

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

**XXXXXXXXX and XXXXX  
XXXXXXXXX, AS PARENTS OF  
XXXXXXXXXXXXXXXXXXXXX,**

**Petitioner/Parents**

**VS.**

**NOS. H-24-27 and  
H-24-30, consolidated**

**PULASKI COUNTY SPECIAL  
SCHOOL DISTRICT,**

**Respondent/District**

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

XXXXXXXXXXXXXXXXXX (“Student”) is a nine-year-old child with a learning disability who is eligible for special education services from the Pulaski County Special School District (“District”). On January 8, 2024, XXXXXXXX and XXXXXXXXXXXX (“Parents” or as applicable, “Mother” or “Father”), filed a request for a due process hearing pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. (“IDEA”) alleging that District denied Student a Free Appropriate Public Education (“a FAPE”) based in part on its failure to evaluate Student in all areas of suspected disability. Parents request the following relief: (1) an occupational therapy evaluation by an evaluator of their choice; (2) a functional behavior analysis conducted by a private Board-Certified Behavior Analyst; and (3) compensatory education if the hearing officer finds a denial of FAPE.

## **ISSUES PRESENTED**

A. Whether the District failed to assess Student in all areas of disabilities for which he is eligible for special education services, when the evaluation did not include dyslexia and dyslexia services were not made a part of the IEP; and

B. Whether District denied Student a FAPE by either failing to develop an appropriate IEP or in implementing his IEP, Behavior Management Plan and Crisis Plan, which resulted in his disability-related maladaptive behaviors at school negatively affecting his academic progress.

## **NON-JUSTICIABLE ISSUES**

Parents also allege that District's conduct constitutes disability discrimination in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165. Parent also asserts retaliation based on the disability discrimination claims as well as retaliation for the exercise of Student's free speech rights under the First and Fifth Amendments to the U.S. Constitution. This Hearing Officer has no jurisdiction over disability discrimination claims or violations of freedom of speech. *See* Ark. Dept. of Ed., Spec. Ed. Rules §10.01.22.1. Accordingly, to the extent Parents' due process complaint raises disability discrimination claims and violations of freedom of speech, those claims are **DISMISSED WITHOUT PREJUDICE**.

## **PROCEDURAL HISTORY**

On December 21, 2023, District filed a Due Process Complaint requesting a hearing pursuant to the IDEA to show that its occupational therapy evaluation of Student was appropriate. The assigned case number for that case is H-24-27. The due process hearing was scheduled to begin on January 30, 2024.

On January 8, 2024, Parents filed a Due Process Complaint (“Complaint”) requesting a hearing pursuant to the IDEA. The assigned case number for that case is H-24-30. The two cases were consolidated by Order dated January 26, 2024, and a hearing was set to begin on February 27, 2024. A continuance was granted for good cause and the hearing rescheduled for April 10, 2024, to April 12, 2024.

At the pre-hearing conference held on April 5, 2024, Parents advised that they had paid for an independent occupational therapy evaluation, which was the sole subject of District’s complaint in H-24-27. To request reimbursement for that independent evaluation, Parents would have to either amend their complaint or file a second complaint. District opposed an amendment. Accordingly, Parents withdrew their request for an independent evaluation, and the parties agreed that District’s complaint was now moot. *See* Pre-Hearing Conference Tr., pp. 14-17; Parents Post-Hearing Brief, p. 27; District Post-Hearing Brief, p. 3.

In addition to its response to Parents’ Complaint, District filed a Motion to Assign Burden of Proof and a Motion to Limit Length of Hearing. The Motion to Assign Burden of Proof was granted, and the burden of proof assigned to Parents. The Motion to Limit Length of Hearing was denied.

Parents’ Complaint alleges that District failed to provide Student a FAPE based in part on its failure to evaluate Student in all areas of suspected disability. For relief, Parents request that District be ordered to: (1) provide Parents an occupational therapy evaluation by an evaluator of their choice; (2) contract with a private Board-Certified Behavior Analyst ("BCBA") approved by Parents to conduct an FBA, to help the IEP team develop a BIP, and to train Student's teachers and support staff on implementation of the BIP to the extent this remains an issue; (3) provide Student compensatory education for lost learning time resulting from the change of

placement, suspensions, and the inappropriate IEP; an expired IEP, and/or the District's failure to implement his IEP.<sup>1</sup>

Having been given jurisdiction and authority to conduct the hearing pursuant to the IDEA, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Cheryl L. Reinhart, J.D., Hearing Officer for the Department, conducted a closed impartial hearing. Parties present for the hearing were Parents, represented by Ms. Theresa L. Caldwell, Caldwell Law Office, Little Rock, Arkansas, and Stephanie Cole, the District's Special Education Director, represented by Mr. Jay Bequette, of Bequette, Billingsley & Kees, PA, of Little Rock, Arkansas. Audra Alumbaugh was present as an advocate for Parents.

Testimony was heard on April 11, 12, 15, and 29, 2024. *See* Transcript, generally, Vols. I-IV. In addition to Parents, the following witnesses testified in this matter: Ellen Morris, Student's special education teacher, third grade, Joe T. Robinson Elementary School; Ruby Blanton, Student's general education teacher, third grade, Joe T. Robinson Elementary School; Michele Pickett, Principal, Joe T. Robinson Elementary School; Tammy Helmick, counselor, Joe T. Robinson Elementary School; Pamela Keith, lead dyslexia teacher for District; Dr. M. Tracy Morrison, Engage of Jonesboro, expert witness for Parents; RaDiah Reynolds, Speech/Language Pathologist and Certified Academic Language Therapist, expert witness for Parents; and Missy Shipman, occupational therapist for District.

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<sup>1</sup> The parties submitted their post-hearing briefs on May 24, 2024. Parents state in the brief that they placed Student in Compass Academy on February 12, 2024, after filing their Complaint for Due Process. Parents raise the issue of private placement for the first time in their post-hearing brief, and request for the first time that District be ordered to pay Compass Academy tuition as compensatory education. Parents' Post-Hearing Brief, pp. 27, 32. The issue was not raised at the hearing, and there was no evidence at the hearing as to the appropriateness of private placement. Therefore, District did not have an opportunity to defend a request for private placement. Accordingly, the issue of private placement is not considered in this decision.

## FINDINGS OF FACT

### A. Background

At the time of the Complaint, Student, a nine-year-old male now in the third grade, had been enrolled at District in Robinson Elementary School since kindergarten. Student suffered from extreme neglect until he was adopted (along with his sister) by Parents when he was less than two years old. Tr. Vol. III, p. 57. At age four, Student was diagnosed with attention deficit hyperactivity disorder (“ADHD”) and Unspecified Disruptive, Impulsive-Control, and Conduct Disorder. Parent Exh., p. 407. Student was also evaluated for occupational therapy services by The Allen School, a school for the treatment of children with intellectual and developmental disabilities, and determined to need only consultative occupational therapy services. Parent Exh, pp. 481-484. Student attended preschool at The Allen School for two years, then enrolled in kindergarten at District. Tr. Vol. III, pp. 58-59. Father testified that, at that time, Student was “very intelligent” but his social skills were an issue, although not “severely pronounced,” had sensory issues (for example, things that touched him, loud noises, lots of activity), was somewhat oppositional, and sucked his thumb. Tr. Vol. III, pp. 60-61. Tr. Vol. III, p. 59. Despite these issues, Student did well in pre-kindergarten, kindergarten, and first grade, according to Father. Tr. Vol. III, pp. 59-62.

Student was first referred for special education in kindergarten on September 17, 2020, and District determined that he was eligible for special education services on December 18, 2020. Parent Exh., p. 302. The evaluation conducted by District noted that Student had below average cognitive ability and “a wide range of academic scores.” Dist. Exh., p. 17, 22. The evaluation also noted reading comprehension and math as strengths, but stated that Student showed weaknesses in “basic reading skills, math calculation skills, and writing skills, including

spelling.” Dist. Exh., p. 22. The evaluator recommended special education eligibility under Other Health Impairment (“OHI”) based on the evaluation and his diagnoses at that time of ADHD and Unspecified Disruptive, Impulsive-Control, and Conduct Disorder. Id., p. 23. District identifies Student’s initial eligibility determination date as December 18, 2020. Id., pp. 27-28. As Student’s eligibility date falls in December, his IEPs are reviewed in the middle of each school year, covering the last half of one school year and the first half of the next.

**B. 2021-2022 School Year (7/1/21 to 6/30/22) – First Grade**

*The statutory period for this case begins on January 8, 2022, the middle of Student’s first-grade year.*

Father testified that in first grade, Student exhibited more “push back when given a directive.” Tr. Vol. III, p. 62. On October 27, 2021, Student’s IEP team met to consider the need for a functional behavioral assessment (“FBA”). Parent Exh., p. 299. The team noted that Parents were considering seeking an evaluation for autism from the UAMS Dennis Developmental Center (“DDC”), but due to the waiting period District would consider a crisis/safety plan for Student. Parent Exh., p. 299-300.

Student’s IEP for the period of 12/16/21 to 12/16/22 (mid-first grade to mid-second grade) (Parent Exh., pp. 346-355), provided special education services of 30 minutes each per day of direct instruction in literacy and math, and related services of 60 minutes per month for occupational therapy consultation. Parent Exh., p. 351. The IEP also provides multiple accommodations for Student (Id., p. 350), strategies for behavior management (Id., p. 349), one goal for literacy, and one goal for math (Id., p. 352).

The IEP team met on January 13, 2022 to discuss Student’s classroom behavior, and develop a behavior management plan. See Parent Exh., pp. 337-341. Two months later on March

8, 2022, the IEP team met again to create a Crisis Plan to address Student’s elopement tendencies. Parent Exh., pp. 346, 365-367. The team also sought parental consent for an assessment to determine whether Student needed a one-on-one paraprofessional. Parent Exh., p. 368. Parent Exh., p. 346.

**C. 2022-2023 School Year (7/1/22 to 6/30/23) – Second Grade**

Student’s second grade year saw several significant developments for Student: school-based mental health counseling, a dyslexia diagnosis, an increase in maladaptive behaviors leading to out-of-school suspensions, the development of behavior management and crisis plans, and an evaluation and diagnosis of autism at the UAMS Dennis Developmental Center (DDC).

**1. School-based Mental Health Services.** During the second grade, Student began receiving school-based mental health services from Youth Home, provided by Ann Smith. Tr. Vol. I, p. 161. Morris, Student’s special education teacher, testified that the school-based mental health services were private, and were not provided through Student’s IEP. Id. Morris stated that she had invited Ann Smith to Student’s IEP meetings. Id., p. 164. Student’s principal testified that Ann Smith met with Student weekly and had a “good rapport” with Student. Tr. Vol. II, pp. 124-125. District would call on her at times for her assistance during behavioral problems and her office was one of her “safe places.” Id.

**2. Dyslexia Diagnosis and Services.** Second grade marked the initiation of District providing dyslexia intervention services to Student. Tr. Vol. I, p. 17. At that time, his Lexile score was at a beginning reader level. Id. Morris testified that she had noted Student had handwriting and written expression deficits also. Id., pp. 23, 76. On November 30, 2022, a Level 1 Dyslexia Screener was administered to Student, with the results showing that Student was considerably below expected level in decoding, word recognition, fluency rate,

spelling/encoding, written expression, and comprehension. Parent Exh., p. 573. Parent consented to a Level 2 Dyslexia Screening, and on January 5, 2023, Parents provided consent for District to begin providing services in the Dyslexia Program. Parent Exh., p. 571. Principal, Michele Pickett, testified that Student began receiving dyslexia services on March 2, 2023. Tr. Vol. II, p. 144. Dyslexia services were not made a part of Student's IEP, because, as Pickett explained, "In Pulaski County, because we diagnose characteristics of dyslexia, it is part of the general education." Tr. Vol. II, p. 178.

According to the testimony of several witnesses, Student was exposed to at least three different reading programs:

- Morris used Phonics First, a phonics curriculum approved by the Department as a dyslexia curriculum. Morris chose Phonics First because it had a strategic and systematic, multi-sensory approach that she believed would be beneficial for her students with reading fluency issues (Tr. Vol. I, pp. 93-94);
- Blanton, Student's regular education teacher, used the District's Benchmark curriculum for reading (Tr. Vol. II, p. 95); and
- The "dyslexia person" used the Soliday System to deliver dyslexia intervention services to Student (Tr. Vol. II, p. 95).

RaDiah Reynolds, a Certified Academic Language Therapist ("CALT") and speech-language pathologist, testified as an expert witness for Parents. Tr. Vol. III, p. 104. Ms. Reynolds has worked in dyslexia intervention since 2018, and has been a speech-language pathologist since 2010. Id. The question was raised to Reynolds about whether using multiple reading programs could pose a problem for Student, given his characteristics of autism and clear difficulties with reading comprehension and written expression. Tr. Vol. III, pp. 152. Reynolds stated that it would be very confusing for a student with a language disorder. Id. However, it is not uncommon for educators to pull from different reading programs to address a student's

individualized needs. Tr. Vol. III, pp. 150. She also pointed out that she did not see much progress in Student's dyslexia worksheets that she reviewed from Parents exhibits. Tr. Vol. III, p. 142.

**3. 12/9/22, IEP Annual Review.** District conducted the annual review of Student's IEP on December 9, 2022, of his second-grade year. Parent Exh., pp. 220-230.

**4. April 2023 Suspensions.** Student was suspended from school on April 13, 2023, April 20, 2022, and April 21, 2023 (Dist. Exh., pp. 668, 670-671), for the following behavioral incidents described on the subsequent Manifestation Determination Review ("MDR"):

- April 12, 2023, [Student] pushed a student so hard that the student crushed his glasses against a pole and he also tried to run away from the school campus after this incident and security had to run after him to make sure he was safe.
- April 18, 2023, right before NWEA testing Ms. Sinh and Mrs. Willmuth tried to get [Student] to get off his laptop to get into the NWEA test and got mad because he had to get off his game. He told the teachers to "get out of my business!" and "get away from me." After Mrs. Willmuth took his laptop away, he ran out of the classroom and the school building. Ms. Sinh chased after him to make sure he did not run into Highway 10. Dist. Exh., p. 224.

**5. May 1, 2023, IEP Team Meeting.** The IEP team met on May 1, 2023, to review Student's IEP in light of his recent behavioral incidents and discipline. Parent Exh., pp. 241-250. The IEP team amended the IEP by adding strategies for behavior management, and amended Student's behavior plan and crisis safety plan. Parent Exh., p. 257.

**6. May 2, 2023, PBIS Major Referral; OSS.** On May 2, 2023, Student was involved in a behavioral incident primarily over attempts to have him stop using his computer. Student was screaming, yelling disrespectfully at his teachers, eventually kicking and knocking over items in the library. After trying to elope, Student hit and kicked the School Resource Officer, and threatened to kill him and the behavior specialist who was assisting. The officer handcuffed

Student to a chair, and Student continued the behaviors. Mother was called to the school. Student received a five-day suspension, but was allowed to return to school one day early, because “[District] recognizes the importance of being in school.” Dist. Exh., pp. 175-176.

**7. May 4, 2023, Dennis Development Center Evaluation.** Student was evaluated for possible autism by the UAMS Dennis Development Center (“DDC”) on May 4, 2023. *See* Parent Exh., p. 400-422. As a result of the evaluation, DDC diagnosed Student with “Autism Spectrum Disorder, without accompanying basic language impairment, without accompanying intellectual impairment, and requiring level 1 support in the area of social communication and level 2 support in the area of restricted, repetitive behaviors.” *Id.*, p. 405-406. The DDC report recommends that Student “be considered for placement into *speech-language therapy services* through the local school district to address deficits in social/pragmatic language skills,” and considered for “*direct occupational therapy services* ... given his difficulties in the school setting,” particularly to “address sensory processing issues [and] difficulty with handwriting.” (emphasis added) *Id.*, pp. 405, 417. Mother testified that District advised her that based on those evaluations, “the pragmatic speech and OT therapy were not necessary for learning in school, that was like a life skill, not at school.” Tr. Vol. IV, p. 65.

**8. May 8, 2023, IEP Team Meeting.** The IEP team met again on May 8, 2023, for the purpose of discussing Student’s behavior and the need to update his IEP, behavior plan, and crisis plan. Parent Exh., p. 266. The team added 30 minutes per day of social skills direct instruction, and “brainstormed ideas” on updates to the behavior plan and crisis plan. *Id.* Parents advised the IEP team at that meeting that Student was evaluated by the DDC for possible autism on May 4, 2023, but did not yet have the DDC report. *Id.* The IEP team amended the IEP (Dist. Exh., p. 213), amended Student’s Behavior Management Plan (Dist. Exh., pp. 235-240), and

conducted an FBA (Dist. Exh., pp. 226-233).

9. **May 8, 2023, MDR.** The IEP team also conducted an MDR on May 8, 2023, which resulted in a five-day suspension. Dist. Exh., pp. 224-225. However, there are no days of suspension shown in Student's attendance record. Dist. Exh., p. 671.

10. **Receipt of DDC Evaluation Report.** Parents provided a copy of the DDC report to District on or about the last day of school. Tr. Vol. IV, p. 64. A copy of the report bearing a date-stamp of June 7, 2023, appears at Dist. Exh., p. 179.

**D. 2023-2024 School Year (7/1/23 to 1/8/24) – Third Grade**

The period from July 1, 2023, to January 8, 2024, was a busy time for Student's IEP team, as well as a difficult four months for Student at the beginning of his third-grade year.

1. **July 12, 2023, IEP Team Meeting.** District met, by video conferencing, to review the DDC evaluation that provided a new diagnosis of autism. *See* Parent Exh., pp. 1-15, 17-18. The IEP team for this meeting consisted of Parents and two persons from the District -- Melissa Kilpatrick, serving in the roles of special education teacher, general education teacher, and LEA representative, and Rebecca Smith, who served as the individual to interpret evaluation results. Parent Exh., p. 10, 17-18.

Although Parents had already provided a copy of the full DDC evaluation to District, the IEP team told Parents at the meeting that they did not have a copy; Parents emailed a copy to District during the meeting. Tr. Vol. IV, p. 64. As a result of the new diagnosis, the team approved new evaluations for achievement, executive function, behavior, and sensory processing. *Id.*, p. 17. The team amended the IEP to add a new behavior goal and revised Student's accommodations. *Id.*

2. **Evaluations.** Following the recommendations of the IEP team made on July 12, 2023,

District conducted a specialized reevaluation (September 14, 2023), and an occupational therapy initial evaluation (October 2, 2023).

**(a) 9/14/23 Specialized Reevaluation.** The specialized reevaluation was conducted by Rebecca Smith, M.S., District’s licensed school psychology specialist. See Parent Exh., pp. 372-399. The report recommends that Student “meets eligibility criteria for special education services under the IDEA category of Autism.” Id., p. 392. Conclusions from the evaluation included:

- ... multiple characteristics of his ASD diagnosis *affecting his acquisition of educational objectives as well as socially.*
- ...significant adaptive skills deficits in Communication, Functional Academics, and Social areas...
- [BASC-3 adaptive scores] At-Risk and/or Clinically Significant score [both school and home settings] in ... Aggression, Conduct Problems, Depression, Attention Problems, Atypicality, Adaptability, Leadership, Anger Control, Bullying, Emotional Self-Control, Executive Functioning, Negative Emotionality, Resiliency, ADHD Probability, Autism Probability, Emotional Disturbance Probability, and Functional Impairment...
- [BRIEF-2 Scores (teacher form)] ... Clinically Elevated ratings in the areas of Inhibit, Self-Monitor, Shift, Emotional Control, and Working Memory with Potentially Clinically Elevated scores in Initiate, Plan/Organize, and Organization of Materials ...
- [KTEA-3 academic skills] ... below average abilities in basic reading skills, reading comprehension, math problem solving, math calculation, and silent reading fluency, and word recognition fluency ... [and] significant deficits in written expression and decoding abilities.

**(b) 9/8/23 Occupational Therapy Initial Evaluation.** The occupational therapy initial evaluation was conducted on September 8, 2023, by Missy Shipman, an occupational therapist employed by District. Tr. Vol. IV, p. 112. Shipman has a master’s degree from the occupational therapy program at the University of Central Arkansas. Id. Shipman’s report (dated October 2, 2023) concluded that consultative occupational therapy services was all that Student

needed. Dist. Exh. p. 273-301. She recommended that, “[Student]’s delays in executive functioning skills, social skills, and sensory sensitivity and avoidance do affect his ability to participate in grade level activities ... [but] can be adequately addressed through consultative occupational therapy services ... [of] 15 minutes ... each week.” Dist. Exh., p. 273.

That conclusion was strongly challenged by Dr. M. Tracy Morrison, who testified as an expert witness for Parents. See Tr. Vol. III, pp.7-54. Dr. Morrison is an occupational therapist with advanced post-doctoral training for four years in cognitive neuroscience. Tr. Vol. III, p. 7; *see also* Parent Exh. pp. 732-737. Dr. Morrison developed assessments for executive functioning that are used as “gold standard” in occupational therapy and psychology. Tr. Vol. III, pp. 7-8. She now also operates a school, Engage, for 130 students, and provides outpatient behavior, speech, and occupational therapy services. *Id.* The school specializes in students who have ADHD, autism, and high anxiety. *Id.* Morrison testified that she had reviewed District’s occupational therapy evaluation, and it is her opinion that the conclusion of the occupational therapist did not align with the data in the report. The evaluation measures Student’s Visual-Motor Integration (“VMI”) score at 1.4 standard deviations below average, but his visual perception is above average and motor coordination is average. Tr. Vol. III, p. 21; Parent Exh., p. 467. Morrison testified that the evaluator should have conducted a Bruininks Oseretsky Test of Motor Proficiency (“BOT”) to determine the reason for Student’s low VMI in light of the results for visual perception and motor coordination. Tr. Vol. III, pp. 21-24. While the evaluator recognized that Student’s drawing patterns “were immature,” citing that he drew bottom to top and right to left, she stated that “this did not affect the quality of his performance.” *Id.*, pp. 24-25; Parent Exh., p. 467. According to Dr. Morrison, the evaluator’s opinion should not negate the qualitative test data, and the evaluator should have gone deeper with the testing to determine why

Student's VMI was so low. Id. If Student is struggling with fine motor skills, "he is going to fall behind in writing, possibly reading, he is going to struggle with precision, line, shapes, writing words, that he is probably going to experience a fair amount of anxiety when it comes to writing assignments... [I]t is like asking a five-year-old to do third grade work and then grading them at that level." Id., p. 26. Dr. Morrison further questioned the validity of the School Function Assessment and the Sensory Profile of the evaluation. Id., pp. 28-33. Morrison testified that if a student falls below one standard deviation on the Sensory Profile, then occupational therapy intervention is required. Id., p. 34. Finally, Dr. Morrison testified that the executive functioning testing was not a standardized test with quantitative data. Id., pp. 36-37.

Shipman's report does not mention the DDC evaluation and diagnosis of autism. In fact, Shipman testified that she was not aware of the diagnosis and District did not provide her with the report "until well after" her evaluation. Tr. Vol. IV, pp. 132-133. While she conducted the evaluation on September 8, 2023, Shipman noted in her October 2, 2023, consultation notes that she discussed with the IEP team "executive functioning and Dennis Developmental report," noting that Student's diagnosis was changed to autism. Parent Exh., p. 489. Shipman testified that knowing that diagnosis would be a considerable influence on her evaluation of Student. Id. Yet, two months later, Shipman's 2022-2023 Occupational Therapy Annual Review dated December 8, 2023, still does not reference the diagnosis of autism or acknowledge the DDC evaluation. See Parent Exh., pp. 474-475. Shipman also testified that she did not know that Student was still sucking his thumb in the third grade, and that it was "concerning." Tr. Vol. IV, p. 132.

**3. September 21, 2023, OSS.** On September 21, 2023, Student received a PBIS Major Referral for being out of the classroom without permission, taking a balloon and refusing to

release it, walking into other classrooms, and slapping a teacher on the leg. Student received a one-day OSS. Dist. Exh., p. 589.

**4. October 2, 2023, IEP Team Meeting.** The IEP team met on the morning of October 2, 2023, to review the DDC evaluation, the new specialized evaluation, and new occupational therapy evaluation. Dist. Exh., p. 324. The team adopted the occupational therapist's recommendation. The team added some accommodations to "help with executive functioning concerns." Parent Exh., p. 21. The team also noted his primary diagnosis as autism. Parent Exh., p. 36.

**5. October 2, 2023, OSS.** On the afternoon of October 2, 2023, Student left his classroom, and was intercepted by the School Resource Officer and another teacher. Upon his return to the classroom, he threw a Chromebook, knocked over a desk, and left the classroom again. Student received a two-day OSS Dist. Exh., p. 587.

**6. October 13, 2023, IEP Team Meeting.** The IEP team met to consider one-on-one paraprofessional support for Student following the OSS. Parent Exh., pp. 39-40. The team added services for instruction and goals to support his needs in the area of emotional control. His behavior plan was revised and the Check-in/Check-out sheets amended to match the behavior goals. Student's use of the Chromebook, which leads to behavior problems, was discussed, and District decided not to remove Student's access to the Chromebook. Parent Exh., p. 57.

**7. October 16, 2023, OSS.** On October 16, 2023, Student became upset when his teacher locked his Chromebook. He left his classroom and went to another room down the hall where he locked himself in. When the door was unlocked, he ran to another

office, turned chairs over, hit his mental health counselor, and eloped from the building. Student received a one-day OSS. Dist. Exh., p. 585.

**8. October 23, 2023, OSS.** On October 23, 2023, Student received a PBIS Major Referral resulting in a three-day OSS, for arguing with his teacher over unifix cubes and his Chromebook, then escalating to throwing items off of her desk, leaving the classroom, cursing his mental health counselor when she encountered him, knocking over desks and a utility cart, slapping his teacher twice, and throwing objects at a student. Dist. Exh., p. 582.

**9. October 27, 2023, IEP Team Meeting.** The IEP team met again to discuss Student's problematic behaviors, and to again discuss a one-on-one paraprofessional to support Student. Parent Exh., p. 59. The team decided to delay adding the paraprofessional until a student support assessment could be conducted, and instead provided a temporary student support paraprofessional. Parent Exh., p. 71. The Notice of Action further states, "Robinson Elementary has requested behavior support services with the district Behavior Intervention Specialist. [Student]'s parents are considering ABA therapy for behavior support at this time. Id.

**10. October 30, 2023, OSS.** Student received another PBIS Major Referral resulting in a one-day OSS after becoming upset about being asked to put his Chromebook away, and his behavior escalated to walking around the room knocking things off the teacher's desk, throwing items, kicking book bins and knocking books onto the floor. Dist. Exh., p. 583.

**11. November 3, 2023, OSS.** Student received a PBIS Major Referral when, on November 3, 2023, he became angry about putting away his Chromebook, and escalated into threatening to throw his Chromebook, chairs, and cool-down crate at the teacher. Student began yelling at the teacher and School Resource Officer to "shut the [f\*\*\*] up; shut the hell up." He

then threw items out of the cool-down area, and hit the School Resource Officer. Student was given a three-day suspension. Dist. Exh., p. 580.

**12. November 13, 2023, MDR and OSS.** Student received a PBIS Major Referral when he “told another student to shut the [f\*\*\*] up and then got up from his seat and got in the other student’s face and said, ‘I’m about to knock your face off.’ ...” Dist. Exh., p. 578. This OSS now brings the number of days that Student has been suspended since the first of school to twelve. District. Exh., p. 672. District conducted an MDR on November 13, 2023, determined that his behavior was disability-related and administered a four-day OSS.

**13. November 27, 2023, IEP Team Meeting.** As a result of the suspensions, the IEP team also met on November 27, 2023, to review Student’s IEP and behavior plan. Parent Exh., pp. 74-88. The team doubled Student’s direct instruction for each of literacy, math, and social skills to 300 minutes per week, which correspondingly reduced the amount of transitioning time for Student. Parent Exh., p. 81. Student’s behavior plan was also reviewed and revised by the IEP team. Parent Exh., pp. 93-98.

**14. November 30, 2023, OSS.** On November 30, 2023, Student became upset when another student “bumped into him during indoor PE.” His behavior escalated to throwing items and attempting elopement. Student twice grabbed another student by the shirt collar, choking the student and swinging his fist at him. Student had to be pulled off the other student by three adults. Student received a five-day OSS. Dist. Exh., p. 576.

**15. December 7, 2023, IEP Team Meeting – Annual Review.** At the annual review of Student’s IEP, which Parents’ attorney and Student’s advocate (Alumbaugh) attended, the IEP team amended the IEP, which now contains the following:

- Direct instruction in social skills, math, and English language arts, 300 minutes per week of each, placing Student in the regular education classroom 57.14% of the time. Student has nine goals for English language arts, five goals for math, and three goals for behavior.
- 15 minutes per week (60/month) of occupational therapy consultation is provided.
- A temporary one-on-one paraprofessional is provided for seven hours each day.
- Accommodations are included.

Parent Exh., pp. 107-136. At the meeting, Parents requested that Dr. Barnes, BCBA, provide behavioral training, and District agreed to consider it. Parent Exh., p. 148. Parents also expressed a concern for the dyslexia curriculum being used. Id. The IEP team noted that Student’s mental health therapy sessions increased from one to two per week “to assist and support behavioral concerns, strategies, and interventions.” Id. Student’s Behavior Support Plan was also amended. Parent Exh., pp. 143-145.

**16. December 12, 2023, Pediatrics Plus Occupational Therapy Evaluation.** On December 12, 2023, Parents presented Student for an occupational therapy evaluation by Pediatrics Plus. Parent Exh., p. 455. The evaluation report acknowledges the autism diagnosis of May 2023 by DDC. Id. Pediatrics Plus administered the BOT-2, including four fine motor subtests: fine motor precision, fine motor integration, manual dexterity, and upper-limb coordination.” The report states that Student “presented with moderate to severe delays in all areas of the BOT-2.” Id., p. 456. The report further states that Student exhibited a “moderate delay in social/cognitive skills” on the Pediatric Evaluation of Disability Inventory-Computer Adaptive Test (PEDI-CAT). Id., p. 457. Finally, the report includes clinical observations concerning Student’s sensory processing, as follows:

Conduct: [Student] almost always can be stubborn and uncooperative, has temper tantrums, resists eye contact, and frequently rushes through coloring/writing/drawing, seems more active than same aged children, and does things in a harder way than is needed.

Social Emotional: [Student] almost always seems to have low self-esteem, needs positive support to return to challenging situations, is sensitive to criticisms, has definite predictable fears, expresses feeling like a failure, is too serious, has strong emotional outbursts when unable to complete a task, struggles to interpret body language or facial expression, gets frustrated easily, has fears that interfere with daily routines, is distressed by changes in routines/plans/expectations, interacts or participates in groups less than same aged children, and frequently has difficulty with friendships. Id., p. 459.

**17. December 13, 2023, MDR.** On December 13, 2023, District conducted an MDR, for the incident that occurred on November 30, 2023. District notes that this is the sixth time Student has been suspended during the 2023-2024 school year (third grade) for “a total of sixteen days.” Parent Exh., p. 142. According to Student’s attendance records, the actual total number of days Student was suspended in the first four months of his third-grade year is seventeen. Dist. Exh., p. 672.

#### **E. Academics**

Father testified that Student began regressing in second grade. Tr. Vol. III, p. 92. Comparing Student’s RIT scores from NWEA MAP testing Spring 2022 (end of second grade) to Fall 2023 (beginning of third grade), Student’s RIT scores in math dropped precipitously (from a 174 RIT score to 156). Parent Exh., p. 541. Yet, Student’s scores regained lost ground and by the Fall 2023 NWEA MAP testing, his RIT score in math was a 189, grade level. Id. Similarly, and despite his continued behavioral struggles in the third grade, Student’s STAR math test scores rebounded by November of his third-grade year, from a grade equivalent of 2.1 in STAR Math at August 22, 2023, to a grade equivalent of 3.1 at November 26, 2023. Parent

Exh., p. 542.

Morris testified that by the end of the second grade, Student was behind more than two grade levels in reading. Tr. Vol. I p. 185. She also testified that he had difficulty with testing both behaviorally and academically. Tr. Vol. I, p. 179. In September, 2023, Student's NWEA MAP reading scores were below mean (29<sup>th</sup> percentile) for growth and for achievement (7<sup>th</sup> percentile). Dist. Exh., pp. 606-607. His language arts achievement score was also below mean (6<sup>th</sup> percentile). Dist. Exh., pp. 615-616. Nevertheless, by the end of the second grade, Student's grade equivalency on the STAR Reading test given on April 6, 2023, was 3.3, above third grade level. Parent Exh., p.535. By November of Student's third-grade year, Student was clearly struggling behaviorally with seven days of suspension in November, before the STAR tests were administered. Dist. Exh., p. 672. District asserts that at April 6, 2023 (end of second grade), Student's STAR Reading score was 3.3, "considerably above grade level." Dist. Post-Hearing Brief, p. 9. Yet, this ignores evidence that Student's reading level dipped from a grade equivalent of 2.1 at August 23, 2023, to a grade equivalent of 1.8 at November 26, 2023 (mid-point of third grade). Parent Exh., p. 525. Further, NWEA MAP testing for third grade indicates a Lexile Level of BR-145L-5L, a beginning reader level that Blanton testified is mid to end of kindergarten. Parent Exh., p. 503, 505; Tr. Vol. II, p. 11.

## **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 out 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).

The first part of the analysis determines whether the district complied with IDEA procedural requirements. Procedural inadequacies are violations only if they (a) impede the child's right to a FAPE; (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (c) cause a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

In the second part of the *Rowley* analysis, a court or hearing officer must determine whether the district met the IDEA's substantive requirements. A district must develop an IEP that is "tailored to the unique needs of a particular child" (*Rowley*, 458 U.S., at 181, 102 S. Ct. 3034), and is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197, L. Ed. 2d 335 (2017).

#### **A. Procedural Violations**

The IDEA requires that once a child is identified as potentially having a disability, a school district **must** conduct "a full and individual evaluation to determine if the child is a child with a disability ... and to determine the [child's] educational needs." 34 C.F.R. § 300.301. The child must be "assessed in all areas related to the suspected disability." 34 C.F.R. § 300.304(c)(4). Parental consent for the evaluation is required. 34 C.F.R. § 300.300(a)(1).

Parents argue that District committed a procedural violation because it did not evaluate Student for the special learning disability of dyslexia. Parent Post-Hearing Brief, p. 7. The IDEA does not require District to classify Student by a particular diagnosis. The Eighth Circuit has held that, generally, a specific diagnosis will "be substantively immaterial because the IEP will be

tailored to the child’s specific needs.” *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1004 (8th Cir. 2011). District points out that Student’s IEP references Student’s dyslexia services in the Consideration of Special Factors and PLAAFP sections of the IEP. Dist. Post-Hearing Brief, p. 17-18; *See also* Parent Exh., p. 220. Further, District argues that Student “made significant progress toward diminishing his reading deficits.” Dist. Post-Hearing Brief, p. 17. I do not agree with that assessment. While Student may have progressed with the dyslexia intervention services, his third grade NWEA MAP test for reading clearly indicates that Student is a third-grader with beginning reader (kindergarten level) skills.

Dyslexia was not Student’s only disability affecting his reading skills. The DDC report was clear in its recommendations for a speech/language evaluation to address pragmatic social skills and an occupational therapy evaluation to address the need for behavioral services, and to address sensory processing issues and Student’s difficulty with handwriting. District relies on the numerous IEP meetings, and IEP and behavior plan amendments as evidence of District’s procedural compliance. Yet, the repeated IEP meetings, multiple MDRs, functional behavioral analysis, and consultative occupational therapy employed by District appear to do little or nothing to stem the tide of Student’s suspensions, ultimately totaling seventeen days in a four-month period. District’s occupational therapy initial evaluation conducted on October 2, 2023, did not even recognize the DDC’s diagnosis of autism, much less address its recommendations. Indeed, the evaluator testified that she did not know about the diagnosis and had not seen the report. District argues that the occupational therapy evaluation conducted by Shipman was “extremely thorough.” Dist. Post-Hearing Brief, p. 20. Yet, when viewed in light of Student’s autism, and the challenges to the testing validity made by Dr. Morrison, the evaluation falls substantially short of providing a basis for the IEP team to develop a program of school-based

behavioral interventions and therapy. The evaluation was a missed opportunity at best, and at worst a procedural violation of the IDEA that impeded Student's right to a FAPE.

## **B. Substantive Violations**

Every IEP, pursuant to the IDEA, in order to be "tailored to the unique needs of the child," must 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). The failure to implement those services identified in the IEP may constitute a substantive violation of the IDEA. The Eighth Circuit held in 2003 that "we cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit." *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

Parents argue that District denied Student a FAPE by either failing to develop an appropriate IEP or in implementing his IEP, Behavior Management Plan and Crisis Plan, which resulted in his disability-related maladaptive behaviors at school negatively affecting his academic progress. It is difficult to point to any one IEP amendment or an area of implementation as a District failure, but it is clear that the IEP programming and its implementation were not working for Student. His sensory issues, social skills deficits, and maladaptive behaviors continued to increase despite District's efforts. Even after Student was given seventeen days of suspensions, and Student's NWEA MAP and STAR reading and

language arts scores had dropped, District was still unwilling to entertain the prospect that its programming or its staffing were not successful in meeting Student's educational needs.

District's occupational therapy evaluation failed to fully evaluate all suspected areas of Student's disabilities and was, therefore, insufficient to provide a basis for meaningful, education-related strategies to meet Student's needs. Student's IEP, therefore, did not contain programming sufficiently tailored to Student's unique educational needs resulting from his autism, fine motor deficits, and sensory issues.

### **C. Compensatory Education**

A student is entitled to compensatory education and services to remedy any educational or other deficits that result from the denial of FAPE. *See School Comm. of Burlington v. Department of Education*, 471 U.S. 359, 374, (1985); *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489 (9th Cir. 1994) (ruling that "the hearing officer's ability to award relief [is] coextensive with that of the court..."(citing *Cocores v. Portsmouth, NH, School Dist.*, 779 F. Supp. 203 (D. N.H. 1991))). Because District's failure to fully evaluate Student impeded Student's right to a FAPE, Student is entitled to compensatory education.

Parents originally requested in their Complaint compensatory education in the form of: first, an occupational therapy evaluation by an evaluator of their choice; second, a contract between District and a private BCBA approved by Parents to conduct an FBA, to help the IEP team develop a BIP, and to train Student's teachers and support staff on implementation of the BIP to the extent this remains an issue; and third, other compensatory education for lost learning time resulting from suspensions, and the inappropriate IEP and/or the District's failure to implement his IEP. Parents withdrew the first request for an occupational therapy evaluation. On

the third request, there was no evidence presented as to what that the compensatory education should be quantitatively in terms of time or qualitatively in terms of content.

The second request for a contract with a private BCBA remains as the most cogent request for relief. District should, at its expense, contract with a private BCBA of Parents' choosing to consult on the development of amendments to and implementation of Student's IEP and behavior management plan, consistent with the private occupational therapy evaluation of Student obtained by Parent and including any staff training recommended by the BCBA. The BCBA shall be a member of Student's IEP team at District's expense for the entire 2024-2025 school year.

### **ORDER**

**IT IS, THEREFORE, ORDERED** as follows:

(1) The District's Due Process Complaint filed in case H-24-27 is **DISMISSED WITH PREJUDICE**;

(2) Parents' disability discrimination claims under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165, and claims for retaliation based on the disability discrimination claims and for the exercise of Student's free speech rights under the First and Fifth Amendments to the U.S. Constitution, are **DISMISSED WITHOUT PREJUDICE**;

(3) Parents' request for private placement tuition is **DENIED**.

(4) District is **ORDERED** to contract with a BCBA of Parents' choice to consult with District concerning the development of amendments to and implementation of Student's IEP and behavior management plan, to include any staff training recommended by the BCBA. The

BCBA shall be a member of Student's IEP team at District's expense for the entire 2024-2025 school year.

**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 Arkansas Department of Education, Special Education and Related Services (February 2024), Section 10.20.9, the Hearing Officer has no further jurisdiction over the parties to the hearing.

**IT IS SO ORDERED.**

*/s/ Cheryl L. Reinhart*

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**Cheryl L. Reinhart**  
**HEARING OFFICER**

**DATE: June 4, 2024**