limits. There was some concern about the results of a Curriculum/Classroom Based Assessment regarding Student, but the District's speech language pathologist was of the opinion that Student had language abilities that he did not, for some reason, demonstrate in the classroom. It was noted that this could be on account of

behavioral concerns. She also noted that Student should be monitored going forward. On August 26, 2019, the IEP team determined that pragmatic language should be assessed due to the fact that the DDC evaluation indicated a diagnosis of autism.

It appears that District's speech evaluation was appropriate. The previous evaluation conducted by Peds Plus was considered and additional tests were conducted by District to balance out the evaluation. Because another evaluator released Student from speech therapy prior to his attending Peds Plus for preschool, it is plausible that District could have come to that same conclusion. This is particularly the case given that Student's speech reevaluation at Peds Plus in May 31, 2019 showed that Student had made progress as a result of the speech therapy that he had received.

It is also worth noting that District's speech pathologist indicated that it believed Student's failure to demonstrate language in the classroom was based on other factors, but that this should be monitored. It appears that District was aware that if Student's ability to use language in the classroom did not improve, then additional testing and consideration would be necessary. Finally, when there was a diagnosis of Autism from the DDC, the District's speech language pathologist recommended evaluating Student for pragmatic language deficits, illustrating that she was tracking Student's potential needs as circumstances changed. For all of these reasons, it is the opinion of this Hearing Officer that District's speech evaluation was appropriate and, therefore, that there was no procedural violation by District on this point.

Consideration of Outside Evaluations. Parent has asserted that District failed to consider outside evaluations provided by Parent. The evidence in this case does not support this assertion. At the May 20, 2019 meeting, District reviewed all evaluations provided by Peds Plus and there is evidence in the record that Parent fully participated in the IEP meeting when these evaluations were considered. In addition, there is ample evidence that the evaluations secured by Parent from DDC were discussed at the August 26, 2019 meeting. Whether District programmed appropriately based on these evaluations is a different issue that will be addressed below, but as for the failure of District to consider outside evaluations, Parent has not met her burden. There is insufficient evidence that District failed to consider evaluations and related information provided by Parent. As such, there is no procedural violation on the part of District with regard to this allegation.

Parental Participation. The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to participate.¹³⁸ Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents.¹³⁹ Such predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP.¹⁴⁰ "The IDEA explicitly requires school district to include parents in the team that drafts the IEP to consider 'the concerns of the parents for enhancing the education of their child' and to

¹³⁸ *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010).

¹³⁹ *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

¹⁴⁰ *Gray*, 611 F.3d at 424 (citation omitted).

address ‘information about the child provided to, or by, the parents.’”¹⁴¹ Certainly, a school district’s obligation under the IDEA regarding parental participation in the development of a student’s IEP “should not be trivialized.”¹⁴²

In *Rowley*, the Court stated that “[i]t seems . . . no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.”¹⁴³ It should be noted, however, that by requiring parental participation, the IDEA in no way requires a school district to accede to parents’ demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent’s request.

In the present case, Parent and District had various meetings and communicated with one another between March 2019 and the date that Parent filed her due process complaint on September 23, 2019. Parent attended conferences with District on March 14, 2019, May 20, 2019, August 26, 2019, and August 27, 2019. In addition, Parent communicated daily, most often before and after school, with the principal for Dwight Elementary School regarding Student’s conduct. Meetings were held at Parent’s request, and some meetings were moved up in time in response to Parent’s requests. However, it appears that there was one meeting, specifically on August 9, 2019, that was conducted without Parent’s participation.

¹⁴¹ *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)).

¹⁴² *Rowley*, 458 U.S. at 205-06.

¹⁴³ *Id.*

District records indicated that Parent was called on August 8, 2019 with regard to scheduling an IEP meeting, and that Parent responded the following day, August 9, 2019, and indicated that she could not meet prior to school because she had undergone knee surgery. Still, the record of access for this case shows that seven teachers met on August 9, 2019. Parent learned about this meeting on August 12, 2019 when she attended a “Meet the Teacher” event at the school. Specifically, in response to Parent’s inquiry, the kindergarten classroom teachers told Parent that they had met with other teachers on August 9, 2019 to discuss the fact that Student had been diagnosed with Autism Spectrum Disorder.

The record is unclear as to what specifically these seven teachers discussed, and certainly, the record of access does not indicate that anyone from District with information regarding Autism Spectrum Disorder or the evaluations by DDC were present. The fact remains, however, that assuming that these teachers met to discuss Student’s new diagnosis, Parent should have been included and an official IEP meeting should have been scheduled. Parent, up to that point, had been very active in meeting with District to discuss Student’s needs. Certainly, it follows that she would not have willingly missed a meeting wherein Student’s instructors were talking about his new diagnosis. As such, the August 9, 2019 meeting in which Parent was not included constituted a procedural violation of the IDEA.

Conclusion. 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 District procedurally violated the IDEA by failing to include Parent in a meeting that took place with Student’s teachers on August 9, 2019. District, however, did

not commit any procedural violations with regard to evaluating Student for speech deficits or considering outside evaluations provided by Parent.

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 failed to ensure that Parent participated in a meeting on August 9, 2019 conducted by Student’s teachers and regarding DDC information about Student’s likely diagnosis of Autism Spectrum Disorder, it is now necessary to consider whether this procedural violation 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 *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.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Andrew F.*, 2017 WL 1066260, at *1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and

individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

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

In the present case, it is first necessary to determine whether District’s failure to include Parent in a meeting on August 9, 2019, which was determined to be a procedural violation of the IDEA, constituted a substantive denial of FAPE. Thereafter, it is necessary to determine whether District substantively violated the IDEA by failing to provide IEPs reasonably calculated to provide Student educational benefit in that they failed to properly address Student’s ongoing behavior issues, provide for a FBA, and include a BIP.

Procedural Violation – Parental Participation. Here, it was determined that District engaged in a procedural violation of the IDEA when it failed to include Parent in a meeting conducted by Student’s teachers on August 9, 2019 for the purpose of discussing DDC evaluation information regarding a possible diagnosis for Student. It is the opinion of this Hearing Officer, however, that this procedural violation did not constitute a substantive violation of the IDEA.

The August 9, 2019 meeting included only classroom teachers and, as such, appeared to be in no way intended to be an IEP meeting or a meeting wherein programming decisions were made for Student. In addition, District had communicated regularly with Parent and Parent had been present for all referral, transition, and programming IEP meetings. While District certainly should have included Parent in the August 9, 2019 meeting, there is insufficient evidence that District's failure to include Parent compromised Student's right to an appropriate education or seriously hampered Parent's opportunity to participate in Student's educational decisions. As of August 9, 2019, the only information that District had regarding the DDC evaluation was a letter stating that Student likely met the criteria for Autism Spectrum Disorder. This information, without the full evaluation report and recommendations from DDC, did not allow the teachers present at the August 9, 2019 meeting to have anything of substance to discuss with regard to Student's programming. Plus, as stated above, the meeting included only teachers, and nobody from the District with authority to analyze the DDC information was present, indicating further that the purpose of the meeting was not to program for Student based on the DDC information. As the testimony indicated, it appears that the meeting existed for the sole purpose of letting all of the teachers know that a possible Autism Spectrum Diagnosis was forthcoming.

For these reasons, District's failure to include Parent in a meeting on August 9, 2019, which constituted a procedural violation of the IDEA, did not constitute a substantive denial of the IDEA.

Appropriate IEP. Parent asserted that the District failed to develop and implement appropriate IEPs on May 20, 2019 and August 26, 2019 that were reasonably calculated to provide educational benefit to Student. Parent argues, primarily, that Student’s behavioral issues were not adequately addressed such that Student had necessary resources to maintain appropriate behavior and academically progress. In addition, Student asserted that placing Student in the ALE was not appropriate.

Regarding appropriateness of the IEP, “[a]cademic progress is an ‘important factor’ in deciding ‘whether a disabled student’s IEP was reasonably calculated to provide educational benefit.’”¹⁴⁴ For children who are Student’s age, the IDEA requires that IEPs include the following: “(1) a statement of the student’s present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence.”¹⁴⁵

Regarding behavioral issues, courts have stated 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.’”¹⁴⁶ A failure to address behavioral issues appropriately can

¹⁴⁴ *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 638 (citing *Rowley*, 458 U.S. at 202)).

¹⁴⁵ *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

¹⁴⁶ *M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

amount to a denial of FAPE for a student.¹⁴⁷ 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.”¹⁴⁸

In the present case, the form of Student’s May 20, 2019 and August 26, 2019 IEPs appear on the surface to meet all requirements. There are goals that appear appropriate for Student, and both IEPs include a statement of Student’s present levels of academic performance, a statement of educational and related services being provided to Student, an explanation of the extent to which Student would be in special education classes versus the general education, a statement of accommodations necessary to measure Student’s achievement, and the date on which services outlined in the IEPs would commence. The IEPs have no progress data, but, in this case, Student was in school approximately one month before Parent filed a request for due process hearing, so that is expected.

In substance, however, the IEPs drafted on May 20, 2019 and August 26, 2019 were inappropriate for Student. Regarding the May 20, 2019 IEP, the evaluations and data considered by the IEP team clearly indicated that Student’s behavior had been an issue. Dr. Dielman had diagnosed Student on March 20, 2018 with unspecified disruptive, impulse control, and conduct disorder. Student’s May 2, 2018 OT evaluation from Peds Plus, which District had as of May 20, 2019, indicated that Student had sensory processing issues and, specifically, difficulty “modulating responses to input.” It was noted that Student engaged in seeking behaviors that ultimately interfered with his ability to function and learn in the

¹⁴⁷*Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

¹⁴⁸*M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 639).

classroom. From a behavioral standpoint, individuals from Peds Plus provided information to District about Student's aggressive behaviors, such as hitting others and throwing objects, and also about the BIP that had been put in place for Student to assist with minimizing these behaviors. Peds Plus reported good results from the BIP and noted that Student's aggressive behaviors had been minimized. Parent's social history provided information similar to that appearing in all other evaluations. Even District's speech language pathologist noted that behavior had been a concern. Behavioral issues were being reported from nearly every angle, yet the May 20, 2019 IEP included no BIP or behavioral supports for Student.

District's argument as to why there was no BIP was that Student was going into a new environment and it would be difficult to determine his needs before District had the opportunity to observe him in his new school environment. This argument makes sense to a point; however, as of August 19, 2019, the first day that Student acted out in class, it was apparent that the reports of prior evaluators and Parent were likely accurate. Student did not merely have a bad day on August 19, 2019, he had an extremely difficult day and created much chaos in the classroom. Some students were injured, and the classroom ultimately had to be cleared for everyone's safety. This should have immediately resonated with District officials given previous reports and, if not, Student's outbursts over the next two days should have reinforced that Student's behavior was going to be a significant issue.

At any point, District could have called an emergency IEP meeting and met with Parent for the purpose of starting an FBA and creating a BIP. The principal for the District was meeting with Parent twice a day and talking with her about Student, so a meeting could have easily been initiated and consent for an FBA obtained. Had there been no prior reports

of negative behavior, perhaps the District would have been justified in waiting a few days to figure out what was going on with Student. In this case, however, Student's behavior from the start matched what had been reported to District when Student's IEP was being developed. This should have been no surprise given Student's history.

On August 26, 2019, Student's IEP team met to discuss the events of the prior week and revise Student's IEP. A review of the records indicates that the only day during the week of August 19, 2019 that Student's behavior was somewhat controlled was on Thursday, August 22, 2019, when Student's teacher essentially worked with him 1:1 setting timers, modifying his work and giving him tasks to help him focus. Essentially, as Parent had been reporting, a 1:1 aide would likely have benefited Student. The team, however, dismissed the idea of providing Student a 1:1 aide and recommended that Student be transferred to another elementary school and placed in the ALE. This action, given that Student had transition issues, was likely illogical. It is noted, also, that Student's IEP team had new information to suggest that Student had a diagnosis of Autism Spectrum Disorder, providing some explanation regarding Student's behaviors. A 1:1 aide would likely have allowed Student to stay in his current kindergarten placement, reduced transitions, and allowed an FBA to be conducted.

Regarding the FBA, the team did agree and obtained consent from Parent; however, between the date of this IEP and the date that Parent filed a due process complaint one month later, District had only completed one observation for the FBA. The FBA could likely have been completed in a shorter time than one month had District prioritized the necessary observations.

Had District provided the supports that Student needed in the classroom and timely conducted an FBA, it is likely that Student could have quickly been provided a BIP and additional placement decisions could be considered as necessary. Unfortunately, that did not happen here. For these reasons, it is the conclusion of this Hearing Officer that Student's IEPs dated May 20, 2019 and August 26, 2019 were inappropriate and, therefore, constituted substantive violations of the IDEA in that Student was denied FAPE.

Conclusion. Having considered Parent's allegations of 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 as a result of 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 March 14, 2019 and September 23, 2019. District is hereby ordered to take the following actions regarding Student:

1. Contact a BCBA within fifteen (15) days of the date of this decision and make arrangements for (1) a full behavioral evaluation to be conducted for Student and, (2) a program to address Student's behavioral issues going forward. Should the program recommended by the BCBA include ABA therapy, District shall provide this therapy to Student in accordance with the behavioral program. District shall revise Student's IEP to reflect the BCBA evaluation and the updated program recommended by the evaluator.

2. Revise Student's IEP to reflect a change in Student's placement from the ALE to a classroom appropriate for Student in light of his circumstances. Student's IEP team shall meet to discuss whether Student would be best served in a traditional general education classroom with supports, or in a self-contained classroom. District and Parent will meet prior to the implementation of this change in placement and agree to a transition plan for Student. Following this change in placement, Student's IEP team will meet every three (3) months for the first year to reevaluate whether the new placement is, in fact, appropriate for Student.
3. Assign a one-on-one paraprofessional to Student. Student's IEP team will meet every three (3) months for the first year to reevaluate whether a 1:1 aide continues to be necessary for Student.

It is also noted that any non-IDEA claims made in Parent's due process complaint, such as claims brought pursuant to Section 504 of the Rehabilitation Act, are hereby dismissed without prejudice, as this Hearing Officer only has jurisdiction to adjudicate claims brought pursuant to the IDEA. Any and all other outstanding motions are hereby deemed moot.

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

03/10/2020

DATE