

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXX,
Parent on behalf of
XXXXXXXXX, Student

PETITIONER

VS.

CASE: ADE H-22-25

El Dorado School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUE PRESENTED:

Whether, as alleged in ADE H-22-25, the El Dorado School District (hereinafter "District" or "Respondent") violated the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), when it determined at an evaluation conference held on December 10, 2021, that XXXXX XXXXX (hereinafter "Student") was not eligible for special education services.

PROCEDURAL HISTORY:

On December 31, 2021, the Arkansas Department of Education (hereinafter referred to as "Department") received a request to initiate due process hearing procedures from XXXXX XXXXXXXXX (hereinafter referred to as "Parent"), the parent and legal guardian of Student. Parent asserted in her complaint that District failed to comply with the IDEA and the regulations set forth by the Department when it determined on December 10, 2021, that Student was not eligible for special education services. ADE H-22-25 is the fifth due process

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hearing between Parent and District. The first three due process hearings between Parent and District, specifically ADE H-20-29, ADE H-21-08, and ADE H-21-24 were consolidated, and this Hearing Officer issued a single decision addressing all three cases on June 14, 2021.¹ The fourth due process hearing, specifically ADE H-22-13, was decided by this Hearing Officer on January 15, 2022.

In response to Parent's request for hearing in the present case, the Department assigned the case to an impartial hearing officer. Testimony was heard in ADE H-22-25 on February 14, 15, and 16, 2022. Due to the threat of COVID-19, this Hearing Officer presided via ZOOM on all hearing dates. Parent and District stipulated and agreed that all witness testimony and admitted exhibits in ADE H-20-29, ADE H-21-08, ADE H-21-24, and ADE H-22-13 would be incorporated into the record for ADE H-22-25. The following witnesses testified in this matter: Audie Alumbaugh, Shawn Lamkin, Amanda Roberson, Joseph Pate Bauldree, Joseph Clark, John Jameson, Marcia Harding, and Parent.²

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed, impartial, due process hearing. Parent had the burden of proof in this case. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and District was represented by Khayyam Eddings (Little Rock, Arkansas). Both parties were offered the

¹ During the course of this proceeding, this Hearing Officer discovered a scrivener's error with regard to the June 14, 2021 decision. Specifically, the date on the decision addressing ADE H-20-29, ADE H-21-08, and ADE H-21-24 was stated as June 14, 2020. The decision was in fact issued, however, on June 14, 2021.

² See *generally* ADE H-22-25 Transcript Vols. I-III.

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.³

FINDINGS OF FACT:

Student currently attends school at El Dorado High School and is in the eleventh grade. There is much history regarding Student, his prior eligibility for special education services, and his discharge from special education services on March 10, 2020. This history is covered in detail in the June 14, 2021 consolidated decision covering ADE H-20-29, ADE H-21-08, and ADE H-21-24, as well as the January 15, 2022 decision in ADE H-22-13. This case, however, focuses on the narrow issue raised by Parent in the present case, specifically, whether Student is eligible for special education services pursuant to the IDEA based on the evidence in the record.

On June 14, 2021, this Hearing Officer issued a decision which provided, in part, that by July 15, 2021, District was required to have Student comprehensively evaluated for the purpose of determining whether Student was eligible for special education services.⁴ This Hearing Officer further ordered that this evaluation be conducted by an independent third party upon which the Parent and District agreed.⁵ After much disagreement between the parties, resulting in federal court intervention, each party submitted names of evaluators to the United States District Court (Western District) for consideration. On November 8, 2021,

³ See Post-Hearing Briefs.

⁴ See Hearing Officer's Final Decision and Order dated June 14, 2021, which addressed ADE H-20-29, ADE H-21-08, and ADE H-21-24. It is noted that this Hearing Officer does not have jurisdiction to enforce this Final Decision and Order, and in no way is attempting to do so in this decision. The contents of this Final Decision and Order, however, provide context for the actions of the parties in this matter.

⁵ *Id.*

the court selected Tyler Crittenden (hereinafter “Crittenden”) to perform the evaluation of Student. Crittenden evaluated Student in December 2021.

Crittenden conducted a comprehensive evaluation of Student and issued a final report on December 8, 2021.⁶ Crittenden’s evaluation included the following: social history, student interview, medical history, prenatal and early infancy history, vision and hearing data, educational history, teacher interviews, curriculum-based assessments, observations, previous assessment results, six tests addressing cognitive processes, three tests addressing achievement, one test addresses communicative abilities, two scales pertaining to social and emotional state of Student, a pattern of strengths and weaknesses analysis, and recommendations.⁷

Crittenden interviewed four of Student’s teachers in preparation of his report. Student’s English teacher, Mr. Clark, reported that Student does well on work that he completes, but that he has many missing or incomplete assignments.⁸ He further noted that Student has difficulty maintaining focus in English, which hinders his performance.⁹ Mr. Clark explained that Student is seated next to a peer in class that is very organized to help Student stay on task, and that Student must be redirected a few times per class period.¹⁰ Mr. Clark described Student as apathetic, and stated that he procrastinated often.¹¹ Student’s Stagecraft teacher, Mrs. Nash-Freeman, reported that Student is well spoken and creative,

⁶ ADE H-22-25 Exhibit Vol. I, p. 20.

⁷ *Id.* at p. 21.

⁸ *Id.* at p. 27.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

but that he is easily distracted and often distracts other Students in class.¹² She explained that Student often does not complete work, and if he does complete work he often fails to turn it in.¹³ Mrs. Nash-Freeman stated that although Student is more positive this year, as compared to last, he still “needs help keeping on track with his behavior.”¹⁴ Student’s Environmental Science teacher, Mrs. Marlin, reported to Crittenden that Student’s “focus is always an issue.”¹⁵ She explained that Student frequently fails to complete or turn in work, is often late to class, and typically leaves class to go to the bathroom.¹⁶ Mrs. Marlin reported that Student performs better when given hands-on tasks, such as labs, as opposed to written tasks or assignments which require compiling data.¹⁷ She further stated that Student has difficulty getting his ideas on paper and that he “avoids all math.”¹⁸ Student’s Algebra teacher, Mr. Bauldree, reported to Crittenden that Student does not turn work in and rarely completes assignments.¹⁹ He stated that Student seems to lack motivation, appears apathetic, is easily distracted, and talkative.²⁰ In addition, Student often gets up during algebra class and walks around while Mr. Bauldree is lecturing.²¹ Mr. Bauldree described Student as off task and needing to be re-engaged several times per period.²² Both Mr. Clark and Mr. Bauldree reported that Student often uses his phone in class and must be

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at p. 28.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

redirected.²³ All of Student's teachers completed rating scales pertaining to Student's classroom performance, and every single teacher indicated that Student's ability to stay on task was below average.²⁴ All teachers with the exception of one indicated that Student's ability to complete homework, turn in assignments on time, and complete classroom assignments was below average.²⁵

Crittenden noted following interviews with Student's teachers that Student's poor grades were, at least in some part, due to missing assignments, noting that during the first quarter of the 2021-2022 school year, Student had zeros in all classes (6 in English, 13 in Environmental Science, 3 in Algebra, and 2 in Stagecraft).²⁶ Crittenden also noted that Student had several failing grades on tests in these classes as well.²⁷ At the time of evaluation, Student was failing three of seven classes, and had As and Bs in the remaining four.²⁸ Student's most recent ACT Aspire scores (10th grade) indicated that Student was in need of support in all areas, specifically reading, English, math, and science.²⁹

Regarding his direct assessment of Student, Crittenden noted in his report that Student was cooperative during testing and that he and Student had good rapport during the testing sessions.³⁰ As a result, Crittenden was confident that the results of his testing were an accurate reflection of Student's abilities at the time of testing.³¹ Crittenden stated that

²³ *Id.*

²⁴ *Id.* at p. 29.

²⁵ *Id.*

²⁶ *Id.* at p. 28.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at p. 40.

³⁰ *Id.*; See also ADE H-22-13 Transcript Vol. I, pp. 25-27.

³¹ ADE H-22-25 Transcript Vol. I, pp. 25-27.

Student showed signs of inattention often during the sessions, and that Student was very talkative and easily strayed off topic.³² Student was given six cognitive assessments, specifically: (1) Wechsler Intelligence Scales for Children – 5th Edition; (2) Woodcock Johnson Tests of Cognitive Abilities – 4th Edition; (3) Kaufman Test of Educational Achievement – 3rd Edition; (4) The Beery-Buktenica Developmental Test of Visual Motor Integration; (5) The Beery VMI Developmental Test of Visual Perception; and (6) the Test of Auditory Processing Skills - 4th Edition.³³ In addition, Student was administered three achievement tests, specifically: (1) Kaufman Test of Educational Achievement – 3rd Edition; (2) Gray Oral Reading Test – 5th Edition; and (3) Wechsler Individual Achievement Test – 3rd Edition.³⁴

On the Wechsler Intelligence Scales for Children, which measures general intelligence, Student’s scores on the verbal comprehension index, visual spatial index, and processing speed index were within the “average” range, and his scores on the fluid reasoning index and working memory index were within the “above average” range.³⁵ However, Student’s score on the naming speed index fell within the “below average” range. On the Woodcock Johnson Tests of Cognitive Abilities, which also measures general intellectual ability, as well as broad and narrow cognitive abilities, academic domain-specific aptitudes and related aspects of cognitive functioning, Student was administered the following six subtests: verbal attention, letter-pattern matching, phonological processing,

³² ADE H-22-25 Exhibit Vol. I, p. 40.

³³ *Id.* at p. 21.

³⁴ *Id.*

³⁵ *Id.* at pp. 42-44.

story recall, numbers reversed, and nonword repetition.³⁶ Student's scores on each of these subtests fell within the "average" range.³⁷ On the Beery-Buktenica Developmental Test of Visual Motor Integration, Student's score fell at the 23rd percentile and was within the "below average" range of scores. On the Beery VMI Developmental Test of Visual Perception and the Test of Auditory Processing Skills, Student's scores fell within the "average" range.

On the Kaufman Test of Educational Achievement, which measures academic achievement in reading, math, written language, reading fluency, and language processing, Crittenden obtained a composite score in each achievement category.³⁸ Student's reading composite score, which looked at letter and word recognition and reading comprehension, fell at the 34th percentile, within the "average" range.³⁹ Student's math computation score, which evaluated math concepts and applications, as well as math computation, fell at the 5th percentile, within the "well below average" range.⁴⁰ Student's written language composite score, which focused on written expression and spelling, fell at the 13th percentile, within the "below average" range.⁴¹ Student's reading fluency composite score, which considered silent reading fluency, word recognition fluency, and decoding fluency, fell at the 5th percentile, within the "below average" range.⁴² Finally, Student's academic fluency composite, which considers math fluency, decoding fluency, and writing fluency, fell at the 6th percentile, within the "well below average" range.⁴³ In addition to these various subtests, Student was

³⁶ *Id.* at p. 44.

³⁷ *Id.* at p. 45.

³⁸ *Id.* at pp. 47-50.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

administered subtests in phonological processing, object naming facility, and letter naming facility.⁴⁴ Student's phonological processing score was within the "average" range; however, his object naming and letter naming facility scores fell at the 13th and 2nd percentiles, respectively, and were within the "below average" range.⁴⁵

On the Gray Oral Reading Test, Student's reading rate, reading accuracy, reading fluency, and reading comprehension were measured.⁴⁶ Student's reading rate (16th percentile), reading accuracy (9th percentile), reading fluency (9th percentile), and reading comprehension (16th percentile) were all within the "below average" range of scores. Students overall oral reading index, which considered fluency and comprehension, fell at the 10th percentile, also within the "below average" range of scores.⁴⁷

On the Wechsler Individual Achievement Test, Student was administered only math subtests.⁴⁸ Student's math problem solving score fell within the "average" range; however, his numerical operations score, which fell at the 2nd percentile, was within the "extremely below average range."⁴⁹ As such, Student's overall mathematics score on the Wechsler fell at the 8th percentile, which was within the "well below average" range of scores.⁵⁰

Three of Student's teachers completed the Behavior Assessment System for Children scales.⁵¹ Based on the teacher rating form completed by Mrs. Nash-Freeman, Student was rated in the "at risk" range on subscales pertaining to aggression, attention problems, school

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at pp. 51-52.

⁴⁷ *Id.*

⁴⁸ *Id.* at pp. 50-51.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at p. 66.

problems, and atypicality.⁵² She further rated Student in the “clinically significant” range on subscales pertaining to hyperactivity, conduct problems, and externalizing problems. Student’s overall behavior symptoms index fell in the “at risk” range.⁵³ Similarly, Mr. Bauldree and Mr. Clark rated Student in the “at risk” range regarding the subscales for conduct problems, externalizing problems, learning problems, school problems, and atypicality.⁵⁴ They further rated Student in the “clinically significant” range regarding hyperactivity and attention problems.⁵⁵ Student’s overall behavior symptoms index, based on Mr. Bauldree and Mr. Clark’s ratings, also fell within the “at risk” range.⁵⁶

Two of Student’s teachers, specifically Mr. Bauldree and Mr. Clark, completed the Behavior Rating Inventory of Executive Function – 2nd Edition.⁵⁷ They rated Student within the “mildly elevated” range on the plan and organize subscale, and within the “potentially clinically elevated” range on the inhibit, self-monitor, initiate, working memory, task monitor, and organization of materials subscales.⁵⁸ Crittenden determined that Student’s overall global executive functioning composite fell within the “clinically elevated” range.⁵⁹

After conducting all assessments, Crittenden used a cross battery approach to determine whether Student has a specific learning disability (hereinafter “SLD”).⁶⁰ Specifically, he used a computer software program called X-BASS 2.4, which considered data

⁵² *Id.* at pp. 66-67.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at p. 67.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at p. 63.

from core and supplemental tests across various assessments.⁶¹ With regard to both written expression and math computation, and based on a pattern of strengths and weaknesses, Student's cognitive and academic performances met the criteria for SLD identification.⁶² Specifically, there was evidence of specific weaknesses in cognitive function, evidence of unexpected underachievement, and evidence of a below-average aptitude-achievement consistency with regard to both areas.⁶³ Crittenden noted for the evaluation committee that Student had received intensive intervention in reading and math since he was in kindergarten.⁶⁴ Despite these interventions, Student still qualified as having a SLD in written expression and math computation.⁶⁵

In addition, Crittenden determined that Student exhibits reading and spelling characteristics of dyslexia.⁶⁶ He explained that although Student demonstrated average phonological awareness skills, he had always exhibited rapid automatic naming deficits and continued to do so based on the evaluation data that he collected.⁶⁷ Crittenden concluded that Student's rapid naming and long-term retrieval deficits were likely contributing factors to his reading and spelling difficulties.⁶⁸ Regarding Student's deficits in written expression, Crittenden testified as follows:

[Student's] rapid naming deficit has always been there. I looked back at some of that early, early testing, and there is a slight deficit with rapid naming. It has fluctuated over the years, but it has always been there. So, how that affects him is, it affects his fluency, it affects how efficient he is with those skills. You are

⁶¹ *Id.*

⁶² *Id.* at pp. 63-64.

⁶³ *Id.*

⁶⁴ *Id.* at p.68.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

only as strong as your weakest area. That's why when you look at the phonological processing as a whole, we look at long-term retrieval, the rapid naming, short-term auditory memory, and the phonological awareness, because a strong, fluent reader has all of those things working well together.⁶⁹

As a result, Crittenden testified that Student needed a full dyslexia intervention program to address his deficits.⁷⁰

Crittenden further testified that Student would require more than accommodations to address his educational needs, particularly in math. Specifically, Crittenden stated the following:

Hearing Officer Young: Let me see if I can word this clearly. So, there was some discussion about accommodations and whether those could be provided pursuant to a 504 versus an IEP. I'm clear on that. My question to you is, is it your opinion that [Student] needs special education minutes in addition to those accommodations that would require an IEP . . . ?

Witness [Crittenden]: So, my opinion is that [Student] needs some type of instruction to target those math deficits, in particular. . . . him just being in Algebra II co-taught with accommodations and nothing else to address the math deficits is not going to be effective for [Student].

Hearing Officer Young: Okay. So, if I understand what you are saying, even if he remains in the co-taught room, you foresee the teacher in there having to provide some specific - - I'm going to use the term "special education instruction." But some specific instruction to intervene regarding his deficits?

Witness [Crittenden]: Yes. . . the fact is that he has got some pretty severe math deficits now. And when he is - - certain things you can offset with a calculator, but there were some skills, like I said, that he still struggled with. And I guess my opinion is that, you know, you can - - a calculator is good for just some computation skills, obviously. But for an 11th grader to not understand subtraction with regrouping concerns me.⁷¹

⁶⁹ ADE H-22-13 Transcript Vol. 1, pp. 52-54.

⁷⁰ *Id.* at pp. 53-54.

⁷¹ *Id.* at pp. 105-08.

In addition, Crittenden determined that Student was also likely eligible for special education services pursuant to the IDEA in the category of other health impairment (hereinafter "OHI") based on his medical diagnosis of ADHD. Crittenden specifically stated: "[Student] reportedly exhibits many characteristics of his diagnosis in the classroom (e.g. easily off task, easily distracted, disorganized, fails to complete work, difficulty initiating tasks, difficulty maintaining focus on a given task, etc.). Teacher, parent, and student interviews all confirmed that [Student] has significant difficulties in each of the previously mentioned areas."⁷² Crittenden testified that he also thought that Student's attention issues affected him across all areas of deficit. Specifically, Crittenden stated the following in his testimony:

Once I started working with [Student], talking with [Student], observing him, talking with teachers, it started to become pretty evident that attention was a concern. So, once I was able to access all the previous records and the previous testing, I saw that this had been documented from early, early on. And like I said before, any time that you have attention difficulties that are significant, you know, to the point where I know that they have tried medicines before, they have talked to different doctors, you know. So, obviously, it's a concern, home and school. You miss pieces of information along the way. If you are not attending to what is going on in that classroom - - I use math in particular, because math really builds from skill to skill, you know, from week to week and year to year. So, if you miss pieces along the way because you aren't attending well, it just snowballs on you. And so, at some point you kind of hit the wall. So, I do think that the attention absolutely adversely affects [Student] in that way.⁷³

Crittenden concluded his report by including seven pages of possible recommendations for the evaluation committee to consider.

⁷² ADE Exhibit Vol. I, p. 69.

⁷³ ADE Transcript Vol. I, pp. 76-77.

On December 10, 2021, District held an evaluation programming conference for the purpose of reviewing the results of the comprehensive evaluation conducted by Crittenden.⁷⁴ The record contains a Notice of Action completed by District and emailed to Parent on December 17, 2021.⁷⁵ Pursuant to the Notice of Action, District stated that Crittenden presented his report and explained that Student met the criteria for IDEA eligibility under the categories of SLD (math calculation and written expression) and OHI (ADHD).⁷⁶ The Notice of Action also stated that Crittenden believed that the category of OHI was more appropriate for Student because he was of the opinion that Student's inattention impacts his performance.⁷⁷ According to the Notice, Parent, Parent's counsel, and Parent's advocate were present for the discussion pertaining to the category of SLD; however, they exited the meeting after District determined that special education services were not warranted pursuant to this category. Thereafter, District continued the meeting and discussed the OHI category without Parent, her counsel, or her advocate.⁷⁸ Ultimately, District stated in the Notice of Action that Student was not eligible for special education services pursuant to the IDEA under either of the categories discussed by Crittenden.⁷⁹

The record in this case contains a video recording of the evaluation conference that occurred on December 10, 2021.⁸⁰ The conference lasted several hours and included a break in the middle. Present at the meeting were Parent, Parent's counsel, Audie Alumbaugh

⁷⁴ ADE H-22-25 Exhibit Vol. 1, pp. 18-19.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ ADE H-22-25 Exhibit Vol. I, 302A-302C.

(Parent’s advocate), Lamkin (Special Education Director/LEA), Staci Stafford (Assistant Special Education Supervisor), Vicky Delone (Special Education Teacher), Mr. Clark (Student’s English Teacher), Mr. Bauldree (Student’s Algebra Teacher), Amanda Roberson (Counselor), John Jameson (Assistant Principal), and District’s counsel.⁸¹ Crittenden was also present for the purpose of presenting his evaluation and results. The meeting was conducted via zoom, with some parties present at District, and others joining from separate locations.⁸²

The meeting was conducted by Lamkin and was hostile from the start. At the beginning of the meeting, Lamkin stated that she did not agree with the fact that Parent had chosen to attend the evaluation conference without Student, chastising Parent and stating to her that Student had a voice and should be present.⁸³ Thereafter, Crittenden calmly discussed his evaluation and explained his findings, specifically that Student was eligible for special education services pursuant to the IDEA under the categories of both SLD and OHI.⁸⁴ Crittenden answered questions presented to him and ultimately, as stated by District in its Notice of Action, asserted that although Student was eligible pursuant to two different categories, OHI was likely the more appropriate category for Student given the effect of his inattention across the board.⁸⁵ Crittenden also stated that Student’s attention issues had an adverse effect on his ability to perform at school.⁸⁶

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

Following Crittenden’s presentation of evaluation data, Lamkin presented a series of highlighted sheets that addressed Student’s missing assignments in each class.⁸⁷ She stated that when Student was engaged, he performed, placing responsibility for Student’s poor grades on his failure to engage and complete assignments.⁸⁸ Lamkin stated during this discussion that District could “lead a horse to water but can’t make him drink” in reference to her assertion that Student was not motivated to complete work.⁸⁹ When asked to provide feedback, Mr. Bauldree and Mr. Clark volunteered information. Mr. Bauldree agreed that Student’s motivation played a part in his performance, but also explained that Student’s current grade in Algebra at that time of the evaluation (60%) was based only on assignments that Student had completed. Mr. Bauldree asserted that Student’s grade accurately represented Student’s actual abilities and did not take into consideration missing work.⁹⁰ Mr. Clark stated that Student did well when his skills were being assessed directly, but that Student failed to turn in work if the assignment was not something that Mr. Clark took up at the time of completion.⁹¹

Aside from the feedback provided by Mr. Clark and Mr. Bauldree, Stafford spoke up and raised the issue of long-term retrieval, which had been addressed by Crittenden. Specifically, Stafford disagreed with Crittenden’s findings in this regard.⁹² Crittenden again explained his findings to the committee.⁹³ At one point, Lamkin stated that she wondered

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

how Student would have performed on the evaluation if the tests had been administered by Student's wrestling coach, given that Student was highly motivated to participate in wrestling. Crittenden immediately responded by explaining that his results were valid, and that Student had been cooperative during all testing, defending the results of his evaluation.⁹⁴

Following all of this discussion, and without any other inquiries of the team members in the room, Lamkin stated that it was the stance of District that Student did not have a SLD.⁹⁵ Following this declaration, the meeting became even more contentious. Lamkin asserted again that Student should be involved in the meeting and told Parent that Student was never heard.⁹⁶ Lamkin reiterated that she had already stated the stance of District, and that she spoke for District as the LEA.⁹⁷ Lamkin then stated that she wanted to caucus with District members of the team and took a ten-minute break.⁹⁸

Upon returning to the evaluation conference, District's counsel stated that some members of the team intended to sign the appropriate paperwork required for determining SLD eligibility, but that other members of the team, specifically Ms. Roberson, Mr. Clark, Mr. Bauldree, and Mr. Jameson, wanted to submit separate statements.⁹⁹ Parent's counsel asked how District voted in regard to the SLD issue, and Lamkin stated, "there is no vote" and "you need to learn IDEA" to Parent's counsel.¹⁰⁰ Parent's counsel reacted by stating that she would

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

file for due process, and when the issue of eligibility was raised regarding the OHI category, Parent's counsel reiterated that they had been there for hours, had reached no consensus, and that there was really no reason to continue talking about anything.¹⁰¹ Lamkin responded that she was closing the meeting, that Student was not in need of special education, and that she was recommending a Section 504 plan with a behavior contract.¹⁰² All parties said goodbye, and Parent's advocate even wished everyone a safe trip home. There was no mention to Parents or Parent's counsel that District planned to continue the meeting without them present.¹⁰³ Parent learned upon receiving the Notice of Action dated December 17, 2021 that District had continued the meeting without her, her counsel, and her advocate.¹⁰⁴ Parent also received copies of the documents that were provided by the four members of the IEP team that chose to submit statements instead of signing the SLD eligibility form. Each person stated that they agreed with Crittenden's evaluation, but that they lacked sufficient knowledge to agree or disagree as to whether Student had a SLD.¹⁰⁵

Although it is somewhat unclear from the record whether District is disputing that Student has qualifying disabilities pursuant to the IDEA, Lamkin does state numerous times throughout her testimony and the video recording of the December 10, 2021 evaluation conference that it is District's position that Student is not in need of special education services.¹⁰⁶ Lamkin testified that the teachers working with Student on a daily basis did not

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ ADE H-22-25 Transcript Vol. II, pp. 81-82.

feel that he needs special education services.¹⁰⁷ She further testified that Student's needs could be met with accommodations in the general education setting.

CONCLUSIONS OF LAW AND DISCUSSION:

The only issue before this Hearing Officer is whether Student is eligible for special education services pursuant to the IDEA. In order for Student to be eligible for special education services, he must first meet the definition of a "child with a disability," which is defined in the IDEA as follows:

(A) In General. The term 'child with a disability' means a child –

- (i) With mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof needs special education and related services.

20 U.S.C. § 1401(3)(A). Essentially, the eligibility inquiry has two prongs. The first prong addresses whether Student has a qualifying disability. In situations where the answer to this inquiry is yes, the second prong, the need analysis, must be addressed. Specifically, the analysis must include an inquiry as to whether Student, by reason of a qualifying disability, needs special education and related services.

Considering the terms "special education" and "related services," it is important to consider the specific definitions set forth in the IDEA. "Special education" is defined as

¹⁰⁷ *Id.*

“specially designed instruction” that is tailored to meet the needs of a child with a disability. 20 U.S.C. § 1401(29). “Specially designed instruction means ‘adapting . . . the content, methodology, or delivery of instruction to address the unique needs of the child that result from child’s disability [and to] ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.’” *Lisa M. v. Leander Independent Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019) (citing 34 C.F.R. § 300.39(b)(3)). “Related services” is defined to include “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26)(A). It is important to note, however, that where a child needs only a related service and not special education, that child is not deemed to have established the need prong of the analysis. 34 C.F.R. § 300.8(a)(2)(i).

What it means to “need” special education and related services is not clearly defined in either the IDEA or the accompanying regulations, and there is little to no legislative history to provide guidance on this matter. *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000); *Lisa M.*, 924 F.3d at 216. Courts and hearing officers must consider the unique facts and circumstances presented in each case. Information to be considered includes parental input, teacher recommendations, information about the child’s physical condition, social or cultural background, and adaptive behavior in addition to a child’s grades and test scores. *Alvin Independent Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 383 (5th Cir. 2007).

In the present case, Crittenden's evaluation addressed two bases of eligibility, specifically SLD and OHI. As such, each eligibility category will be addressed separately, and both prongs of the analysis will be considered for each category.

Specific Learning Disability (SLD)

Pursuant to IDEA regulations, a "specific learning disability" is defined as a "disorder of one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia." 34 C.F.R. § 300.8(c)(10)(i). SLDs do not include, however, any learning problems that are the primary result of "visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." 34 C.F.R. § 300.8(c)(10)(ii). Assuming that Student has one or more SLDs and, thus, has a qualifying disability, the question then becomes that of whether Student, by reason of these SLDs, is in need of special education services.

It is noted that District argued in its post-hearing brief that there must be an adverse impact on educational performance in order for IDEA eligibility to be established. While this is true of all other categories, SLD does not require that adverse effect on educational performance be established. It appears that District was relying on *Alvin Independent Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 383 (5th Cir. 2007) in making this assertion, and that case dealt specifically with the category of OHI, which does require such analysis.

In the present case and considering the first prong of the eligibility analysis as outlined above, it is the opinion of this Hearing Officer that Student has a SLD in both written expression and math computation and, therefore, has a qualifying disability. Student performed similarly on three different achievement tests, namely the Kaufman Test of Educational Achievement, the Gray Oral Reading Test, and the Wechsler Individual Achievement Test, with nearly all scores pertaining to written expression and math calculation falling in the “below average,” “well below average,” or “extremely below average” range of scores.

Considering the area of written expression, Student’s reading composite score (addressing letter and word recognition and reading comprehension) on the Kaufman Test of Educational Achievement was within the “average range.” However, Student’s written language composite score (addressing written expression and spelling) fell at the 13th percentile, and his reading fluency composite score (addressing silent reading fluency, word recognition fluency, and decoding fluency) fell at the 5th percentile, both within the “below average” range of scores. Student also scored in the “below average” range on two additional subtests, specifically object naming facility and letter naming facility, with his percentiles in these subtests falling at the 13th and 2nd percentiles, respectively. On the Gray Oral Reading Test, reading rate, reading accuracy, reading fluency, and reading comprehension were measured. Student’s reading rate (16th percentile), reading accuracy (9th percentile), reading fluency (9th percentile), and reading comprehension (16th percentile) were all within the “below average” range of scores. Students overall oral reading index, which considered

fluency and comprehension, fell at the 10th percentile, and was also within the “below average” range of scores.

Crittenden used a cross battery approach to evaluate these scores and determine whether, based on a pattern of strengths and weaknesses, Student’s cognitive and academic performances in the area of written expression met the criteria for SLD identification. In doing so, Crittenden determined that there was evidence of specific weaknesses in cognitive function, unexpected underachievement, and below average aptitude-achievement consistency in the area of written expression. Crittenden further determined that Student exhibits reading and spelling characteristics indicative of dyslexia based on the fact that Student had consistently exhibited rapid automatic naming deficits and continued to do so based on the evaluation data that Crittenden had collected. Crittenden concluded that Student’s rapid naming and long-term retrieval deficits were likely contributing factors to Student’s reading and spelling deficits and recommended that Student be administered a full dyslexia intervention program.

Considering the area of math computation, Student’s math computation score (addressing math concepts and application, as well as math computation) on the Kaufman Test of Educational Achievement fell at the 5th percentile, within the “well below average” range of scores. Student’s scores on various subtests on the Wechsler Individual Achievement Test were similar. Specifically, Student’s math problem solving on the Wechsler was within the average range of scores; however, Student’s numerical operations score on this same test fell at the 2nd percentile and was within the “extremely below average” range

of scores. Student's overall mathematics score on the Wechsler Individual Achievement Test fell at the 8th percentile and was within the "well below average" range of scores.

Crittenden used a cross battery approach to evaluate Student's scores in the area of math computation and determine whether, based on a pattern of strengths and weaknesses, Student's cognitive and academic performances met the criteria for SLD identification. In doing so, Crittenden determined that there was evidence of specific weaknesses in cognitive function, unexpected underachievement, and below average aptitude-achievement consistency in the area of math computation.

With regard to both written expression and math computation, Crittenden noted that Student had received intensive intervention in reading and math going back as far as his kindergarten year of school. Despite these interventions, Student still showed deficits significant enough to qualify him as having a SLD in both written expression and math computation.

This Hearing Officer finds Crittenden's evaluation and results to be compelling and based on this evidence, it is the opinion of this Hearing Officer that Student has a SLD in both written expression and math computation. As such, the eligibility analysis shifts now to the second required prong, specifically that of whether, considering these SLDs, Student is in need of special education. Based on the evidence in the record, it is the opinion of this Hearing Officer that Student is, in fact, in need of specially designed instruction tailored to meet his individual needs. First, Crittenden testified that mere accommodation would not be sufficient to address Student's SLDs, particularly in the case of Student's math deficits. Crittenden specifically stated that it would not be enough for Student to simply be present

in a co-taught algebra class with accommodations, as he had been in the past. When pressed on this point, Crittenden explained that, particularly regarding Student's math deficits, accommodations such as use of a calculator would provide some help to Student but would not offset Student's significant deficits in understanding fundamental math concepts, such as subtraction.

In addition, other data was considered at the December 10, 2021 evaluation conference. District focused almost solely on the fact that Student often failed to turn in classroom assignments, placing the onus on Student and asserting that he lacked motivation to perform adequately in class. Considering other data in the record, however, District's conclusion is not supported. While it is true that Student had many missing assignments across his classes, other data sources supported Crittenden's findings. For example, Student's most recent ACT scores as of the date of the evaluation conference indicated that Student was "in need of support" in all areas, specifically reading, English, math, and science. Certainly, the ACT aspire measures performance at a given time, and completion of classwork does not come into play. Student's teachers also provided feedback that supported that Student was in need of special education. Mr. Bauldree acknowledged that Student often failed to turn in his work in Algebra II; however, he also explained that Student's grade during the first quarter of the 2021-2022 school year was a 60% and that this grade was based only on assignments that Student had submitted. When questioned about the accuracy of this grade, Mr. Bauldree stated that he thought that the percentage earned by Student during the first quarter, specifically 60%, was an accurate reflection of Student's level of understanding. Essentially, Student's understanding of Algebra II, at least based on the work

that had been submitted and graded, was near failing. Mrs. Nash-Freeman provided feedback to Crittenden and explained that Student was good at hands-on activities, but struggled to get anything down in writing and avoided all math. This also supports Crittenden's findings regarding Student's SLDs in written expression and math computation. It is also notable that Student's due process hearings have been ongoing for nearly two years, and during that time Student has remained in a co-taught math class with a special education teacher available to him. Aside from the fact that this seems to indicate that District knows that Student needs assistance, it is notable that Student continues to have significant math deficits. Certainly, it can be concluded that Student needs more individualized instruction than he has been receiving. Finally, and perhaps most instructive to this Hearing Officer on the issue of SLD, four of the individuals present in the evaluation conference refused to sign the SLD eligibility form and, instead, chose to submit statements indicating that they agreed with Crittenden's evaluation, but did not feel that they had sufficient knowledge to say one way or another whether Student had a SLD in either written expression or math computation. Certainly, these evaluation conference members could have simply stated that they had insufficient knowledge to determine whether Student had a SLD without going a step further and supporting Crittenden's evaluation results. The fact that they indicated specific agreement with Crittenden's assessment, however, is telling.

In conclusion, it is the opinion of this Hearing Officer that Student has SLDs in written expression and math computation. Additionally, in light of these disabilities, Student is in need of special education pursuant to the IDEA. Considering these findings, Student is eligible for special education services pursuant to the IDEA in the category of SLD. District

erred in concluding at the evaluation conference of Student that he did not qualify on this basis.

Other Health Impairment (OHI)

Pursuant to IDEA regulations, “other health impairment” means “having limited strength, vitality or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to educational environment that is due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder . . . ; and adversely affects a child’s educational performance. 34 C.F.R. § 300.8(c)(9). Assuming that Student has a qualifying disability pursuant to the category of OHI, and that disability adversely affects Student’s educational performance, the question then becomes that of whether Student, by reason of his qualifying disability, is in need of special education services.

In the present case and considering the first prong of the eligibility analysis as outlined above, it is the opinion of this Hearing Officer that Student has ADHD and that this condition adversely affects Student’s educational performance. Student was diagnosed with ADHD in past evaluations and, therefore, has an appropriate medical diagnosis regarding this condition. Crittenden reported based on his evaluation results that Student exhibited characteristics of an ADHD diagnosis in the classroom in that he is easily off task, easily distracted, disorganized, fails to complete work, has difficulty initiating tasks, and has difficulty maintaining focus on tasks that he does initiate. Crittenden testified that he, himself, witnessed Student’s inattention while he was evaluating Student. When asked if Student’s ADHD adversely impacts Student’s academic performance, Crittenden testified

that it did and further explained how Student's ADHD had been documented time and time again since he was very young, and how missing pieces of educational instruction over the course of time can snowball into missed skills and significant deficits. Crittenden specifically stated in his testimony that, based on Student's attention issues, he was of the opinion that that Student's attention issues "absolutely adversely affects" Student's educational performance at District.

This Hearing Officer finds Crittenden's evaluation and testimony to be compelling and based on this evidence, it is the opinion of this Hearing Officer that Student has a qualifying disability in the category of OHI. Student has an appropriate medical diagnosis of ADHD, a history of attention issues, and there is evidence that Student currently exhibits attention issues which adversely affect his educational performance at District. As such, the eligibility analysis shifts now to the second required prong, specifically that of whether, considering Student's qualifying disability in this regard, Student is in need of special education. Based on the evidence in the record, it is the opinion of this Hearing Officer that Student is, in fact, in need of specially designed instruction tailored to meet his individual needs.

Aside from Crittenden's specific observations of Student, Crittenden conducted interviews with four of Student's teachers. During interviews, Student's teachers reported that Student had many missing or incomplete assignments. In addition, his teachers indicated that Student had difficulty maintaining focus in class, and Student's English teacher even reported that he had seated Student next to a peer in class that is very organized and could help Student stay on task. Several teachers reported that Student procrastinated on assignments, was easily distracted in class, and often distracted other students as a result. It

was even reported that Student randomly stood up and wandered around his classrooms at times. One teacher in particular, Mrs. Marlin, reported that Student performs better when given hands-on tasks to complete, adding that getting Student to put his ideas on paper was difficult. Mr. Bauldree, Student's Algebra II teacher, reported that Student is often off task and must be re-engaged and redirected throughout the class period. Every one of Student's teachers that completed rating scales as part of Crittenden's evaluation indicated that Student's ability to stay on task in the classroom was below average. In fact, all teachers, with the exception of one, indicated that Student's ability to complete homework, turn in assignments on time, and complete classroom assignments was also below average.

In addition, teachers completed various rating scales as part of Crittenden's evaluation. Specifically, three of Student's teachers completed the Behavior Assessment System for Children scales. Based on the teacher rating form completed by Mrs. Nash-Freeman, Student was rated in the "at risk" range on subscales pertaining to aggression, attention problems, school problems, and atypicality. She further rated Student in the "clinically significant" range on subscales pertaining to hyperactivity, conduct problems, and externalizing problems. Student's overall behavior symptoms index fell in the "at risk" range. Similarly, Mr. Bauldree and Mr. Clark rated Student in the "at risk" range regarding the subscales for conduct problems, externalizing problems, learning problems, school problems, and atypicality. They further rated Student in the "clinically significant" range regarding hyperactivity and attention problems. Student's overall behavior symptoms index, based on Mr. Bauldree and Mr. Clark's ratings, also fell within the "at risk" range. In addition, two of Student's teachers, specifically Mr. Bauldree and Mr. Clark, completed the Behavior

Rating Inventory of Executive Function – 2nd Edition. With regard to this scale, they rated Student within the “mildly elevated” range on the plan and organize subscale, and within the “potentially clinically elevated” range on the inhibit, self-monitor, initiate, working memory, task monitor, and organization of materials subscales. Crittenden determined that Student’s overall global executive functioning composite based on these ratings fell within the “clinically elevated” range.

In conclusion and considering the evidence in the record as stated above, it is the opinion of this Hearing Officer that Student has a qualifying disability in the category of OHI, i.e., Student has ADHD and evidence in the record, specifically data received from teachers, suggests that this diagnosis adversely impacts his educational performance. Additionally, in light of this disability, evidence in this case supports that Student is in need of special education pursuant to the IDEA to address his deficits. As such, Student is eligible for special education services pursuant to the IDEA in the category of OHI. This Hearing Officer also finds, based on the testimony of Crittenden, that OHI is the more appropriate eligibility category for Student pursuant to the IDEA because Student’s attention deficits affect him across all classes and likely make his SLDs in written expression and math computation more significant overall.

IDEA Versus Section 504

District’s position, and particularly the opinion of Lamkin, throughout this case (and all prior due process hearings between the parties) is that even if Student has a qualifying disability, he is not a student in need of special education because any deficits that he has can be addressed using Section 504 accommodations in the general education classroom.

District's position in this regard is legally incorrect. The United States Court of Appeals for the Eighth Circuit has been clear that "although an individual who is eligible for services under the IDEA may also qualify for assistance under the Rehabilitation Act of 1973, the school district must comply with both statutes." *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996). The Court pointed out in *Yankton* that although both Section 504 of the Rehabilitation Act and the IDEA have been interpreted as requiring states to provide qualifying students with a free appropriate public education, only the IDEA requires the development of an IEP and specifically provides for transition services to assist students in preparation of entering a post-high school environment. *Id.* The Court specifically stated as follows: "Under the statutory scheme, the school district is not free to choose which statute it prefers. . . . If a student is eligible under the IDEA, appropriate services, including transition benefits, shall be provided. That some of those services may also be mandated by the Rehabilitation Act does not mean they are not "specially designed instruction" under the IDEA." *Id.*

In light of this precedent, and this Hearing Officer's conclusion that Student is eligible for special education pursuant to the IDEA in the categories of SLD and OHI, District is not free to substitute its opinion that a Section 504 plan would be better for Student. Student is eligible under the IDEA in not one, but two categories. As such, District is required to develop an IEP for Student and provide appropriate special education services. Here, it is the opinion of this Hearing Officer that Student's primary category for IDEA eligibility is OHI, and the IEP developed for Student needs to include necessary special education services to address same. However, Student still has SLDs in written expression and math computation;

therefore, his IEP must also address these areas of disability and include special education services necessary to do so.

ORDER:

The results of the testimony and evidence in ADE H-22-25 warrant a finding for the Parent. Student is eligible for IDEA services pursuant to two different eligibility categories, specifically SLD (written expression and math computation) and OHI. As such, District is ordered to do the following:

1. District is required to create an IEP for Student no later than April 25, 2022. The category of primary eligibility for this IEP shall be OHI, and the IEP must address special education services necessary to address Student's attention issues as caused by his ADHD. In addition, however, Student's IEP must acknowledge that he also has SLDs in written expression and math computation and provide special education programming to address Student's deficits as a result of these disabilities. Specifically, Student's IEP must, at a minimum, provide Student with an appropriate dyslexia program, such as Take Flight or other similar program recommended by Crittenden, as well as other specialized instruction to address Student's written expression and math deficits. Student's IEP team must also take into consideration Crittenden's recommendations, as set forth in his evaluation of Student. Finally, the IEP team must take into consideration Student's desire that he not be required to receive services in the resource room to the extent possible.
2. Regarding the development of Student's IEP as stated in Paragraph 1 of this section, it is also hereby ordered that **every single IEP meeting** required for

Student for the remainder of Student's education at District be facilitated by the Arkansas Special Education Mediation Project. District can contact the ADE for guidance on initiating this service, or it can contact the program's coordinator directly (Tiffany Kell, (501) 916-5430). Attorneys for both parties will be permitted to be in each facilitated IEP. Given the contentious nature of prior meetings between the parties, as well as the hostile way Lampkin facilitates special education conferences and addresses Parent, it is the Order of this Hearing Officer that requiring facilitated IEP meetings is likely the only way to create calm, productive IEP meetings for the purpose of determining and addressing the needs of Student.

3. District is ordered to provide all special education staff at El Dorado High School, including Shawn Lamkin as the Special Education Services Director, with a minimum of eight (8) hours of special education training regarding the IDEA, at District's expense. This training shall have particular focus on IDEA eligibility, requirements for IEP meetings, and the differences between IDEA and Section 504 of the Rehabilitation Act. This must be completed no later than June 1, 2022.
4. It is the recommendation of this Hearing Officer, not order, that District consider having a special education staff member with no prior involvement in this case to step in and manage Student's special education file. At this point, a neutral person without involvement in the prior due process hearings will likely have more success in cooperatively working with Parent to meet Student's needs.

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

03/22/2022

DATE