

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

IN RE:

XXXXXXXXXX,
Parent on behalf of
XXXXXXXXXX, Student

PETITIONER

VS.

CASE: ADE H-20-29¹
CASE: ADE H-21-08²
CASE: ADE H-21-24³

El Dorado School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

- A. Whether, as alleged in ADE H-20-29, the El Dorado School District (hereinafter "District" or "Respondent") denied XXXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between August 1, 2018⁴, and April 1, 2020, in violation of certain procedural and substantive requirements of the

¹ ADE H-20-29 commenced on July 22, 2020, and concluded on April 26, 2021. Numerous continuances were requested and granted in this matter on account of COVID-19 and medical issues of District's initial counsel, Sharon Streett.

² ADE H-21-08 and ADE H-21-21 were consolidated for judicial efficiency and commenced on April 27, 2021. The hearing pertaining to these matters concluded on April 29, 2021.

³ For judicial efficiency, this Final Decision and Order includes all issues raised in ADE H-20-29, ADE H-21-08, and ADE H-21-21 and heard in the due process hearings referenced in footnotes 1 and 2 *supra*.

⁴ Petitioner's Due Process Complaint in ADE H-20-29 alleges denial of FAPE during the 2018-2019 and 2019-2020 school years. Although the statute of limitations in this case, which was filed on April 1, 2020, technically allows the period between April 1, 2018, and August 1, 2018, to be included in this matter, Petitioner's Complaint did not raise alleged procedural or substantive violations during this four-month period.

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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 provide individualized educational programs (hereinafter IEPs) for the 2018-2019 school year (Student’s eighth grade year), as well as for the 2019-2020 school year (Student’s ninth grade year), that were reasonably calculated to enable Student to make progress appropriate in light of his circumstances; and (2) discharging Student from special education services on March 10, 2020.

B. Whether, as alleged in ADE H-21-08, District procedurally violated the IDEA between April 1, 2020, and August 26, 2020, by failing to adhere to the IDEA’s stay put provision and, therefore, failing to implement Student’s May 23, 2019, IEP during the pendency of ADE H-20-29.

C. Whether, as alleged in ADE H-21-24, District procedurally violated the IDEA between August 26, 2020, and February 17, 2021, by failing to adhere to the IDEA’s stay put provision and, therefore, failing to implement Student’s May 23, 2019, IEP during the pendency of ADE H-20-29. Alternatively, whether District procedurally violated the IDEA between August 26, 2020, and February 17, 2021, by failing to comply with statutory child find requirements.

PROCEDURAL HISTORY:

On April 1, 2020, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXXXXXXXX (hereinafter referred to as “Parent” or “Petitioner”), the parent and legal

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guardian of Student (ADE H-20-29). Parent asserted in ADE H-20-29 that District failed to comply with the IDEA and the regulations set forth by the Department by failing to provide and implement an appropriate IEP for Student between August 1, 2018, and April 1, 2020. In addition, the complaint alleged that student was discharged from special education services on March 10, 2020, in violation of the IDEA. On August 26, 2020, and, also, on February 17, 2021, Parent filed additional requests to initiate due process hearing procedures (ADE H-21-08 and ADE H-21-24, respectively). Parent asserted in ADE H-21-08 and ADE H-21-24 that District violated the IDEA's stay put provision during the pendency of ADE H-20-29.⁵

In response to Parent's requests for hearing in ADE H-20-29, ADE H-21-08, and ADE H-21-24, the Department assigned the cases to an impartial hearing officer. All in all, after numerous continuances pertaining to COVID-19 and medical issues cited by District's counsel, Sharon Streett, testimony was heard in ADE H-20-29 on July 22, 2020, August 19, 2020, August 21, 2020, September 15, 2020, September 17, 2020, September 18, 2020, October 22, 2020, October 23, 2020, November 18, 2020, November 19, 2020, March 15, 2021, and April 26, 2021. Subsequently, testimony was heard in ADE H-21-08 and ADE H-21-24 on April 27, 2020, April 28, 2020, and April 29, 2020. Due to the threat of COVID-19, this Hearing Officer presided via ZOOM on all hearing dates with exception of April 26, 2021, April 27, 2021, April 28, 2021, and April 29, 2021.

⁵ See Parent's Due Process Complaints in ADE H-21-08 and ADE H-21-24.

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For clarity, throughout the proceedings referenced in the caption to this case, ADE H-20-29 was referred to as Hearing #1, and ADE H-21-08 and ADE H-21-24 were referred to as Hearing #2. This same nomenclature is used in this decision as well. Parent and District stipulated and agreed that all witness testimony and admitted exhibits in Hearing #1, ADE H-20-29, would be incorporated into the record for ADE H-21-08 and ADE H-21-24. The following witnesses testified in Hearing #1, ADE H-20-29: Parent, Staci Stafford, Natalye Leake, Bailey Hall, Audie Alumbaugh, Melissa Hannah, Sherry Hill, Kristi Miller, David Hanson, Ron Dumont, Shawn Lamkin.⁶ The following witnesses testified in Hearing #2, ADE H-21-08 and ADE H-21-24: Parent, Melissa Hannah, Cheryl Morgan, Carol Hokanson, John Jameson, Aprile Richardson, John Sixbey, Savannah Morris, Jessica Freeman, Katy Gorden, Shannon Ellison, Amanda Roberson, and Shawn Lampkin.⁷

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 two due process hearings. The first hearing, which commenced on July 22, 2020, and concluded on April 26, 2021, addressed issues raised in ADE H-20-29. The second hearing, which commenced on April 27, 2021, and concluded on April 29, 2021, addressed issues raised in ADE H-21-08 and ADE H-21-24. Both were closed, impartial hearings. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) in all proceedings. District was

⁶ See generally ADE H-20-29 Transcript, Vols. I-XII.

⁷ See generally ADE H-21-08 and ADE H-21-24 Transcript, Vols. I-III.

represented by Sharon Streett (Little Rock, Arkansas) and, subsequently, Khayyam Eddings and Christopher Heller (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.⁸

It is noted that the decision in ADE H-20-29 was due prior to the decision for ADE H-21-08 and ADE H-21-24 based on the fact that the decision deadline for Hearing #1 was on a separate timeline. On May 24, 2021, Petitioner filed a Motion to Consolidate Records and Extend Timelines. Pursuant to this request, Petitioner sought to combine the decision for all three cases into a single decision on account of judicial efficiency. District did not object to this request. This Hearing Officer notified the parties that Petitioner's request would be granted, and that the combination of all cases and the effect on case timelines would be memorialized in this decision. As such, ADE H-20-29 was transferred to the timeline and, thus decision deadline, for ADE H-21-08 and ADE H-21-24. Although unusual, Arkansas Department of Education regulations, specifically ADE 10.01.18, allows this action when necessary.

FINDINGS OF FACT:

Student currently attends school at El Dorado High School and will be starting the eleventh grade in August 2021. At the time Hearing #1, specifically ADE H-20-29, was filed by Petitioner, Student was nearing the end of his ninth-grade year.⁹ Prior to March 10, 2020,

⁸ See Post-Hearing Briefs.

⁹ See Parent's Due Process Complaint in ADE H-20-29.

when Student was discharged from special education services, Student was being served by District pursuant to the IDEA eligibility category of Specific Learning Disability based on deficits in the areas of basic reading, math calculation and written expression.¹⁰ Student was also previously diagnosed with dyslexia, dysgraphia, and attention deficit hyperactivity disorder.¹¹ Student began receiving special education services during his fourth-grade year as a result of these diagnoses. Testing conducted by District in November 2014, during Student's fourth grade year, indicated that Student had a full-scale IQ score of 105, and that Student's reading and math scores were all in the average range; however, testing showed that Student had weaknesses in written expression and adaptive behavior.¹²

When Student was evaluated by District in November 2014, District reviewed testing completed by the Dennis Developmental Center in October 2014, as well as Carol Whatley in November 2013. These tests included the following: (1) Woodcock-Johnson Test of Achievement, including subtests for basic reading cluster, reading fluency, passage comprehension, math calculation, applied problems, and writing fluency;¹³ (2) Diagnostic Reading Scales;¹⁴ (3) Wide Range Assessment of Memory and Learning, Second Edition, including subtests for verbal learning core and verbal learning delayed;¹⁵ (4) Child Behavior Checklist;¹⁶ (5) Wechler Intelligence Scale for Children-IV, including subtests for verbal

¹⁰ Hearing #1, ADE H-20-29, District Exhibits, pp. 591, 724.

¹¹ Hearing #1, ADE H-20-29, Parent Exhibits, p. 2; Hearing #1, ADE H-20-29, District Exhibits, pp. 591, 724.

¹² Hearing #1, ADE H-20-29, Transcript, Vol. II, pp. 77, 79-80, 87; Hearing #1, ADE H-20-29, Parent Exhibits, p. 250.

¹³ Hearing #1, ADE H-20-29, Parent Exhibits, p. 251.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

comprehension, perceptual reasoning, working memory, and processing speed;¹⁷ (6) Bender Visual Motor Gestalt Test – II;¹⁸ and (7) Visual-Aural Digit Span Test, including subtests for aural-oral, visual-oral, aural-written, visual-written, aural input, visual input, oral expression, written expression, intrasensory integration, and intersensory integration.¹⁹ In addition, District administered the following tests: (1) Woodcock -Johnson IV Test of Cognitive Abilities, including subtests for phonological processing, nonword repetition, story recall, and visual-auditory recall;²⁰(2) Woodcock-Johnson IV Tests of Achievement, including subtests for letter-word identification, passage comprehension, sentence reading fluency, word attack, oral reading, spelling, writing samples, and sentence writing fluency;²¹(3) Kaufman Test of Educational Achievement – 3, including subtests for letter/word recognition, reading comprehension, phonological processing, nonsense word decoding, object naming facility, reading vocabulary, letter naming facility, work recognition fluency, decoding fluency, and silent reading fluency;²² (4) Wechler Individual Achievement Test, Third Edition, including subtests for oral reading accuracy, oral reading rate, and oral reading fluency;²³ (5) Oral and Written Language Scales, including the subtest for written expression;²⁴ (6) Test of Written Language – 4, including subtests for vocabulary, spelling, punctuation, logical sentences, sentence combining, contextual conventions, and story

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at p. 253.

²⁰ *Id.* at pp. 253-54.

²¹ *Id.*

²² *Id.* at p. 255.

²³ *Id.* at pp. 255-56.

²⁴ *Id.* at p. 256.

composition;²⁵ and (7) Adaptive Behavior Assessment System, Second Edition, including subtests for communication, functional academics, self-direction, leisure, social skills, community use, school living, health and safety, and self-care.²⁶ District summarized, in reviewing scores across all tests, that Student was in the average range for intellectual functioning, broad reading, basic reading skills, and reading comprehension. Student was in the below average or low average ranges for auditory processing, reading fluency, broad written language, reading fluency, overall writing (sentence structure, mechanics of writing, sentence formation, organization of writing, and use of detail), and certain adaptive behavior skills (communication, self-direction, leisure, social skills, and school living).²⁷

Student was evaluated again in January 2017, when he was in the sixth grade. The evaluator summarized all test results from Student's 2014 evaluation, as well as conducted additional testing.²⁸ Tests administered to Student in January 2017 included: (1) Kaufman Test of Educational Achievement – 3, including subtests for letter and word recognition, reading comprehension, math concepts and applications, math computation, written expression, spelling, phonological processing, nonsense word decoding, silent reading fluency, word reading fluency, and decoding fluency;²⁹ (2) Woodcock Reading Mastery Tests-Revised, including subtests for word comprehension and passage comprehension;³⁰ (3) Key Math-3 Diagnostic Assessment, including subtests for mental computation, addition

²⁵ *Id.*

²⁶ *Id.* at p. 257.

²⁷ *Id.* at pp. 257-58.

²⁸ Hearing #1, ADE H-20-29, District Exhibits, pp. 434-44.

²⁹ *Id.* at pp. 439-40.

³⁰ *Id.* at p. 441.

and subtraction, multiplication and division, basic concepts, operations, and applications;³¹ (4) Test of Written Language-4, including subtests for vocabulary, spelling, punctuation, logical sentences, sentence combining, contextual conventions, and story composition;³² (5) Adaptive Behavior Assessment System, Second Edition, including components specific to communication, community use, functional academics, school living, health and safety, leisure, self-care, self-direction, and social skills;³³ and (6) Comprehensive Test of Phonological Processing, Second Edition, including subtests for elision, blending words, phoneme isolation, memory for digits, nonword repetition, rapid digit naming, and rapid letter naming.³⁴

Regarding the 2017 Kaufman Test of Educational Achievement – 3, Student’s reading composite was in the average range (25th percentile), his math composite was in the below average range (13th percentile), his written language composite was in the below average range (4th percentile), his decoding composite was in the average range (19th percentile), and his reading fluency composite was in the below average range (5th percentile).³⁵ The District’s evaluation indicated that Student had deficits in reading comprehension as compared to his average IQ score, deficits in decoding nonsense words, deficits in math computation, and deficits in written expression.³⁶ Regarding the Woodcock Reading Mastery Tests – Revised, Student’s scores pertaining to word and passage comprehension were all in

³¹ *Id.* at pp. 441-42, 505-06.

³² *Id.* at pp. 441-42.

³³ *Id.* at pp. 442-43.

³⁴ *Id.* at pp. 506-07.

³⁵ *Id.* at pp. 439-40.

³⁶ *Id.* at pp. 440-41.

the average range.³⁷ Regarding the Key Math -3 Diagnostic Assessment, Student's scores fell within the low range and he exhibited weakness in his ability to add and subtract multi-digit problems without a calculator.³⁸ Regarding the Test of Written Language – 4, Student's overall writing composite fell within the below average range, and it was noted that Student's weakest performance was in the area of logical sentences.³⁹ Regarding the Adaptive Behavior Assessment System, Second Edition, Student's composite score placed him within the superior range, with no issues noted.⁴⁰ The evaluator summarized that Student's intellectual ability fell within the average range, but that Student had weaknesses on tasks that measured the understanding of language, math computation, and written expression.⁴¹

Eighth Grade (2018-2019 School Year)

During the eighth grade, Student's 2018-2019 school year, Student received services pursuant to an IEP that was developed on May 17, 2018 and had duration of services from August 14, 2018, through May 31, 2019.⁴² In the section of the IEP that addressed present levels of academic achievement and functional performance, it was noted that Student's Brigance testing as of March 2017 showed that Student was functioning at the eighth-grade level for word recognition, the sixth-grade level for oral reading, reading comprehension, and sentence writing, the fifth-grade level for spelling, the second-grade level for math

³⁷ *Id.* at p. 441.

³⁸ *Id.* at pp. 505-06.

³⁹ *Id.* at p. 442.

⁴⁰ *Id.* at p. 443.

⁴¹ *Id.*

⁴² Hearing #1, ADE H-20-29, Parent Exhibits, p. 32.

computation, and the third-grade level for applied problems.⁴³ It was also noted that, while capitalization skills were on grade level, Student showed weaknesses in punctuation.⁴⁴ The present levels portion of the IEP also noted that Student was administered the Key Math-3 test as well as a Comprehensive Test of Phonological Processing, Second Edition, in May 2018. On the Key Math-3, Student was functioning at the sixth-grade level (second month) in basic concepts, the fourth-grade level (eighth month) in operations, the fifth-grade level (second month) in application, and the fifth-grade level (ninth month) overall.⁴⁵ Student's strengths were listed as oral reading, identifying main ideas when given choices, recalling details, writing grammatical sentences, and multiplying two digits by one.⁴⁶ In addition, it was noted that Student got along with peers, participated in class discussions, and communicated his needs to his teachers.⁴⁷ Student's needs included vocabulary, locating evidence to support answers, consistent use of end punctuation in sentences, completing and turning in class or homework assignments, and remaining on task.⁴⁸ Student's IEP noted that Student's disabilities would hinder him from progressing in classes where he was required to read and respond in writing. It was also noted that Student would likely have difficulty in math.⁴⁹

⁴³ *Id.* at p. 33.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at p. 34.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Student's May 17, 2018, IEP set forth accommodations that Student needed to be successful. These accommodations included extra time for completing assignments, extra copies of textbooks (to take home), preferential seating, study guides, tests of reduced length, text to speech options, use of iPad, oral testing, use of calculator, grades for content without consideration of spelling, small groups where possible, and use of auditory aides.⁵⁰

Student's May 17, 2018, IEP had a total of ten goals, including three for English Language Arts – Basic Reading Skills, three for English Language Arts – Written Expression, and four for Mathematics.⁵¹ Student's English Language Arts – Basic Reading goals included the following: (1) upon presentation of selected grade-level passages, demonstrate improved comprehension by identifying key details and support answers with evidence from the text with 80% accuracy; (2) upon presentation of selected grade-level passages, exhibit improved reading comprehension skills by choosing correct answer choices for identifying main ideas with 80% accuracy; and (3) upon presentation of selected grade-level passages, demonstrate improved reading and comprehension skills by using inference and text to support answers with 80% accuracy.⁵² Student's English Language Arts – Written Expression goals included the following: (1) when presented with a written assignment, demonstrate improved sentence writing skills by expanding simple sentences, specifically adding adjectives and/or prepositional phrases with or without the use of technology with 75% accuracy; (2) when presented with a written assignment, demonstrate improved

⁵⁰ *Id.* at p. 37.

⁵¹ *Id.* at pp. 39-42.

⁵² *Id.* at p. 39.

sentence writing skills by combining simple sentences into compound or complex sentences with or without the use of technology with 75% accuracy; and (3) when presented with a written assignment, demonstrate understanding of the prompt by writing to support a claim and provide clear reasons and relevant evidence to support the claim with 80% accuracy.⁵³ Student's Mathematics goals included the following: (1) when given mathematical problems involving exponents, evaluate exponents with 75% accuracy in two of three trials; (2) when given mathematical or real-world problems, apply proportions to solve the problem with 75% accuracy in two of three trials; (3) when given mathematical or real-world problems, apply the Pythagorean Theorem to determine unknown side lengths in right triangles in real-world and mathematical problems with 75% accuracy in two of three trials; and (4) when presented with mathematical problems involving computation, add and subtract whole numbers with and without regrouping with 80% accuracy.⁵⁴ At the end of the 2018-2019 school year, one of three English Language Arts-Basic Reading goals had been mastered, one of three English Language Arts-Written Expression goals had been mastered, and two of four Mathematics goals had been mastered.⁵⁵

In addition to a statement of present levels and goals, Student's May 17, 2018, IEP provided a schedule of services to include 100 minutes per week of co-taught instruction in

⁵³ *Id.* at p. 40.

⁵⁴ *Id.* at pp. 41-42.

⁵⁵ Hearing #1, ADE H-20-29, District Exhibits, pp. 596-99.

English, and 100 minutes per week of co-taught instruction in math. All co-taught instruction was scheduled to occur in the regular general education classroom.⁵⁶

On October 22, 2018, a Notice of Conference was sent to Parent, scheduling an IEP meeting for November 1, 2018.⁵⁷ At this meeting, the IEP team discussed Student's reading and math interventions with Parent. Pursuant to a Notice of Action dated November 8, 2018, no changes were made to Student's IEP following the meeting.⁵⁸ On February 7, 2019, a Notice of Conference was sent to Parent, scheduling an IEP meeting for February 13, 2019.⁵⁹ The purpose of this meeting was to discuss Student's failing grade in English, as well as his risk of ultimately receiving a failing grade in the subjects of science and math.⁶⁰ The team discussed the fact that Student was not completing class assignments and homework with consistency, and that he was struggling to attend to tasks, often talking to peers when he was supposed to be doing classwork.⁶¹ The IEP team determined that Student would be allowed to make up missed classwork and tests, and that no additional accommodations would be added to Student's IEP.⁶²

On May 9, 2019, a Notice of Conference was sent to Parent, scheduling an IEP meeting for May 23, 2019, for the purpose of conducting an annual review for Student.⁶³ The team,

⁵⁶ Hearing #1, ADE H-20-29, Parent Exhibits, p. 38.

⁵⁷ *Id.* at p. 44.

⁵⁸ *Id.* at p. 45.

⁵⁹ *Id.* at p. 47.

⁶⁰ *Id.* at pp. 48-49.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at p. 50.

including Parent, met on May 23, 2019, and discussed Student's IEP goals and placement.⁶⁴

The IEP team determined that Student would be reevaluated in the fall of 2019, as his three-year reevaluation would be required at that time.⁶⁵

Ninth Grade (2019-2020 School Year) and Dismissal from Special Education Services

During the ninth grade, Student's 2019-2020 school year, Student received services pursuant to an IEP that was developed on May 23, 2019 and had duration of services from August 13, 2019, through May 29, 2020.⁶⁶ In the section of the IEP that addressed present levels of academic achievement and functional performance, it was noted that Student's Brigance testing as of April 2019 showed that Student was functioning at the eighth grade level for word recognition, the ninth- grade level for oral reading, the seventh-grade level for reading comprehension, the sixth-grade level for sentence writing and spelling, and the third- grade level for math computation and applied problems.⁶⁷ The present levels portion of the IEP restated information about Student's performance on the Key Math-3 and the Comprehensive Test of Phonological Processing, Second Edition, both of which were administered to Student in May 2018.⁶⁸ In addition, it was noted that Student got along with peers, participated in class discussions, and communicated his needs to his teachers.⁶⁹ Student's needs included using inference to answer comprehension questions, multiplication of whole numbers, essay writing, completing and turning in class or

⁶⁴ *Id.* at pp. 51-52.

⁶⁵ *Id.*

⁶⁶ *Id.* at p. 1.

⁶⁷ *Id.* at p. 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at p. 3.

homework assignments, and remaining on task.⁷⁰ Student's IEP again stated that his disabilities would hinder him from progressing in classes where he was required to read and respond in writing. It was also noted that Student would have difficulty in math.⁷¹

Student's May 23, 2019, IEP set forth accommodations that Student needed to be successful. These accommodations included extra time for completing assignments, assignments and activity notebooks, extended time, reduced assignments, use of calculator, grading for content without consideration of spelling, extra copies of textbooks (to take home), study guides, and use of an iPad.⁷²

Student's May 23, 2019, IEP had a total of five goals, including one for English Language Arts – Basic Reading Skills/Written Expression and four for Mathematics.⁷³ Student's English Language Arts – Basic Reading/Written Expression goal specified that Student would maintain a passing grade for basic reading skills covered in Pre-AP English with 60% accuracy when reading at instructional level and presented with a written assignment. Student's Mathematics goals included the following: (1) when given mathematical problems involving polynomials, develop skills and understanding in the addition and subtraction of polynomials by solving the problems with 70% accuracy; (2) when given mathematical problems involving computation of polynomials, develop skills and understanding in the multiplication and division of polynomials by solving the problems

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at p. 6.

⁷³ *Id.* at pp. 39-42.

with 70% accuracy; (3) when given mathematical or real-world problems involving linear equations, demonstrate skills and understanding in solving linear equations by solving the problems with 70% accuracy; and (4) when presented with mathematical and real-world problems involving linear inequalities, demonstrate skills and understanding in solving linear inequalities by solving the problems with 70% accuracy.⁷⁴ As of March 10, 2020, when Student was discharged from special education services, none of Student's four stated goals had been mastered.⁷⁵

In addition to a statement of present levels and goals, Student's May 23, 2019, IEP also provided a schedule of services to include 30 minutes per week of direct instruction in English, and 125 minutes per week of direct instruction in math.⁷⁶

On October 15, 2019, a Notice of Conference was sent to Parent, scheduling a reevaluation conference for October 29, 2019.⁷⁷ A Notice of Decision dated October 29, 2019, indicated that the IEP team completed an existing data review for Student during the meeting.⁷⁸ Pursuant to the Notice of Decision, the IEP team reviewed the following existing data for Student: achievement tests, adaptive behavior scores, classroom assessments, hearing/vision screening, parent-provided information, psychological evaluation, and social history. The IEP team recommended reevaluation of Student to determine continued eligibility for IDEA services, with a notation that Student would be reevaluated only in deficit

⁷⁴ *Id.* at pp. 9-10.

⁷⁵ Hearing #1, ADE H-20-29, District Exhibits, pp. 729-30.

⁷⁶ *Id.* at pp. 729-30.

⁷⁷ Hearing #1, ADE H-20-29, Parent Exhibits, p. 14.

⁷⁸ *Id.* at p. 15.

areas.⁷⁹ The IEP team discussed Student's behavior and agreed that there were no significant issues. As such, no additional behavior assessments were to be given to Student.⁸⁰

On December 13, 2019, as decided by the IEP team in October 2019, District began its reevaluation of Student. District's examiner conducted a psychoeducational evaluation that included a social history review and administration of five different examinations aimed at determining Student's cognitive and achievement levels.⁸¹ The tests administered by the District included the following: (1) Woodcock-Johnson IV Test of Cognitive Abilities, including subtests for oral vocabulary, number series, verbal attention, letter pattern matching, phonological processing, story recall, visualization, and concept formation;⁸² (2) Woodcock-Johnson IV Test of Achievement, including subtests for letter-word identification, word attack, and calculations;⁸³ (3) Oral and Written Language Scales, Second Edition, including only the subtest for written expression;⁸⁴ (4) Key Math Diagnostic Assessment – 3, including subtests for mental computation/estimation, addition and subtraction, and multiplication and division;⁸⁵ (5) Test of Auditory Processing Skills – 3, including subtests for word discrimination, phonological segmentation, phonological blending, number memory forward, number memory reversed, word memory, sentence memory, auditory comprehension, and auditory reasoning.⁸⁶

⁷⁹ *Id.* at pp. 16-18.

⁸⁰ Hearing #1, ADE H-20-29, Transcript, Vol. I, p. 163 and Vol. II, pp. 134-35.

⁸¹ Hearing #1, ADE H-20-29, Parent Exhibits, pp. 205-212.

⁸² *Id.* at pp. 207-08.

⁸³ *Id.* at pp. 208-09.

⁸⁴ *Id.* at p. 208.

⁸⁵ *Id.* at pp. 209-10.

⁸⁶ *Id.* at p. 210.

Regarding the Woodcock-Johnson IV Test of Cognitive Abilities, Student's general intellectual ability score was 103, which is in the average range.⁸⁷ It was noted, however, that the Gf-Gc composite score of 116, which is in the high average range, "may provide the best description of [Student's] intellectual level since it measures comprehensive knowledge and fluid reasoning tests alone and does not include cognitive processing speed."⁸⁸ District noted that Student had "relative weakness" in letter-pattern matching, which is a measure of processing speed, but that Student had strengths in comprehensive knowledge (measure of acquired knowledge), fluid reasoning (ability to problem solve new tasks), and short term memory (ability to take in and immediately use information).⁸⁹ Regarding the Woodcock-Johnson IV Test of Achievement, Student scored in the average range for word identification and word attack, with are both measures of basic reading skills; however, Student had low average scores in the area of math calculation. District noted that Student had difficulty adding and subtracting like fractions and solving division problems.⁹⁰ Regarding the Oral and Written Language Scales, Second Edition, Student's written expression scores indicated average writing skills, and District specifically stated that Student "had no difficulty putting his thoughts into compound and complex sentences as well as paragraphs" and that Student's writing "included correct use of nouns, verbs, modifiers, and conventions (spelling, punctuation, capitalization)."⁹¹ District further stated that Student's writing contained text

⁸⁷ *Id.* at pp. 207-08.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at pp. 208-09.

⁹¹ *Id.* at p. 209.

organization, use of pragmatics, and cohesion.⁹² Regarding the Key Math Diagnostic Assessment – 3, District concluded that Student scored in the average range for mental computation, estimation, addition, and subtraction; however, Student’s scores in the areas of multiplication and division were in the below average range.⁹³ Regarding the Test of Auditory Processing Skills-3, Student scored in the average range in the phonologic, memory, and cohesion areas, with a specific strength in auditory.⁹⁴

In addition to the various assessments administered by District, classroom-based assessments were also reviewed as part of District’s evaluation. Several teachers completed classroom information forms regarding Student’s performance in various classes. Two math teachers stated that Student was functioning at or above grade level as compared to his peers, and that Student had no problems with math equations and problem solving. One of Student’s math teachers, however, indicated that Student’s weaknesses included “refusal to complete his work unless prompted, refusal to show his work, attention to task, defiant towards his teachers, and fidgety.”⁹⁵ Student’s English teacher stated that Student demonstrated the “same depth of understanding as his same age peers” and that Student’s strengths included “interpretation of tone, mood, theme, characterizations, perspective, figurative language, grammar rules, punctuation, and subject verb agreement.”⁹⁶ Student’s weaknesses in English included that he was “frequently off topic, distracted, interrupts

⁹² *Id.*

⁹³ *Id.* at pp. 209-10.

⁹⁴ *Id.* at p. 210.

⁹⁵ *Id.*

⁹⁶ *Id.*

instruction, and refuses to complete class assignments.”⁹⁷ Student’s physical science teacher indicated that Student performed above average compared to his same-age peers, with strengths in reciprocating information, communication skills, attitude, and social skills.⁹⁸ She further indicated, however, that Student was weak with regard to organizational skills.⁹⁹ Student’s oral communications teacher stated that Student functioned at the same level as his peers, noting that he worked well with other students and was always polite.¹⁰⁰ She indicated, however, that Student had difficulty keeping up with class assignments and completing work at home.¹⁰¹ Finally, Student’s survey of business teacher stated that Student was capable of completing his assignments, but that he chose not to on some days.¹⁰² She referenced that Student was sometimes unable to stay focused, that he daydreamed in class, that he got out of his seat and talked to other students, and that he needed to be redirected often.¹⁰³

Also, with regard to classroom-based assessments, Student was administered the Brigance.¹⁰⁴ District reported that Student’s Brigance scores showed that he was functioning at the ninth- grade level in word recognition, the ninth-grade level in reading comprehension, the eighth-grade (fifth month) level in writing, and at the seventh-grade

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

level in math computation.¹⁰⁵ No Brigance scores were reported for the areas of spelling and applied problems, deficit areas which had previously been reported in Student's IEPs.¹⁰⁶

Pursuant to a January 2, 2020, Notice of Conference, an IEP meeting was scheduled for January 9, 2020, for the purpose of discussing Student's evaluation results. District's special education staff, teachers, assistant principal, and counselor all recommended dismissing Student from IDEA special education services based on Student's most recent evaluation.¹⁰⁷ At this same meeting, the IEP committee recommended that Student be referred for 504 services and that Student continue attending the same co-taught math class that he had been attending pursuant to the May 23, 2019 IEP.¹⁰⁸ Parent was not in agreement with District's recommendation and requested to meet at a later date.¹⁰⁹ Parent thereafter arranged for Student to be independently evaluated.

On February 14, 2020, Student underwent a comprehensive language literacy evaluation by Melissa Hannah (hereinafter "Hannah"). Hannah summarized all previous testing that appeared in Student's record.¹¹⁰ In addition, Hannah administered the following tests: (1) Comprehensive Test of Phonological Processing – 2; (2) Test of Mathematical Abilities – 3; (3) Kaufman Test of Educational Achievement – 3; (4) Word Identification and

¹⁰⁵ *Id.* at p. 211.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at pp. 19-20.

¹⁰⁸ *Id.* at p. 20.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at p. 152.

Spelling Test; and (5) Academic Achievement Battery.¹¹¹ Hannah never observed Student at school or in any other environment where he was doing schoolwork.¹¹²

In reporting scores on the tests that she administered, Hannah considered Student's cognitive potential and, therefore, predicted his IQ score to be 114. Based on this number, she modified the descriptors on various tests.¹¹³ In doing so, Hannah referenced a chart appearing in a book written by Dr. Ronald Dumont. Dr. Dumont testified as an expert witness in this matter and explained his findings based on a review of Hannah's evaluation.¹¹⁴ Dr. Dumont had numerous concerns regarding Hannah's evaluation, ranging from sloppiness, mislabeling tests, and use of copied boilerplate language to manipulating tables to reflect average scores as below average.¹¹⁵ Dr. Dumont testified that Hannah had essentially used "cognitive referencing," which the American Associate of speech and Language was against.¹¹⁶ Dr. Dumont reported that the stanine scores on Hannah's report were not consistent with the various descriptors specified by the tests she administered to Student, stating that stanines were misidentified and labels were often incorrect.¹¹⁷ Dr. Dumont explained that, throughout Hannah's report, the descriptors used indicated that Student's impairments are worse than they are in actuality.¹¹⁸ Dr. Dumont specifically stated that the

¹¹¹ *Id.* at p. 163.

¹¹² Hearing #1, ADE H-20-29, Transcript, Vol. I, p. 110.

¹¹³ *Id.* at pp. 152-202; Hearing #1, ADE H-20-29, Transcript, Vol. VI, p. 66.

¹¹⁴ Hearing #1, ADE H-20-29, Transcript, Vol. XI, p. 204.

¹¹⁵ *Id.* at pp. 211, 215-16, 244-45.

¹¹⁶ *Id.* at pp. 217-18.

¹¹⁷ *Id.* at pp. 226-30.

¹¹⁸ *Id.* at p. 253.

report was not written in a way that “gives an honest picture” of Student’s strengths and weaknesses.¹¹⁹

On March 3, 2020, District sent Parent a Notice of Conference, scheduling an evaluation conference for March 10, 2020.¹²⁰ Pursuant to the Notice of Action issued on March 13, 2020, the IEP committee met to review the December 12, 2019, evaluation conducted by the District as well as the February 14, 2020, evaluation conducted by Hannah.¹²¹ The IEP team discussed both reports, with Hannah attending the meeting via telephone.¹²² The IEP team, excluding Parent, again recommended that Student be dismissed from IDEA special education services and that he, instead, be placed on a 504 plan so that he could continue receiving necessary accommodations.¹²³ Parent asked that the final decision again be tabled, but the rest of the IEP team decided to move forward with dismissal and advised Parent that she would have a reasonable time, specifically seven days from receipt of the March 13, 2020 Notice of Action, before dismissal was implemented.¹²⁴ Parent wrote “stay put” and the date on a note and handed it to District personnel.¹²⁵ District relied on guidance from an Arkansas Department of Education website in determining that seven days was a reasonable time period for Parent to file a due process hearing. The March 13, 2020 Notice of Action noted that the IEP team’s decision was also based on concern for Student’s

¹¹⁹ *Id.* at p. 254.

¹²⁰ Hearing #1, ADE H-20-29, Parent Exhibits, p. 26.

¹²¹ *Id.* at p. 27.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Hearing #2, ADE H-21-08 and H-21-24, Parent Exhibits, p. 29.

“social and emotional wellbeing due to his fear of standing out and being different while receiving services through special education.”¹²⁶ Parent stated that she did not agree with Student’s discharge from special education services and placement on a section 504 plan because progress monitoring was not required for a section 504 plan.¹²⁷ On March 16, 2020, less than a week following the issuance of the March 13, 2020 Notice of Action discharging Student from IDEA special education services, the Arkansas Governor announced that all schools in Arkansas would be closed temporarily due to COVID-19 and that alternative methods of instruction would be used by public schools. Parent filed a due process complaint in Hearing #1, ADE H-20-29, on April 1, 2020.

District used an Aptitude-Achievement Consistency Model, which includes the method of Cross-Battery Assessment to determine and examine a student’s cognitive strengths and weaknesses as compared to academic strengths and weaknesses.¹²⁸ In previous years, District had used the severe discrepancy model to determine Student’s eligibility for services. District’s examiner testified that reviewing patterns of strengths and weaknesses does not take into consideration things outside of standardized testing, stating that this method looks only at “intelligence and achievement.”¹²⁹ She explained that if there is not an issue with intelligence or achievement, performance deficits must be based on other factors, such as issues at home or communications between a teacher and student. ¹³⁰

¹²⁶ *Id.* at pp. 28-29.

¹²⁷ *Id.*

¹²⁸ *Id.* at pp. 329-400.

¹²⁹ Hearing #1, ADE H-20-29, Transcript, Vol. III, pp. 113-14.

¹³⁰ *Id.*

Despite this, however, District's examiner testified that the IEP team did not limit its discussion to just intelligence scores, but instead noted that Student had passing grades and that all teachers reported that Student was capable of performing work at grade level.¹³¹

As of March 20, 2020, Student was no longer provided services pursuant to and IEP. Student did not have an IEP during the remainder of ninth grade, or during tenth grade. Testimony established, however, that Student continued to receive the accommodations that he had been receiving on his May 23, 2019 IEP.¹³² During the tenth grade, Teachers were provided a folder for Student that listed accommodations previously used.¹³³

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 U.S. 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). Pursuant to *Rowley*, 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 IEP(s) developed pursuant to IDEA procedures was

¹³¹ *Id.* at pp. 118, 121.

¹³² *See generally*, Hearing #2, ADE H-21-08 and H-21-24, Transcript, Vols. I-III.

¹³³ *Id.*

reasonably calculated to enable the student to make appropriate progress in light of his or her specific circumstances. *Id.*

For purposes of this decision, and considering that three different cases are being addressed, it makes sense to apply this test first to Hearing #1, ADE H-20-29, looking specifically at the issues raised by Parent in her initial due process complaint. Thereafter, this same test will be applied to the issues raised by Parent in Hearing #2, specifically ADE H-21-08 and H-21-24.

ADE H-20-29:
Alleged Denial of FAPE During 2018-2019 and 2019-2020 School Years and Discharge from Special Education Services

Regarding the first inquiry, that of whether District complied with the procedures set forth in the IDEA, this Hearing Officer notes that the alleged violations cited by Parent in ADE H-20-29, specifically denial of FAPE during the 2018-2019 and 2019-2020 school years, and improper discharge from special education services in March 2020, are all allegations of substantive violations of the IDEA. As such, this Hearing Officer hereby finds that District did not deny a FAPE to Student on account of violation of any procedural issues.

Having considered the first prong of the FAPE analysis, and found it inapplicable to Parent's allegations in ADE H-20-29, it is now necessary to analyze whether District substantively denied FAPE to Student, *i.e.* whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances during the 2018-2019 and 2019-2020 school years. In addition, it

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is necessary to analyze whether District discharged Student from special education services in March 2020 in violation of the IDEA.

Prior to March 22, 2017, Eighth Circuit law provided that if a student received “slight” or “de minimis” progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court “rejected the ‘merely more than *de minimis*’ standard that had previously been the law of the Eighth Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. ___ (2017), 137 S.Ct. 988 (2017)). In *Endrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Endrew F.*, 137 S. Ct. at 1000. The Court in *Endrew F.* stated the following:

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

Endrew F., 137 S.Ct. at 1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

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).

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“Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Andrew F.*, 2017 WL 1066260, at *1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

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

Eighth Grade (2018-2019 School Year). Regarding Student’s 2018-2019 school year (eighth grade), it is the opinion of this Hearing Officer that Student was denied FAPE because District failed to provide Student with an IEP that was reasonably calculated to

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enable Student to make appropriate progress in light of his individual circumstances. It is noted that, in theory, Student's May 17, 2018 IEP contained all required components. Specifically, the IEP had a detailed statement of Student's present levels of academic achievement, as well as a description of how Student's disabilities affected his academic progress. In addition, Student's IEP contained a total of ten goals that appeared measurable and contained descriptions as to how progress on each goal would be tracked. Finally, Student's May 17, 2018, IEP contained a description of special education services that would be provided to Student, specifying that Student would receive 100 minutes per week of co-taught instruction in English, as well as 100 minutes per week of co-taught instruction in math. The IEP document, without further analysis, appears at first glance to be adequate.

Upon further investigation, however, it is apparent that Student's May 17, 2018 IEP was not reasonably calculated to allow Student to make progress in light of his individual circumstances. Comparing Student's levels of academic achievement at the beginning of eighth grade (2018-2019 school year) with those at the beginning of ninth grade (2019-2020 school year), data shows that Student progressed very little over the course of an entire academic year. For example, Brigance testing in March 2017, the most recent testing cited by District in Student's IEP, showed that Student was functioning at the eighth-grade level for word recognition when he began the eighth grade. A year later, however, pursuant to Brigance testing conducted in April 2019, Student was still functioning at the eighth-grade level with regards to word recognition. Although Student began the 2018-2019 school year on grade level in this academic area, he had no growth throughout the academic year and,

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ultimately, went into the ninth grade with regressed skills pertaining to word recognition. With regards to reading comprehension, Student began the 2018-2019 school year at the sixth-grade level, approximately two grade levels behind his actual grade. As Student entered the ninth grade, his April 2019 Brigance scores in this area showed that Student was functioning on the seventh-grade level. Although this appears to be progress, the reality is that Student remained two reading levels behind his actual grade level, with no closure of that gap. In the area of sentence writing, Student began and ended the eighth-grade year on the sixth-grade level, showing zero growth during the 2018-2019 academic year. Essentially, Student began the eighth grade two grade levels behind in sentence writing, and ended the year three grade levels behind his peers. Regarding Student's academic skills in spelling, he began the 2018-2019 school year at the fifth-grade level, three years behind that of his same-age peers. A year later, as Student entered the ninth grade, he was functioning at the sixth-grade level in spelling, still three years behind his peers in spelling. Regarding math, Student's Brigance scores at the beginning of the 2018-2019 school year indicated that he was functioning at the second-grade level for math computation, and the third-grade level for applied problems. One year later, as Student began the 2019-2020 school year and entered the ninth grade, Student was functioning at the third-grade level for math computation and, as before, the third-grade level for applied problems. In both math computation and applied problems, Student was six grade levels below that of his peers upon entering the ninth grade. The only area where Student appeared to exhibit normal growth, specific to the Brigance scores, was in the area of oral reading. Specifically, Student's oral

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reading scores increased from the sixth-grade level to the ninth-grade level during the 2018-2019 school year. Given Student's average IQ score, his growth was overall insufficient in numerous subject matter areas.

A review of Student's May 17, 2018, IEP goals further indicates that Student's IEP was not reasonably calculated to allow Student to make progress in light of his individual circumstances. Student had a total of ten goals, only four of which had been mastered by the end of the 2018-2019 school year. This indicates one of two things, specifically, that Student's goals were not appropriate for him or, alternatively, that the programming provided by District was not appropriate to assist Student in achieving the stated goals. Either way, Student's IEP was not reasonably calculated to allow appropriate progress on stated goals.

Finally, there are two other issues for consideration regarding the question of whether Student's IEP during the 2018-2019 school year was appropriate. First, it is noted that an IEP conference was scheduled in February 2019, more than halfway through the 2018-2019 academic year, for the purpose of reviewing Student's failing grade in English, as well as his near failing grades in science and math. It cannot be said, based on this fact, that District lacked notice as to Student's continued academic deficits. Second, Student's 2018-2019 IEP stated in the present levels of academic achievement that Student's needs included completing and turning in assignments and remaining on task. In fact, Student's failing grade in English was on account of missing class and homework assignments. Both of these documented "needs" could have been related to Student's diagnosis of ADHD; however,

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Student's IEP neither addressed the possible effect of ADHD on Student's academic performance, nor addressed testing for the purpose of determining same.

Based on all evidence cited, this Hearing Officer finds that Parent proved by a preponderance of the evidence that District failed to provide Student with an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances during the 2018-2019 academic year.

Ninth Grade (2019-2020 School Year). Regarding Student's 2019-2020 school year (ninth grade), it is the opinion of this Hearing Officer that Student was denied FAPE in that District failed to provide Student with an IEP that was reasonably calculated to enable appropriate progress in light of Student's individual circumstances. Again, it is noted that Student's May 23, 2019 IEP, on its face, appears to contain all necessary requirements (detailed statement of present levels of academic achievement, description of how Student's disabilities affected his academic progress, five goals that appear measurable and contain adequate descriptions regarding tracking, and a description of special education services, i.e. 30 minutes per week of direct English instruction and 125 minutes per week of direct math instruction). As with the previous IEP, Student's 2019-2020 IEP appears at first glance to be adequate.

As before, however, closer examination reveals that Student failed to make adequate progress to support a conclusion that the IEP was reasonably calculated to allow Student to make progress in light of his individual circumstances. Student's IQ score was average, and possibly above average; however, comparing Student's levels of academic achievement at

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the beginning of ninth grade (2019-2020 school year) to those on March 10, 2020, when Student was discharged from special education services, data again shows that Student progressed very little over the course of ten months and remained below grade level in several academic areas. For example, Brigance testing conducted in April 2019, just prior to Student's ninth-grade year, showed that Student was functioning on the sixth-grade level in the academic area of sentence writing. Pursuant to the most recent Brigance testing as of March 10, 2020, when Student was discharged from special education services, Student was performing on the eighth-grade level in this area. While this shows some growth, the reality is that Student, at the time that he was discharged from special education services, remained more than a year behind his same-age peers regarding sentence writing. Similarly, Student's April 2019 Brigance scores indicated that Student was at the third-grade level for math computation at the start of the 2019-2020 school year, and, in March 2020, at the time of discharge, was at the seventh-grade level in this same area. Again, although this shows growth, Student remained nearly three grade levels behind considering that, as of March 10, 2020, he was two months from being a tenth-grade student. No Brigance scores were reported for spelling and applied problems, both areas where Student had significant deficits in the past. District's testing did show positive growth in the areas of word recognition and reading comprehension, with scores as of March 10, 2020, indicating that Student was performing at the ninth-grade level in both. Given that Student was approaching the tenth grade, however, it appears that even these scores may have been slightly below grade level.

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In addition, a review of Student's May 23, 2019, IEP goals indicates that Student's 2019-2020 IEP was not reasonably calculated to allow Student to make progress in light of his individual circumstances. Student had a total of five goals, none of which had been mastered at the time that he was discharged from special education services on March 10, 2020. As stated previously, this indicates that Student's goals were not appropriate for him or, alternatively, that the programming provided by District was not appropriate to assist Student in achieving the stated goals. It is noted that Student was receiving 125 minutes per week of direct math instruction during the 2019-2020 school year; however, as of March 10, 2020, Student still had not mastered any of the four math goals on his IEP. Student's IEP was not reasonably calculated to allow appropriate progress on stated goals.

Finally, as before, Student's 2019-2020 IEP stated in the present levels of academic achievement that Student's needs included completing and turning in assignments and remaining on task. Both needs were also addressed in Student's 2018-2019 IEP during the prior year. As stated previously, both documented "needs" could have been related to Student's diagnosis of ADHD; however, Student's 2019-2020 IEP neither addressed the possible effects of ADHD on Student's academic performance, nor addressed testing for the purpose of determining same. Even as of March 10, 2020, when Student was discharged from receiving special education services, recent data collected from teachers indicated that Student was often off task, fidgety, and out of his seat and talking to peers during class. Whether there was a specific cause for these behaviors was never adequately explored or addressed during the 2019-2020 academic year.

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Based on all evidence cited, this Hearing Officer finds that Parent proved by a preponderance of the evidence that District failed to provide Student with an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances during the 2019-2020 academic year.

Discharge from Special Education Services. It is the opinion of this Hearing Officer that Student was inappropriately discharged from special education services on March 10, 2020, in violation of the IDEA. One reason for this conclusion is that the evaluation performed by District in December 2019 was woefully inadequate compared to testing completed in previous evaluations of Student.

As an initial point, this Hearing Officer found Dr. Ronald Dumont to be a credible expert for District, and the issues that he raised regarding the evaluation conducted by Hannah were significant. As such, Hannah's February 2020 evaluation was disregarded completely in reviewing this issue. All conclusions herein are based solely on a comparison of District's testing in December 2019 with prior testing in 2014 and 2017, as well as other factors identified below.

In November 2014, District reviewed seven different assessments that had been administered by other examiners. In addition, District administered seven assessments to Student. All-in-all, these assessments covered numerous academic areas including, but not limited to, intelligence, reading (basic reading, comprehension, fluency), math calculation, writing fluency, memory and learning skills, phonological processing, spelling, written expression, vocabulary, punctuation, sentence combining, and adaptive behavior. The

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summary of Student's 2014 evaluation indicated that Student was in the below average range for reading fluency, broad written language, and overall writing.

In January 2017, District administered six different tests to Student and examined all others that were administered in November 2014. All-in-all, the assessments administered by District covered numerous academic areas including, but not limited to, intelligence, reading (basic reading, comprehension, fluency), math calculations, math concepts and applications, written expression, writing fluency, phonological processing, spelling, and adaptive behavior. The summary of Student's 2017 evaluation indicated that Student was below average in the areas of math, written language, reading fluency, reading comprehension, and decoding nonsense words.

In December 2019, District administered five different tests to Student. These assessments covered intelligence, letter-word identification, word attack, math computation, written expression, and phonological processing. It does not appear that tests were administered for the purpose of determining whether Student continued to have deficits in reading fluency and reading comprehension. In addition, less subtests were given on many of the assessments. For example, District issued only three subtests for the Woodcock-Johnson - IV Test of Achievement, as compared to approximately ten on the previous administration of this test in November 2014. District's examiner explained that Student was not evaluated in areas where there was no longer a deficit. However, given that Student was possibly going to be discharged from special education services, District should

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have done a thorough, comprehensive evaluation before making any decisions as to eligibility for services.

Aside from testing, it is telling that Student was discharged from special education services despite the fact that he had not met any of the goals that he had been working on for nearly ten months during the 2019-2020 school year. District witnesses repeatedly testified that Student was capable of performing at grade level, but that he was not willing to put in the work to complete class assignments and homework. However, District offered no explanation for why Student had failed to master even a single goal on his current IEP at the time that he was discharged from special education services. Second, District witnesses testified that Student did not want to be identified as a special education student because he did not want to be labeled and looked at differently. If this was true, however, it makes no sense that Student would intentionally fail to master IEP goals, assuming he was capable, that could result in his discharge from special education services. Third, District failed to acknowledge that Student had a diagnosis of ADHD when conducting its evaluation in December 2019. Student's IEPs had repeatedly referenced that Student was off task, and teachers reported in December 2019 that Student was fidgety and often walked around the classroom and talked to peers during class. In addition, Student had a history of not completing work, which can be an organizational issue and related to ADHD. While this Hearing Officer is in no position to say whether ADHD did or did not play a role in Student's academic issues, evidence suggests that, at a minimum, District should have evaluated Student on this basis and ruled out the possibility. Finally, District continually offered Parent

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the option of creating a section 504 plan for Student. In addition, despite the fact that District supposedly ceased special education services, it did not stop accommodations for Student. While it is certainly possible to be eligible for a section 504 plan and, at the same time, ineligible for an IEP pursuant to the IDEA, the fact that District acknowledged that Student continued to need the same accommodations that he had been receiving pursuant to his 2018-2019 and 2019-2020 IEPs indicates that the decision to discharge Student was likely a rush to judgment. This is particularly true considering the inadequate evaluation and other factors addressed in this section.

This Hearing Officer cannot say, definitively, whether Student will continue to qualify for special education services pursuant to the IDEA. However, it is clear that more comprehensive evaluations should be conducted so that District can make a more informed decision in this regard.

**ADE H-21-08 and H-21-24:
Alleged Violation of IDEA's Stay Put Provision and, Alternatively, Failure to Adhere to
Child Find Requirements.**

Regarding the first inquiry, that of whether District complied with the procedures set forth in the IDEA, this Hearing Officer notes that the alleged violations cited by Parent in ADE H-21-08 and ADE H-21-24, specifically violations of the IDEA's "stay put" provision between April 1, 2020, and February 17, 2021, are procedural in nature. In addition, in ADE H-21-24, Parent alleged in the alternative that District violated its child find obligations, another issue that is procedural and must be analyzed as such before determining whether a substantive

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denial of FAPE has occurred. As such, it is necessary to first determine whether either procedural violations has occurred.

Stay Put. In cases ADE H-21-08 and ADE H-21-24, Parent alleged that District violated the “stay put” provision of the IDEA when District refused to keep Student on his May 23, 2019 IEP during the pendency of the above-referenced cases. Regarding maintenance of current educational placement during a due process proceeding, the IDEA states as follows:

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until such proceedings have been completed.

20 U.S.C.S. § 1415(j). As a threshold matter, there are no proceedings pending, pursuant to this provision, until a request for a due process hearing is filed. *Monahan v. Nebraska*, 491 F. Supp. 1074, 1089 (D. Neb. 1980) (affirmed in part and vacated in part), *Monahan v. Nebraska*, 645 F.2d 592 (8th Cir. 1981). Other circuits agree with this interpretation as well. *See generally K.D. v. Dept. of Educ.*, 665 F.3d 1110, 1117 (9th Cir. 2011) (finding that the IDEA’s stay put provision does not apply until a request for a due process hearing is filed); *Sammons v. Polk Cnty. Sch. Bd.*, 165 F. Appx. 750, 753 (11th Cir. 2006) (finding that only the filing of a request for a due process hearing invokes the stay-put injunction as referenced in 34 C.F.R. § 300.514).

Once this requirement has been met, *i.e.* a due process complaint has been filed, the question then becomes that of what constitutes the “then-current educational placement” of

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Student. The IDEA does not provide a definition for the term “then-current educational placement.” *Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002). Therefore, based on case law, what is deemed to be the then-current placement of Student is determined at the time that a due process complaint is filed. Some circuits have determined a student’s “then-current educational placement” by focusing on the “operative placement that is actually functioning at the time the dispute first [arose].” *Drinker v. Colonial Sch, Dist.*, 78 F.3d 859 (3d. Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990). The operative placement is defined as the placement in which Student actually received instruction at the time that the dispute arose, *i.e.* a due process hearing was filed. *Id.*

Applying this caselaw to the present situation, it is necessary, as a threshold issue, to first evaluate when a due process hearing was filed by Parent. ADE H-20-29 was filed by Parent on April 1, 2020, and constituted the precise date that the IDEA’s stay put provision was invoked. The second inquiry required of this analysis, therefore, is to determine Student’s operative placement on this date. Student’s IEP team made the decision to discharge Student from IDEA special education services on March 10, 2020, and a Notice of Action dated March 13, 2020, was provided to parent which stated same. Parent was notified that the decision to discharge Student from services would take effect on March 20, 2020, ten days after the initial decision, and seven days following the receipt of the Notice of Action regarding this matter. Parent did not file a request for due process hearing until April 1, 2020. At that point, Student’s operative placement, specifically the placement in which Student was receiving instruction, was the general education classroom. Technically, as of Friday, March

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20, 2020, Student was no longer receiving special education services. Even disregarding the week of spring break, specifically the week of March 23, 2020, Student received instruction as a general education student on March 20, 2020, March 30, 2020, and March 31, 2020. Although this was only a three-day period, the rules regarding stay put are technical and Student's operative placement at the precise moment that Parent filed her due process complaint on April 1, 2020, was the general education setting.

During the hearing of this matter, Parent presented evidence that she referenced stay put in both the January, 2020 and March, 2020 meetings where Student's IEP team discussed discharging Student from special education services. In fact, Parent wrote "stay put" on a piece of paper, along with the date and her signature, during the March 10, 2020 IEP meeting, thereafter providing the paper to District IEP team members. This action did not, however, act to invoke the stay put provision because only the official filing of a due process complaint can do so. In addition, Parent's counsel argued that because of the pandemic and resulting statewide school shutdown on March 16, 2020, Student never received instruction as a general education student prior to April 1, 2020. This is a novel argument; however, the shutdown of schools by the Arkansas Governor did not render schools inoperable but, instead, dictated how services would be provided during the pandemic. Specifically, schools were directed to provide alternative methods of instruction until they could safely open once again. As such, school was technically operating, albeit differently, as of March 20, 2020.

In conclusion, it is the opinion of this Hearing Officer that the stay put provision of the IDEA was not invoked by Parent until April 1, 2020. On this date, Student's operative

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placement was, and had been, the general education setting since March 20, 2020. District did not, therefore, violate Student's rights pursuant to the stay put provision of the IDEA during the pendency of ADE H-20-29.

Child Find.

In the present case, Parent alleged, alternative to the allegation of a stay put violation, that District violated its "child find" obligations when it failed to find Student eligible for special education services following its discharge of Student from services on March 10, 2020. Some circuits have expressly stated that child find and failure to evaluate claims are procedural in nature and, therefore, must be analyzed prior to determining whether there was a substantive violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-250 (3d Cir. 2012); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

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

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

20 U.S.C. § 1412(a)(3)(A).

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

In the present case, it is the opinion of this Hearing Officer that District is not in violation of its child find obligations regarding Student. Here, Student was identified in 2014, and, thereafter, was on an IEP for approximately six years before being discharged from special education services on March 20, 2020. In addition, Student was evaluated by District as recent as December 2019. Essentially, District previously identified and evaluated Student and, therefore, did not fail to fulfill its child find obligations. Certainly, Parent can dispute whether District’s discharge of Student from special education services was appropriate and, thus, a violation of FAPE. In fact, that is precisely what Parent did when she filed ADE H-20-29. As for the issue of child find, this Hearing Officer finds no procedural violations on the part of District.

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In sum, having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and finding no violations on the part of Respondent, it is unnecessary to consider the issue of whether Student was substantively denied FAPE in ADE H-21-08 and ADE H-21-24.

ORDER:

Regarding ADE H-20-29, the results of the testimony and evidence warrant a finding for the Parent. Specifically, Parent has introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student a FAPE between August 1, 2018, and April 1, 2020, by failing to produce IEPs for Student that were reasonably calculated to enable him to make progress appropriate in light of his circumstances and by discharging Student from special education services inappropriately.

Therefore, in ADE H-20-29, this Hearing Officer hereby orders the following:

1. By or before July 15, 2021, District shall have Student comprehensively evaluated for the purpose of obtaining current information so as to determine Student's academic deficits and, specifically, whether Student continues to need special education services. This evaluation must be conducted by an independent third party, as opposed to the District, and Parent and District must agree as to the evaluator chosen. Under no circumstances can Melissa Hannah be chosen to comprehensively evaluate Student in this case, as she has already done so, and her evaluation was determined to raise significant concerns.

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2. The comprehensive evaluation of Student must contain, at a minimum, testing to determine Student's intelligence, reading abilities (all facets including, but not limited to, basic reading skills, reading comprehension, reading fluency, and word and letter identification), phonological awareness and processing, writing skills (including spelling, punctuation, grammar), math skills, adaptive behavior, and performance on classroom-based assessments and scales. In addition, the comprehensive evaluation must include assessments aimed at determining the extent to which ADHD may, if at all, contribute to Student's academic issues.
3. All evaluations ordered in the preceding paragraphs, specifically paragraphs 1 and 2 in this section, must be completed by August 15, 2021, and shall be paid for by District.
4. District is required to hold an IEP meeting for Student for the purpose of discussing the results of the comprehensive evaluation ordered in paragraphs 1-3 by or before August 15, 2021. At this IEP meeting, District and Parent shall discuss all evaluation results and determine whether special education programming is necessary.
5. If it is determined that special education services are necessary after reviewing all evaluation results of Student, District shall schedule, by or before September 1, 2021, an IEP meeting for the purpose of creating an appropriate IEP for Student.
6. As a result of the substantive violations of FAPE during Student's 2018-2019 and 2019-2020 school years, it is hereby ordered that District shall provide to Student

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fifty (50) hours of compensatory education in the areas of reading, writing, and math during Student's eleventh-grade school year. This equates to approximately two additional hours of direct instruction per week during the 2021-2022 academic year. These hours are to be provided outside of the normal school day, and District shall work with Parents to choose the best time(s) for such instruction to be provided during the school week. Should it be determined after comprehensively evaluating Student that he does not qualify for special education services, these compensatory hours will remain in place and will function as tutoring hours for Student outside of normal school hours.

Regarding ADE H-21-08 and ADE H-21-24, the results of the testimony and evidence warrant a finding for the District. Parent failed to establish that District violated the stay put provision of the IDEA. In addition, Parent failed to establish that District violated its child find obligations pertaining to Student.

Regarding ADE H-20-29, ADE H-21-08, and ADE H-21-24, it is hereby ordered that all Section 504 claims alleged by Parent are dismissed as nonhearable, as this Hearing Officer only has jurisdiction to adjudicate claims arising pursuant to the IDEA.

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)

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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

06/14/2020

DATE

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