

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

-----,
AS PARENT OF -----

PETITIONER

VS. NO. -----

MOUNTAIN HOME SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

Did the Respondent deny the Student with a free and appropriate public education (FAPE) according to the Individuals with Disabilities Education Act (IDEA) by failing to follow due process procedures by not implementing the Student’s Colorado Individualized Education Program (IEP), failing to conduct an initial evaluation, and declaring the Student eligible for IDEA services?

Procedural History:

On December 31, 2009, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the “Department”) from ----- (hereinafter referred to as “Parent”), the Parent and legal guardian of ----- (Petitioner) (hereinafter referred to as “Student”). The Parent requested the hearing because they believe that the ----- (hereinafter referred to as “District”) failed to comply with the Individuals with Disabilities Education Act (20 U.S.C. Sections 1400-1485, as amended) (IDEA) (also referred to as the “Act” and Public Law 108-446) and the regulations set forth by the Department in

providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Parent's request by designating June 29, 2009, as the date on which the hearing would be held and by assigning the case to an impartial hearing officer. The hearing officer issued an order setting preliminary timelines on May 13, 2009, which included the District convening a resolution session with the Parents on or before May 27, 2009. On June 11, 2009, the District notified the hearing officer that a resolution session was held and that the District was still waiting on information from the Parents regarding a settlement and resolution and had not heard from the Parents as of 4:00 p.m. on June 10, 2009.

The Parent alleged violations by the District of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fourteenth Amendment of the U.S. Constitution were not hearable issues under the Individuals with Disabilities Act (IDEA). In addition, the complaint alleged the District's failure to identify, program, and implement an IEP for the Student's alleged disabilities was found to be hearable under the IDEA.

A burden of proof was assigned to the Parent. The hearing began as scheduled on March 4, 2010. Additional hearings were held on March 5, March 29, March 30, April 8, April 9, May 5, May 6, and May 21, 2010, after which time the record was closed and closing statements were waived in lieu of submitting Post Hearing Briefs. The briefs were due within seven days of the receipt of the transcripts from the Court Reporter. The Parent's

attorney requested two extensions of time regarding the due date of the briefs, with the last being August 19, 2010.

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, Garry J. Corrothers, Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa Caldwell, Attorney at Law of Little Rock, Arkansas, and the District was represented by Roger L. Morgan, Attorney at Law, of Mountain Home, Arkansas.

At the time of the hearing the Student was a----- placed in an Alternative Learning Environment Classroom (“ALE classroom”) at ----- School District. He had attended 2nd grade and part of his 3rd grade year at the ----- . The Student received therapy and medication management services from ----- while living in ----- . His diagnoses at ----- (“not otherwise specified”).

He had an IEP developed in ----- on October 2, 2007, which showed a primary disability of ----- .

His ----- IEP listed his Least Restrictive Environment (“LRE”)”Special Education Instructional Setting” as being “inside the Regular Classroom 40% to 79% of the time.

His ----- IEP also included a Behavior Intervention Plan which was implemented in both his Regular and Special Education classes.

He enrolled in the -----School District on or about November 26, 2007. On December 5, 2007, an IEP conference was held. The District determined that the Student was not eligible for placement for special education under the IDEA. The District stated, inter alia, that previous placement in another state does not automatically qualify the Student for placement in Arkansas. They further stated that he has no educational deficits at this time and no medical record to justify placement. On December 7, 2007, the Student was placed in the school's ALE classroom and was determined qualified for a Section 504 plan. He remains in the ALE classroom as a 504 student.

Findings of Fact

1. The Student transferred into the ----- School District in November, 2007, and was enrolled in the ----- on November 27, 2007. He transferred into the District from ----- . He resides with his father, Parent herein, and both of them moved to ----- shortly after the Parent divorced from the Student's adoptive mother in -----.

2. Prior to enrolling in the District, the Parent contacted the District by telephone on November 26, 2007. The Parent's call was returned later that same day by Rita Parsons. Ms. Parsons is the assistant principal of ----- and also is the buildings's special education designee. The Parent informed her that the Student was enrolling in the District. She was also informed that he had an IEP with severe ----- and that he hoped that the District could be prepared to handle the child (T. Vol. II, P. 155).

3. Ms. Persons arranged for the Student to be in a third grade classroom until such time as paperwork could be obtained from his previous school in -----.

On that same day, she also advised the resource teacher, Lyn Keaster, that a child with an IEP was moving in and also contacted the District's Special Education office. (T. Vol. II, P. 156).

4. Upon being notified of that the Student was moving into the District, Ms. Keaster communicated with the school district in ----- and requested the Student's records. A copy of the behavior plan and the IEP was sent by facsimile to -----on November 27, 2007. Upon receipt of the IEP, Ms. Keaster determined that the Student was receiving special education services through the resource room and that his services were for social skills (T. Vol. II, P. 220).

5. Additionally, Ms. Keaster, in an attempt to obtain an exact idea of what Colorado was actually providing to the child, contacted the resource teacher in -----, Ms. Nicole Abrahamson. The information provided could be summarized as follows:

- (a) The Student received one hour of services per day for social skills. During this hour, he would come to the resource room and was talked to by the resource teacher (T. Vol. II, P. 225).
- (b) The resource teacher was like a counselor for the Student for social skills. (T. Vol. II, P. 227)
- (c) There was no academic instruction (T. Vol. II, P. 227).
- (d) The Student was very bright, functioned on grade level and a paraprofessional was available in his regular classroom, if needed. However, the paraprofessional was not a "one on one" aide (T. Vol. II, P. 226).

6. In the -----, social skills are not handled

through the resource room, but are instead handled by a mental health counselor with a master's degree, which was Terry Berry, the counselor as ----- (T. Vol. III, P. 227). Mr. Keaster contacted Ms. Berry and arranged for the Student to begin receiving counseling services in the District. These services begin immediately addressing the Student's coping and social skills. Ms. Keaster also contacted the third grade teacher, Ms. Amber Wescoat, to put in place proper supports for the Student until a special education conference could be held (T. Vol. III, P. 223).

7. During the conversation with Ms. Abrahamson, it was disclosed to Ms. Keaster that the paraprofessional time that the Student was receiving in ----- was similar to a study hall in which the paraprofessional gave the Student extra attention, if needed, and would also do some social skills training (T. Vol. III, P. 223). Ms. Keaster met with Ms. Wescoat and the Ms. Wescoat agreed to provide extra attention and support and was specifically made aware of the fact that the Student had an IEP from the ----- and that there were certain services that she would need to provide until such time as a conference was held (T. Vol. V, P.116).

8. The Student was not placed in special education even though his ----- -IEP placed him in resource for five hours per week. The IEP also provided for the implementation of a Behavior Support Plan (P. Exh. Binder P. 114). The District determined that services could be provided without having the Student placed in special education.

9. On December 5, 2007, an initial evaluation conference was held which was attended by the Parent, Ms. Keaster, Ms. Wescoat, Ms. Persons, and Ms. Berry. The District's position was that the Student's significant identifiable ----- was different from the Arkansas category of -----). Specifically,

Arkansas requires a clinical diagnosis/certification by a licensed psychologist or psychiatrist while ----- does not require such a diagnosis. The District then offered the services of the school-based mental health unit to obtain the certification/diagnosis. The offer of such certification/diagnosis was refused by the Parent. The Father, therefore, refused to consent for the initial evaluation for eligibility, and the committee determined that the Student did not meet the criteria of the State of Arkansas to be placed in special education.

10. The committee determined that it was best for the Student to be considered for a Section 504 placement and a 504 conference was held on December 17, 2010. The 504 Committee, as an accommodation placed the Student in the classroom known as *Creating Pathways for Success*, which is also known as the ALE classroom. The Student has remained in the ALE classroom at -----
----- since that time.

11. While at -----, the Student was in the ALE classroom of Joe Grabowski and was in the ALE classroom of Cassie Fowler while at----- Middle School. The regulations of the State of Arkansas for ALE classrooms require a small teacher/student ratio (10:1, unless a paraprofessional is present, at which time the ratio is 12:1). In the Mountain Home School District the ALE is taught by highly qualified teachers and the classrooms modeling appropriate behavior and immediate feedback and consequences for inappropriate behavior and provides the students with one on one help academically in the areas that the individual child needs (T. Vol. IV, P.159).

12. The classrooms follow the same grade level curriculum as all other classrooms (T. Vol. IV, P.163).

13. Additional 504 conferences were held on August 14, 2008, October 2,

2008, May 18, 2009, and August 11, 2009. At each of these conferences, the Parent, as well as at least one advocate, was present and the Committee decision was consistently for the Student to remain on a 504 plan and to remain in the ALE classroom.

14. On June 9, 2008, a referral conference was held at the request of the Parent. The committee, which involved the Parent as well as the Student's mental health counselor, Clay Allen, decided not to test the Student at that time, due to the fact that the Student was visiting his mother in ----- under court ordered visitation for the entire month of July. However, the committee agreed to meet at the beginning of the 2008-2009 school year to begin the referral process for a comprehensive evaluation to determine eligibility for special education, as well as the Student's continuing needs and services.

15. The referral conference was held on August 29, 2008, at which time permission was obtained from the Parent for a comprehensive evaluation.

16. A conference was held on October 28, 2008 to discuss the results of the evaluations. The conference was attended by numerous school officials, including the Student's teacher, principal, school mental health counselor, assistant principal, the District's ALE coordinator, Special Education Director, as well as the Parent, two advocates on behalf of the Parent and the Student's private mental health counselor, Clay Allen.

17. The committee determined that the Student did not qualify for special education services due to the fact that there was currently no adverse affect on the Student's educational performance.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21. 20 U.S.C. Section 1412(a) and 34 C.F.R. Section 300.300(a). The IDEA establishes that the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech and language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services. 20 U.S.C. Section 1401(3)(A).

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities in its regulations at Section 5.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

The United States Supreme Court provided guidance for determining whether a student has received FAPE in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court’s first case involving the IDEA. In *Rowley*, the Court set forth a two fold inquiry for determining FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? This procedural test was based on Congress’s belief that compliance with the requirements of the Act would probably produce substantive compliance. *Rowley* clearly established that a school district’s failure to comply with the Act’s procedures constitutes a sufficient basis for determining that a child has been denied a FAPE. Generally, courts only overlook procedural violations when they are technical and no harm has occurred to

the student as a result. *See, e.g. Doe v. Alabama Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

The framework of Section 504 of the Rehabilitation Act of 1973 is also relevant in this matter. Section 504 is a general civil rights provision “to prevent discrimination against all handicapped individuals.” 29 U.S.C.S. Section 794. Section 504 provides: “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. Section 794(a). Section 504 applies to all public schools that receive federal financial assistance.

While Section 504 does not require a FAPE or procedural safeguards in an educational setting, its implementing regulations do. See 34 CFR Sections 104.1-104.61. 34 CFR Section 104.33 requires recipients of federal funds to “provide a free appropriate public education [FAPE] to each qualified handicapped person.” 34 CFR Section 104.33(a).

Section 504 protects a student if he or she has a physical or mental impairment that substantially limits one or more life activities, or if he or she has a record or is regarded as having such an impairment. 29 U.S.C. Section 794; 34 CFR Section 104.3(j).

- (I) THE ----- HOME SCHOOL DID NOT FULLY COMPLY WITH THE IDEA REQUIREMENTS FOR THE TRANSFER OF AN OUT OF STATE STUDENT WITH AN IEP.

The issues addressed in the instant case has been presented by the Parent as being such an egregious violation of the IDEA by the District that they have completely denied

the Student with FAPE. FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set for by the Department. Consequently, a hearing officer must look at the issue to determine whether or not a district has been compliant with that definition and whether or not a single violation or the accumulation of violations are severe enough to constitute a denial of FAPE.

The Parent initially asserted that the District did not implement the Student's -----
----- IEP. The Student transferred to the District from ----- during
November 2007. In such case the transfer of the Student is governed by Arkansas
Department of Education Regulation 8:03.4.1 which provides:

“If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency -

Conducts an evaluation pursuant to 34 CFR 300.304 through
300.306 (if determined to be necessary by the new public agency); and

Develops, adopts, and implements a new IEP, if appropriate, that
meets the applicable requirements in 34 CFR 300.320 through 300.324.”

The Arkansas regulations mirror 34 CFR 330.324(f).

One of the initial mandates of the District was to provide the Student with FAPE including “comparable services”. One federal court discussing the meaning of comparable services resolved the controversy this way stating:

Where the meaning of a statute is plain and unambiguous, the clear language of the statute controls. *United States vs. Maria-Gonzalez*, 268 F.3d 664, 668 (9th Cir. 2001)(citing *Aragon-Ayon vs I.N.S.*, 206 F.3d 847, 851 (9th Cir. 2000)). In addition, in construing statutory language, courts should defer to the position and interpretation of the Office of Special Education Programs of the Department of Education (“OSEP”), the agency responsible for monitoring and administering the IDEA. *Ms. S. vs. Vashon Island School District*, 337 F.3d 1115, 1134 (9th Cir. 2003) (citing *Honig vs. Doe*, 484 U.S. 305, 325 n. 8, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)), *superceded by statue on other grounds*, IDEA, Pub.L. No. 105-17, 111 Stat. 81, *as recognized in M.L. v. Fed. Way Sch. Dist.*, 341 F.3d 1052, 1063 n. 7 (9th Cir. 2003).

In 71 Fed.Reg. 46540 (Aug. 14, 2006), OSEP notes that while several commentators requested clarification of the meaning of “comparable” services, clarification was not necessary because “the Department interprets ‘comparable’ to have the plain meaning of the word, which is ‘similar’ or ‘equivalent’.” *Id.* at 46681. When a child transfers to a new public agency from another state, “comparable services means services that are ‘similar’ or ‘equivalent’ to those that were described in the child’s IEP from the previous public agency, as determined by the child’s newly-designated IEP Team in the new public agency.” *Id.*

Sterling A. vs. Washoe County School District, 2008 WL 48655570.

As noted above, the District was required to provide similar or equivalent under the ----- IEP. In an effort to comport with this mandate, the resource teacher at ---
-----, namely Lyn Keaster took the following steps:

a. Ms. Keaster immediately, on November 27, 2007, contacted the -----
school district and determined exactly what services were being provided for the Student. She then spoke with the Student’s teacher and determined that he was receiving special education services through the resource room and that the services he was receiving were entirely for social skills (D.Exh. Binder P. 34).

b. Ms. Keaster also was told that the Student was receiving the following in -----
-----:

(i) One hour per day for social skills. During this hour, he would go to the resource room and was talked to by the resource room teacher, if needed;

(ii) The resource teacher was like a counselor to him for special skills and there was no academic instruction done;

(iii) The Student was very bright, functioned on grade level and a paraprofessional was available in his classroom to assist all students, if needed. The paraprofessional was not a one-on-one aide.

c. At the end of her discussion with the ----- teacher, Ms. Keaster immediately contacted the school mental health counselor, Terry Berry, and arranged for her to provide the Student with the same type of services that he was receiving in ; and

d. The Student's third grade teacher, Amber Wescoat, was then contacted and was made aware of the services provided under the ----- IEP and provided services that met or exceeded the services that the child was receiving in -----.

The District insured that the services the Student received when he started the District met or exceeded some of the services he was receiving under his IEP in ----- --. Specifically, the counseling services that the Student received were provided by a mental health counselor with a master's degree, as opposed to a resource room teacher in ----- Ms. Wescoat provided additional time and instruction that met or exceeded what the Student was provided in Colorado (T. Vol. V, P. 117-118). The District reviewed the IEP, discussed it with the Colorado teacher and implemented services. Therefore, comparable services were offered.

However, as noted above, the District was to provide the Student a FAPE, which is *specifically defined*, in part, as special education and related services that are provided at public expense Although the District substantially provided comparable services, the Student was not completely provided FAPE, as he was not placed in special education. According to his ----- IEP he would have been in the resource room and receiving indirect special education services. It is clear that the District chose to rely on its interpretation of the law, which was to provide comparable services, after consultation with his ----- teacher, without regard to the technical definition of FAPE. Furthermore, part of the Student's ----- IEP contained a Behavior Support Plan. There is no documentation that this was specifically implemented either (T. Vol. I, P. 103-104) and the Student was involved in numerous disciplinary incidents upon his initial enrollment in the District (T. Vol. I, P. 104). These incidents, without question, ultimately led to his placement in the ALE classroom. The District understood its obligation was to provide comparable services. However, its obligation was to provide a FAPE, including comparable services. The difference is that FAPE includes special education services, which the District did not provide.

Arkansas Department of Education Regulation 8:03.4.1 also requires the District to conduct an initial evaluation. The Father was notified of the required conference held on December 5, 2007. He was in attendance, as well as Ms. Keaster, Ms. Berry, Ms. Wescoat, and Rita Persons, assistant principal and the building's special education designee. The Student's disability in ----- was classified as significant identifiable emotional disability (SIED). The Arkansas category of emotional disturbance (ED) requires a clinical diagnosis/certification by a licensed psychologist or psychiatrist (D.Exh. Binder 31 and 32). In her testimony, Ms. Keaster explained that she tried in to

obtain proper certification/diagnosis of the Student. She attempted to obtain further documentation or information from the father, which he did not provide (T. Vol. II, P. 240-241). The District subsequently offered school based mental health services in order to obtain the needed certification/diagnosis. This offer was refused by the Father and no certification would be provided by the Father until August 28, 2008 (D.Exh. Binder 101).

Arkansas Department of Education Regulation 4:06.3 provides as follows:

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph 4.06.01 of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under 34 CFR 300.506 or the due process procedures under 34 CFR 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to parental consent. The public agency does not violate its obligation under 34 CFR 300.311 and 300.301 through 300.311 if it declines to pursue the evaluation.

The District, under Regulation 4.06.3, was under no obligation to continue when the Father refused consent to the test that is central to the determination of whether or not the Student qualified as ED under Arkansas law. The Notice of Conference Decision documents his refusal (D.Exh. Binder 77). Ms. Wescoat testified that the Father refused the testing and the school based mental health (T. Vol. V, P. 132). Ms. Persons testified that the Father said that he would get his own services and get his own diagnosis (T. Vol. II, P.169 - 170).

The initial evaluation conference decided that the Student did not meet the criteria for special education under Arkansas regulations. The committee did make a 504 referral and the Student subsequently continued under the 504 plan to receive services through the ALE classroom. The initial ALE classroom was taught by Mr. Grabowski. The Father felt that this initial ALE placement met the requirement for services needed by the Student (T. Vol. VIII, P. 44-46).

(II) THE STUDENT DOES QUALIFY FOR SPECIAL EDUCATION SERVICES BECAUSE THE CHILD'S DISABILITY ADVERSELY AFFECTS THE STUDENT'S EDUCATIONAL PERFORMANCE.

Under Arkansas law to receive special education services under either the category of -----, it is necessary to show that the disability adversely affects the child's educational performance. Specifically, Arkansas Department of Education Regulation defines emotional disturbance as follows:

The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance.

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- C. Inappropriate types of behavior or feelings under normal circumstances.
- D. A general pervasive mood of unhappiness or depression.
- E. A tendency to develop physical symptoms or fears associated with personal or school problems.

Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

Is due to chronic or acute health problems such as-----
----- and adversely affecting a child's educational performance.

Neither the Code of Federal Regulations nor the Arkansas Department of

Education Regulations provide any sort of a definition of what is meant by “adversely affect the child’s educational performance”. However, in the case of *Alvin Independent School District vs. A.D.*, 503 F.3d 378 (5th Cir. 2007), the Fifth Circuit Court of Appeals reviewed the term “adversely affect the child’s educational performance” and concluded as follows:

AISD responds, and the district court agreed, that A.D. does not need special education services for several reasons. First, A.D.’s passing grades and success on the TAKS test demonstrate academic progress. *See Rowley*, 458 at U.S. 207 n. 28, 102 S.Ct. 3034 (“[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining the educational benefit.”) Second, A.D.’s teachers testified that, despite his behavioral issues, he did not need special education and was achieving social success in school. AISD argues that the district court properly determined that the testimony of A.D.’s teachers, who observed his educational progress firsthand, is more reliable than much of the testimony from A.D.’s physicians, who based their opinions on faulty information culled from isolated visits, select documents provided by A.D.’s mother, and statements from A.D.’s mother about what she believed was happening in school. [fn9] Finally, AISD argues that much of A.D.’s behavioral problems derived from non-ADHD related occurrences, such as alcohol abuse and the tragic death of A.D.’s brother. Thus, AISD asserts, any educational need is not by reason of A.D.’s ADHD, as required by statute. We agree with AISD’s argument and find that the district court’s findings were not clearly erroneous.

On August 29, 2008, an evaluation conference was held for the Student in which the committee made a decision to conduct a comprehensive evaluation. A conference was held on October 28, 2008, to evaluate the results of the testing. The results of the testing indicated that the Student had clinical diagnoses of-----
----- The evaluation results were explained at the conference by Sue Brechnitz, who has an extensive background in special education instruction and evaluation. In addition to explaining the results of the testing, she observed the Student on two occasions. She testified that he was benefiting from instruction and the specific behavioral instruction. She testified that he had good thinking skills for a fourth grader (T. Vol. IX, P. 175). She further testified that he was working at grade level and getting

along with peers and with the authority figures (T. Vol. IX, P. 176-179). She testified that if the Student has emotional problems, behavioral problems, or attention problems, she could not see them, and if he does, they are not affecting his acquisition of academic skills” (T. Vol. IX, P. 194).

The Principal at ----- Middle School, Michelle McWilliams testified to the following regarding the Student’s progress from his fourth grade year to his fifth grade year:

Literacy - In fourth grade the Student was administered the Developmental Spelling Assessment (DSA) which he scored in the “within word” level which ranges between grade second and fourth. In fifth grade the Student was administered the DSA which he scored in the “syllable juncture” level which ranges between the grades fifth and eighth.

By the end of fifth grade, students should be able to read 128 words per minute (wpm) fluently. During the month of January, the Student scored between 100-110 words per minute which is completely on target to reach the 128 wpm fluency. Fluency is a measure of oral reading skills, as well as reading comprehension and vocabulary development.

Math - The Student is taking part of a Team 3-fifth grade unit on mean, median, mode and range - all of which are fifth grade student learning expectations. Out of the 17 students that took the test on the material, he scored better than 9 of those students and he got 17 of the 20 questions correct, giving him an 85%.

(See D.Exh. Binder P. 172).

See also D.Exh. Binder P. 173 showing the Student’s benchmark scores. In Math, the score increased from 379 in 2008 to 473 in 2009 and in Literacy, the score increased from 56 in 2008 to 306 in 2009. Ms. McWilliams testified that such an increase on the benchmark was almost unheard of (T. Vol. IX, P. 306).

In addition to making academic progress, the Student is making progress in behavior issues in that there is a decrease in the number of behavior related incidents (D.Exh. Binder P. 173).

His current teacher, Ms. Cassie Fowler, testified that, in addition to passing grades and improved behavior, the Student is also showing increased responsibility, such as reading announcements that he wrote to the entire school in the morning over the District's intercom system (T. Vol. VI, P. 248). He also participated in Yearbook Staff and going by himself, demonstrating socially appropriate behaviors, following age appropriate instructions to take pictures of events happening all over the school and taking pictures of events that Ms. Fowler has instructed him to take (T. Vol. VI, P. 249).

The Parent has met the burden of proof that the Student's -----
----- had an adverse effect on the Student's educational performance. A properly implemented and successful Section 504 program can allow for a Student to benefit from his education. In *W.H., a minor, By and Through his parents B.H. and K.H., vs. Clovis Unified School District*, CV F 08-0374, (2009), a district court in the Eastern District of California extensively considered the impact of a student's Section 504 plan on his eligibility for services under the IDEA. That court held that the District failed to provide a Student with FAPE when it failed to identify him as eligible for special education under the category of ----- . The student performed at or above grade level in math, reading, and writing according to District assessment, and his STAR results were proficient or advanced. However, he was not making academic progress in the area of written expression. Furthermore, he had inflated grades and test scores, that were the result of accommodations. Here, there was substantial testimony positively recounting the Student's academic, social, and behavioral successes and improvements. However, but for his participation in the ALE, an accommodation under his 504 plan, he would not have shown the improvements. The ALE was mandated by regulations to have smaller class sizes and counseling.

Additionally, even though the Student's behavior incidents have decreased, they still occurred and adversely affected his educational performance.

Finally, the ultimate issue in this matter from the Father's standpoint appears to be the Student's placement in the ALE classroom. The Hearing Officer finds this to be a regular classroom which comports with State law and regulations. However, the District should strongly consider placing the Student outside of the ALE environment while he is being served under his Section 504 plan. The Student should have been identified as a special education student on or about October 28, 2008.

Order

1. The Hearing Officer finds that the District did not comply with the IDEA when it did not implement the Student's ----- IEP from his initial enrollment through December 7, 2007.
2. The Hearing Officer finds that the Father did not consent to special education testing on or about December 7, 2007, and therefore, the Student was not eligible for placement in special education.
3. The Hearing Officer finds that the District has denied the Student with FAPE in its failure to identify him as a special education student on or about October 28, 2008. The District is ordered to hold an IEP Conference wherein the Student will be placed with special education services and related services under an IEP developed and implemented in the Least Restrictive Environment (LRE).
4. The Parent is to be awarded compensatory education for the denial of FAPE

beginning November 26, 2007 and continuing through December 7, 2007. Additionally, compensatory education is awarded from October 28, 2008, through December 31, 2009. The compensatory education shall be awarded at the rate of five (5) hours per week.

Finality of Order and Right to Appeal

1. The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall 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 2000, the Hearing Officer has no further jurisdiction over the parties to the hearing. It is so ordered.

DATED:

August 7, 2010

SIGNATURE:

S/ Garry J. Corrothers

GARRY J. CORROTHERS,
HEARING OFFICER