

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**XXXX and XXXX XXXXXXXXX,**  
Parents on behalf of  
**XXXX XXXXXXXXX,** Student

**PETITIONERS**

VS.

**CASE NO. H-23-18**

**PULASKI COUNTY SPECIAL SCHOOL DISTRICT**

**RESPONDENT**

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

**ISSUE PRESENTED:**

Whether the Pulaski County Special School District (hereinafter "District" or "Respondent") denied XXXX XXXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between October 19, 2020 and October 19, 2022, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter "IDEA"), by denying XXXX and XXXX XXXXXXXXX (hereinafter "Parents" or "Petitioners") the right to meaningfully participate in Student's educational planning, as well as failing to provide an IEP that was reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances. Parents alleged that Student's kindergarten, first grade, and second grade IEPs failed to include Applied Behavior Analysis (hereinafter "ABA") therapy, a Behavior Intervention Plan ("hereinafter "BIP") based on a Functional Behavior Assessment (hereinafter "FBA"), speech therapy, occupational therapy, full-time

paraprofessional, and sufficient special education instruction pertaining to social skills, math, written expression, and dyslexia intervention.<sup>1</sup>

**PROCEDURAL HISTORY:**

On October 19, 2022, the Arkansas Department of Education (hereinafter “Department”) received a written request from Parents to initiate due process hearing procedures on behalf of Student. Parents requested a due process hearing because they believed that District failed to comply with the IDEA by failing to provide Student with IEPs that were reasonably calculated to allow her to make appropriate progress in light of her individual circumstances. Specifically, Parents alleged that Student’s kindergarten, first grade, and second grade IEPs failed to include ABA Therapy, a BIP, speech therapy, occupational therapy, a full-time paraprofessional, and sufficient special education instruction pertaining to social skills, math, written expression, and dyslexia intervention.<sup>2</sup> The remedies sought by Parents included the scheduling of an IEP meeting to develop an appropriate IEP for Student, specifically an IEP which includes a one-to-one paraprofessional for Student, special education services for dyslexia, ABA therapy, speech therapy, and occupational therapy.<sup>3</sup> Parents also requested compensatory education, speech therapy, and occupational therapy.<sup>4</sup>

In response to Parents’ request for hearing, the Department assigned ADE H-23-18 to an impartial hearing officer. Thereafter, February 21, 2023 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time. On February 15, 2023, a prehearing conference regarding this matter was

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<sup>1</sup> See Due Process Complaint in ADE H-23-18.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing conference, the parties discussed unresolved issues to be litigated at the hearing of this matter, as well as the witnesses and evidence necessary to address these issues. On February 21, 2023, the closed hearing of this matter commenced. Testimony was heard on February 21, 2023, February 22, 2023, February 23, 2023, March 7, 2023, and March 27, 2023.<sup>5</sup> All testimony was heard either in person at the Pulaski County Special School District Administrative Offices or via ZOOM. The hearing concluded on March 27, 2023.

The following witnesses testified in this matter: Haleigh Herring, Rebecca Smith, Yolanda Harris, Tonya Jackson, Tracey Cary, Sarah Bright, Audra Alumbaugh, Dr. Tracy Morrison, Dr. Sheila Barnes, Stephanie Cole, Stephanie Wise, Neely Claasan, Deborah Dickson, , Parent (Mother).<sup>6</sup> Parents had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parents were represented by Theresa Caldwell (Little Rock, Arkansas), and the District was represented by Jay Bequette (Little Rock, Arkansas). Both parties were offered the opportunity to provide post-hearing briefs, and both timely submitted briefs for consideration.

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<sup>5</sup> See Hearing Transcript, Vols. I-V.

<sup>6</sup> *Id.*

## **FINDINGS OF FACT:**

Student is a seven-year-old female (DOB 07/20/2015) who is enrolled in the Pulaski County Special School District. Between October 19, 2020 and October 19, 2022, the time period statutorily covered in this action, Student attended school at Chenal Elementary School in Little Rock, Arkansas. Student was in kindergarten during the 2020-2021 school year and first grade during the 2021-2022 school year. Student is currently completing the second grade as of the date of this decision.

Student was adopted by Parents on April 30, 2018 after being placed in several foster homes.<sup>7</sup> Student was physically and emotionally neglected before she was placed with Parents.<sup>8</sup> Prior to starting kindergarten, Student received special education services, specifically 30 minutes per week, through the District's Early Childhood Program at Robinson Elementary. The purpose of this instruction was to address Student's social emotional deficits.<sup>9</sup> Thereafter, in the year 2020, Student was diagnosed with adjustment disorder and anxiety.<sup>10</sup> At the time of this diagnosis, it was noted that Student had a history of exhibiting inappropriate behaviors and feelings under normal circumstances, resulting in an impact to her ability to learn and ability to build and maintain satisfactory interpersonal relationships with peers and teachers.<sup>11</sup> As such, Student was deemed eligible for special education services in October 2020 pursuant to the category of Emotional Disturbance.<sup>12</sup>

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<sup>7</sup> Parent Exhibits, pp. 169-70.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at p. 79.

<sup>10</sup> *Id.* at p. 103.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

### **Kindergarten (2020-2021 School Year)**

When Student began kindergarten, she was receiving weekly therapy services at District from an outside provider.<sup>13</sup> On August 19, 2020, Parent provided a medical note that stated that Student had an adjustment disorder and sensory processing difficulties, both of which would require treatment for several years.<sup>14</sup> On September 25, 2020, October 8, 2020, and October 12, 2020, District administered educational assessments to Student.<sup>15</sup> Specifically, Student was administered the following assessments: (1) Woodcock-Johnson Tests of Achievement - Fourth Edition (hereinafter "WJ-IV"); (2) Kaufman Test of Educational Achievement - Third Edition (hereinafter "KTEA-3"); (3) Beery-Buktenica Developmental Test of Visual Motor Integration - Sixth Edition (hereinafter "VMI-6"); (4) Test of Auditory Processing Skills - Third Edition (hereinafter "TAPS-3"); (5) Autism Spectrum Rating Scales (hereinafter "ASRS"); and the Behavior Assessment System for Children - Third Edition (hereinafter "BASC-3").<sup>16</sup> Student was also observed in the classroom setting, and the evaluator considered previous assessments that had been administered to Student when she was in preschool.<sup>17</sup>

Regarding the WJ-IV, Student was assessed in the areas of reading, math, and writing.<sup>18</sup> Student's scores regarding the letter-word identification and applied problems subtests fell within the "low average" category, and her scores regarding the calculation subtest fell within the "below average" category.<sup>19</sup> Student was assessed to be in the

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<sup>13</sup> Parent Exhibits, p. 90

<sup>14</sup> *Id.* at p. 85.

<sup>15</sup> *Id.* at p. 173.

<sup>16</sup> *Id.* at p. 176.

<sup>17</sup> *Id.* at pp. 174-75.

<sup>18</sup> *Id.* at p. 177.

<sup>19</sup> *Id.*

“extremely low” category on the passage comprehension subtest.<sup>20</sup> Student’s scores on the writing samples subtest were “average.”<sup>21</sup> Regarding the KTEA-3, which was utilized to assess Student’s reading comprehension, Student’s scores fell within the “average” category.<sup>22</sup> Regarding the VMI, which was administered to Student for the purpose of assessing visual-motor integration and development, Student’s scores fell within the “low” category.<sup>23</sup> Regarding the TAPS-3, which was administered for the purpose of assessing Student’s auditory skills, Student was administered the word discrimination subtest, and her performance fell in the “extremely low” category.<sup>24</sup> Regarding the ASRS, Student’s Parent (mother) and teacher completed rating scales.<sup>25</sup> Student’s scores were “average” in only 2 of 11 scales, with all other scores being elevated, slightly elevated, or very elevated. Student’s total score fell in the “very elevated” category, and both Parent (mother) and teacher ratings fell within this same level.<sup>26</sup> Regarding the BASC-3, which assesses emotional and adaptive behavior, Student’s overall executive functioning index fell in the “elevated” category, and her attentional and behavioral control indexes fell in the “extremely elevated” category.<sup>27</sup>

In summary, it was determined based on Student’s educational assessment that she had “significant weaknesses” in the area of reading comprehension, extremely impaired auditory processing abilities, behavioral characteristics marked as “very elevated” for Autism Spectrum Disorder, and exhibited several adaptive behavior characteristics that

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<sup>20</sup> Parent Exhibit, p. 177.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at p. 178.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at pp. 179-80.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

were in the clinically significant range.<sup>28</sup> It was recommended that Student's IEP committee consider eligibility under one of two categories, specifically Other Health Impairment or Emotional Disturbance.<sup>29</sup>

In addition, sometime after September 24, 2020, District consulted with an outside clinic to conduct a psychological assessment of Student.<sup>30</sup> Student was administered the BASC-3, as well as the Preschool Parent Form Diagnostic Clinical Interview.<sup>31</sup> The results of the BASC-3 indicated that Student was overly active, aggressive, and prone to depression and withdrawal.<sup>32</sup> The evaluator stated that Student "was reported to have unusual thoughts and perceptions and engage in odd behaviors."<sup>33</sup> The evaluator also noted that Student was reported to react negatively when faced with change in her everyday routine.<sup>34</sup> The evaluator did note, however, that Parent (mother) obtained an elevated F index score with regard to her ratings, indicating that Parent "may have responded to test items in an inordinately negative fashion."<sup>35</sup> The overall clinical impression of the evaluator was that Student "may exhibit a number of symptoms related to an attention related disorder and/or developmental disorder."<sup>36</sup> The evaluator also stated that Student likely had significant attachment concerns and emotional dysregulation, noting that Student's boundary issues, self-soothing behaviors, and behavioral and emotional dysregulation may be associated with disruptive behaviors that had been observed prior to Student's

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<sup>28</sup> Parent Exhibits, pp. 179-80

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at pp. 169-72.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

kindergarten year.<sup>37</sup> The evaluator recommended that Student be provided with significant supports in the areas of emotional and behavior regulation, speech, and occupational therapy.<sup>38</sup>

On October 16, 2020, Student's IEP team convened to discuss the results of Student's recent evaluations. Parents were present at the meeting via google meets. Also in attendance was a special education teacher, a general education teacher, the LEA, the special education coordinator, and an individual qualified to interpret evaluation results.<sup>39</sup> The IEP team ultimately identified Student as eligible for special education services pursuant to the IDEA under the category of Emotional Disturbance. An IEP with duration of services from October 16, 2020 through October 15, 2021 was created as a result.<sup>40</sup> The portion of the IEP devoted to Student's present levels of academic achievement stated her strengths to include writing her name, knowing some letters and sounds, age appropriate fine motor and gross motor skills, and toileting independently.<sup>41</sup> Student's stated weaknesses included social and emotional skills and following multi-step directions.<sup>42</sup> Student's test results from her most recent educational testing, as well as an explanation about the eligibility category were also included on this page.<sup>43</sup> The IEP team noted on the IEP that Parents had scheduled Student to be evaluated for a possible Autism diagnosis.<sup>44</sup>

In the section of the October 16, 2020 IEP devoted to consideration of special factors, it was noted that Student would receive positive behavioral interventions and

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<sup>37</sup> Parent Exhibits, pp. 169-72.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at p. 70.

<sup>40</sup> *Id.* at p. 56.

<sup>41</sup> *Id.* at p. 57.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



supports and other strategies to address behavioral issues, with specific mention of the use of a penny board and sticker system.<sup>45</sup> In addition, supplementary aids and accommodations included: (1) preferential seating; (2) supervision during transition times; (3) opportunity to repeat and explain instructions; (4) immediate and frequent feedback; (5) model of appropriate behaviors; (6) praise for desirable behaviors; (7) stand breaks between activities; (8) visual aids; (9) timer; (10) sensory tools to include weighted blanket, wiggle seat, chair bands, sensory bracelets/necklaces; (11) extra time for completing assignments; (12) adjustment of long assignments into more manageable segments; (13) oral and printed directions; (14) private cues to redirect attention; and (15) designated safe place for cooling off during stressful times.<sup>46</sup> Finally, it was noted that Student would receive services from a mental health provider.<sup>47</sup> Most of these accommodations were recommended by Parents on September 28, 2020 via email, and were included in a 504 plan for Student prior to IDEA eligibility.<sup>48</sup>

Student's October 15, 2020 IEP included a schedule of services which provided that Student would receive direct instruction in reading and social skills. For each of these areas of concentration, Student was scheduled to receive 150 minutes per week in the special education classroom.<sup>49</sup> Additionally, Student was scheduled to receive 60 minutes of occupational therapy services, in a consultative capacity, during each school week.<sup>50</sup> Student's IEP contained three goals. One of the goals was specific to English Language Arts and provided that Student would "be able to use and apply grade level phonics and word

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<sup>45</sup> Parent Exhibits, p. 58.

<sup>46</sup> *Id.* at p. 59.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at p. 90.

<sup>49</sup> *Id.* at p. 61.

<sup>50</sup> *Id.*

analysis skills to decode words in order to complete grade level assignments with 80% accuracy” by the end of the IEP term.<sup>51</sup> This goal contained three objectives as well, which provided that Student would be able to identify all uppercase letters, all lowercase letters, and all consonant letters sounds with 80% accuracy by the end of the IEP term.<sup>52</sup> In addition to the English Language Arts goal, Student’s IEP contained two goals that pertained to behavior. The first behavior goal, which specifically addressed Student’s social interactions related to others, provided that Student would “demonstrate awareness and understanding of socially acceptable rules of interpersonal interaction by interacting appropriately 80% of the time” with her peers by the end of the IEP term.<sup>53</sup> This goal had a single objective, which provided that Student would show self control of her body and voice, specifically focusing on good personal space, keeping hands/arms/legs to near body, and appropriate voice level in relation to the expected classroom levels for 80% of a 15-minute period by then end of the IEP term.<sup>54</sup> The final goal on Student’s IEP pertained to task-related behaviors and specified that Student would “demonstrate improved social/behavioral skills by following directions to complete assignments and tasks appropriately 80% of the time” by the end of the IEP term.<sup>55</sup> This goal provided a single objective which stated that Student would “listen to adults and comply with requests with 80% accuracy” by the end of the IEP duration.

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<sup>51</sup> Parent Exhibits, p. 64.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at p. 62.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at p. 66.

On January 21, 2021, Student's IEP team met again to discuss concerns raised by Parents.<sup>56</sup> Parents asked for an IEP meeting to discuss communication between them and the District, as well as their concern that Student could not properly communicate with her peers or with Parents.<sup>57</sup> Parents specifically reported that Student could not relay information about her day to them. Parents also raised concerns pertaining to Student's behaviors at school, requesting that District conduct an FBA for Student.<sup>58</sup> Student's IEP dated October 16, 2020 was amended to provide additional options for behavior supports, specifically the use of a taped zone for redirection in the classroom, and sensory tools such as a weighted blanket (previously addressed only in accommodations).<sup>59</sup> Student's IEP team determined that an FBA was not necessary at that time.<sup>60</sup> However, during this same month, Student's teachers began collecting behavioral data and continued doing so for the remainder of the school year so as to have some additional information.<sup>61</sup> The data collection indicated that Student often require redirection to stay on task.<sup>62</sup>

In May 2021, Parents sought an outside psychological evaluation for Student. Prior to discussing assessment results, the evaluator stated numerous clinical observations in her evaluation report. Specifically, she noted that Student's hearing, vision, cooperation with testing, responsiveness, fine and gross motor skills, thought processes, and speech and language skills were within normal limits.<sup>63</sup> The evaluator administered the following assessments to Student: (1) Wechsler Preschool and Primary Scale of Intelligence - Fourth

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<sup>56</sup> Parent Exhibits, p. 41.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at p. 43.

<sup>60</sup> District Exhibits, p. 176.

<sup>61</sup> Parent Exhibits, pp. 491-692.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at p. 153.

Edition (hereinafter “WPPSI-IV”); (2) WJ-IV; (3) ASRS; (4) Social Responsiveness Scale - Second Edition (hereinafter “SRS-2”); (5) Montiero Interview Guidelines for Diagnosing the Autism Spectrum - Second Edition (hereinafter “MIGDAS-2”); and (6) BASC-3.<sup>64</sup>

Based on the result of these assessments, it was determined that Student’s IQ was in the “average” range.<sup>65</sup> Student’s performance on the WJ-IV, which measures academic achievement, showed that Student was in the “very low,” “low,” or “low average” categories on all subtests, with the exception of spelling and applied problems.<sup>66</sup> On 9 of 12 subtests, Student’s grade equivalent was prekindergarten.<sup>67</sup> Regarding the ASRS, Student’s ratings were either “slightly elevated” or “very elevated” in all areas with the exception of usual behavior, applied language, and stereotypy, which fell in the “average” category.<sup>68</sup> Regarding the SRS-2, which measures social responsiveness, Student’s scores fell within the “severe” range.<sup>69</sup> Regarding the MIGDAS-2, the evaluator determined that a majority of Student’s behaviors were consistent with Autism Spectrum Disorder.<sup>70</sup> Regarding the BASC-3, Student was determined to be within normal ranges in all areas with the exception of hyperactivity, attention problems, adaptability, social skills, developmental social disorders, executive functioning, and resiliency.<sup>71</sup> In all of these areas, Student was determined to be “at risk.”<sup>72</sup> As such, the evaluator determined that Student’s overall executive functioning index was “extremely elevated.”<sup>73</sup>

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<sup>64</sup> Parent Exhibits, pp. 150-68.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at p. 154.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at p. 156.

<sup>69</sup> *Id.* at p. 158.

<sup>70</sup> *Id.* at p. 159.

<sup>71</sup> *Id.* at p. 160.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Student was diagnosed as having Unspecified Trauma and Stressor-Related Disorder and Unspecified Attention Deficit/Hyperactivity Disorder.<sup>74</sup> In addition, Student was diagnosed with Autism Spectrum Disorder, without accompanying intellectual impairment, but with accompanying language impairment.<sup>75</sup> Academic recommendations included, but were not limited to, the following: (1) regular communication between Parents and Student's teachers; (2) good attendance; (3) preferential seating; (4) behavior modeling; (5) repeated "review and drill, visual aids, flash cards, checklists, concrete examples, encouragement to verbalize steps, breaking things down into manageable steps, and hands-on activities"; (6) recognition and reinforcement of Student's strengths; (7) behavior modification; (8) classroom and testing modifications; and (9) frequent breaks.<sup>76</sup>

In addition, the evaluator made behavioral recommendations, which included, but were not limited to, the following: (1) structure, routine, consequences, and loving support; (2) respect modeling; (3) avoidance of debate or arguments with Student; (4) consistent enforcement of rules and consequences; (5) discipline appropriate for infraction; (6) empathy and tolerance instruction; (7) encouragement of independence; (8) identification of trigger events for Student's negative behaviors; (9) instruction regarding alternate ways to view negative situations; (10) opportunity for Student to take responsibility for behavior; (11) clear, concise, and specific boundaries and expectations; (12) quiet voice when interacting with Student; (13) eye contact during verbal instruction; (14) manageable tasks that are broken down into smaller steps; (15) frequent verbal praise; (16) role play of social situations; and (17) de-escalation strategies.<sup>77</sup>

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<sup>74</sup> Parent Exhibits, p. 163.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at p. 164.

<sup>77</sup> *Id.* at pp. 165-66.

As of May 28, 2021, at the end of Student's kindergarten school year, she had mastered all objectives regarding her English Language Arts goal.<sup>78</sup> Regarding Student's two behavior goals (behavior in relation to others and behavior pertaining to tasks), Student had mastered the goal with relation to others and showing self control of her body and voice, but had not yet mastered the behavioral goal pertaining to tasks.<sup>79</sup>

Student was administered the NWEA Map test in reading and math throughout the 2020-2021 school year.<sup>80</sup> Regarding reading, Student's NWEA Map scores in fall 2020, winter 2021, and spring 2021 were 134, 138, and 149, respectively.<sup>81</sup> Student's lexile scores during these same periods were BR400L, BR400L, and BR295, respectively, indicating that Student ended the school year on a reading level below that of a kindergartner.<sup>82</sup> Based on this testing, Student was at the 41st percentile in reading in fall 2020, 24th percentile in winter 2021, and 37th percentile in spring 2021.<sup>83</sup> Regarding math, Student's NWEA Map scores in fall 2020, winter 2021, and spring 2021 were 133, 136, and 152, respectively.<sup>84</sup> Based on this testing, Student was at the 30th percentile in math in fall 2020, 12th percentile in winter 2021, and 34th percentile in spring 2021.<sup>85</sup>

### **First Grade (2021-2022 School Year)**

At the start of the 2021-2022 school year, Parents sought an outside speech-language evaluation for Student.<sup>86</sup> Student was administered the following assessments as part of the evaluation: (1) Goldman Fristoe Test of Articulation, Third

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<sup>78</sup> Parent Exhibits, pp. 418-19, 28.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at pp. 436-38.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at p. 208.

Revision (hereinafter “GFTA-3”); (2) Clinical Evaluation of Language Fundamentals - Fifth Edition (hereinafter “CELF-5”); (3) Comprehensive Assessment of Spoken Language (hereinafter “CASL”); and (4) Oral and Written Language Scales - Second Edition (hereinafter “OWLS-II”).<sup>87</sup>

Regarding the GFTA-3, which measures articulation, Student’s scores indicated that her articulation was within normal limits for her age and gender.<sup>88</sup> Regarding the CELF-5, Student was administered numerous subtests, including sentence comprehension, linguistic concepts, word structure, word classes, following directions, formulated sentences, recalling sentences, and understanding spoken paragraphs.<sup>89</sup> Student’s receptive language content fell within normal limits, however, the evaluator determined that Student’s language skills were mildly delayed in the areas of core language, expressive language, and language structure.<sup>90</sup> Regarding the CASL, Student’s scores indicated that her core language skills were moderately delayed compared to other students her age.<sup>91</sup> Regarding the OWLS-II, Student’s scores indicated that she had expressive language skills that were moderately delayed compared to others within her age range.<sup>92</sup> Based on these test results, the evaluator determined that Student’s receptive language was mildly delayed, her expressive language was moderately delayed, her articulation was within normal limits, and her fluency, voice and prosody, oral motor skills, and hearing were all within functional

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<sup>87</sup> Parent Exhibits, p. 208.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at pp. 210-11.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at p. 212.

<sup>92</sup> *Id.* at pp. 212-13.

limits.<sup>93</sup> It was recommended that Student receive speech therapy services or 90 minutes per week for one year to address her deficits.<sup>94</sup>

On September 21, 2021, a month prior to the end date of Student's existing IEP, Student's IEP team held an annual review conference.<sup>95</sup> The team reviewed and discussed Student's annual progress, the results of her outside speech evaluation, and whether speech services were necessary for Student.<sup>96</sup> As a result of these discussions, Student's IEP team determined that Student continued to be eligible for special education services and drafted an IEP for Student with duration of services from September 21, 2021 through September 20, 2022.<sup>97</sup> Parents (mother) participated in the IEP meeting and was active in creating Student's new IEP.

Student's present levels of academic achievement referenced Student's eligibility for special education in the category of Autism, as opposed to Emotional Disturbance, on account of the psychological testing in May 2021 that established an Autism diagnosis.<sup>98</sup> The results of this testing were summarized and included in this section as well.<sup>99</sup> The result of Student's most recent speech therapy evaluation was also summarized, as well as an update on her occupational therapy progress.<sup>100</sup> Student's IEP team considered whether Student needed an FBA, but ultimately declined to conduct such assessment on account of the fact that Student's behaviors did not warrant that level of intervention.<sup>101</sup> The IEP also provided accommodations, which included: (1) preferential seating; (2) short instructions;

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<sup>93</sup> Parent Exhibits, p. 214.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at p. 121.

<sup>96</sup> *Id.* at p. 122.

<sup>97</sup> *Id.* at p. 27.

<sup>98</sup> *Id.* at p. 28; District Exhibits, pp. 140, 142-43.

<sup>99</sup> Parent Exhibits, p. 28.

<sup>100</sup> *Id.*

<sup>101</sup> District Exhibits, pp. 140, 142-43.



(3) visual aids; (4) reduction of assignments; (5) extra time for written responses; (6) frequent feedback; (7) encouragement for classroom participation; (8) fidgets for sensory needs; (9) extended time in reading; (10) small group settings; and (11) text to speech.<sup>102</sup> Student's schedule of services stated that Student would continue receiving direct instruction in reading and social skills, each for 150 minutes per week, in the special education classroom. In addition, speech services, specifically 60 minutes per week, were added to the IEP on account of Student's most recent speech and language evaluation.<sup>103</sup> Student was also scheduled to receive occupational therapy consultative services 60 minutes per month.<sup>104</sup>

Student's September 21, 2021 IEP included five goals, one behavioral, three English Language Arts, and one speech.<sup>105</sup> Student's behavior goal was the same as for the prior year, specifically that Student would listen to adults and comply with requests with 80% accuracy when given a directive.<sup>106</sup> Student's English Language Arts goals were as follows: (1) blend beginning, middle and ending sound to form on syllable words with 80% accuracy in four of five trials by the end of the IEP term; (2) add an individual sound to a word to make a new word with 80% accuracy in four of five trials by the end of the IEP term; and (3) delete initial and final sounds to make a new word with 80% accuracy in four of five trials by the end of the IEP term.<sup>107</sup> Student's speech goal provided that Student, when presented with auditory/visual stimuli, would demonstrate improved language skills by completing short term objectives with 80% accuracy by end then of the IEP term.<sup>108</sup> This

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<sup>102</sup> Parent Exhibits, p. 31.

<sup>103</sup> *Id.* at p. 33.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at pp. 34-36.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at p. 35.

<sup>108</sup> *Id.* at p. 36.

goal also included four objectives, specifically that Student would formulate grammatically correct sentences given grade level vocabulary, make inferences about pictures of scenarios, answer wh question in complete sentences, and ask questions to gain more information about a topic or scenario, all with 80% accuracy over 3 consecutive sessions.<sup>109</sup>

In December 2021, Parents sought another outside speech evaluation for Student. Student was evaluated on December 8, 2021 and was administered the following assessments: (1) Test of Language Development Primary: Fifth Edition (hereinafter “TOLD-P:5”); (2) Arizona Articulation Proficiency Scale: Third Edition (hereinafter “AAPS-3”); (3) Test of Pragmatic Language: Second Edition (hereinafter “TOPL-2”); and (4) Pragmatic Language Skills Inventory (hereinafter “PLSI”).<sup>110</sup> The evaluator concluded that Student’s hearing, oral motor skills, voice, and fluency were within functional limits.<sup>111</sup> Student’s scores on the TOLD-P:5 indicated that her spoken language, listening, organizing, speaking, grammar, and semantics were all within normal limits.<sup>112</sup> Student’s scores on the TOPL2 and the PLSI indicated that Student had a moderate pragmatic language delay.<sup>113</sup> Student’s scores on the AAPS-3 indicated that Student’s articulation was within functional limits.<sup>114</sup> In summary, the evaluator found that Student’s only deficiency with regard to speech pertained to pragmatic language and recommended that Student receive speech therapy for 180 minutes per week.<sup>115</sup>

In March 2022, midway through the second semester of the 2021-2022 school year, District sought consent from Parents to screen Student for characteristics of dyslexia (level

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<sup>109</sup> Parent Exhibits, p. 36.

<sup>110</sup> *Id.* at p. 203.

<sup>111</sup> *Id.* at pp. 203-04.

<sup>112</sup> *Id.* at p. 204.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at pp. 205-06.

<sup>115</sup> *Id.*

2). Student's scores on assessments measuring phonological awareness, word recognition, spelling, written expression, and reading comprehension indicated that Student was performing "considerably below expected level."<sup>116</sup> Student's scores on assessments measuring rapid naming skills, sound/symbol recognition, and fluency indicated that Student was performing "slightly below expected level."<sup>117</sup> As part of this process, it was also noted that Student's NWEA reading scores had decreased from the 41st percentile in fall 2020 to the 1st percentile in winter 2022.<sup>118</sup> Based on the results of these assessments, District immediately began providing dyslexia intervention to Student via the Sunday System.<sup>119</sup> Student began the Sunday System at Level 8, based on her placement test results.<sup>120</sup> Approximately three weeks later, Student had completed Level 12 of the program.<sup>121</sup>

District's speech provider records indicate that Student received 1290 minutes of speech, across 43 sessions, between September 23, 2021 and May 18, 2022.<sup>122</sup> Testimony indicated that the District had six days of school wherein instruction was AMI, or alternate method of instruction.<sup>123</sup> Regarding her IEP goals, as of May 27, 2022, at the end of Student's first grade school year, she had mastered all three of her English Language Arts goals, as well as her behavior goal pertaining to tasks.<sup>124</sup> Student's other goals were continuing.

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<sup>116</sup> Parent Exhibits, pp. 205-06.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at p. 287.

<sup>119</sup> *Id.* at pp. 318-20.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at p. 329.

<sup>122</sup> *Id.* at pp. 190-91.

<sup>123</sup> Transcript Volume II, pp. 138-39.

<sup>124</sup> Parent Exhibits, p. 2.

Student was administered the NWEA Map test in reading and math throughout the 2021-2022 school year.<sup>125</sup> Regarding reading, Student's NWEA Map scores in fall 2021 and spring 2022 were 142 and 155, respectively.<sup>126</sup> Student's lexile scores during these same periods were BR400L and BR180L, respectively, indicating that Student ended the school year on a reading level below that of a kindergartner.<sup>127</sup> Based on this testing, Student was at the 14th percentile in reading in fall 2021 and the 15th percentile in spring 2022.<sup>128</sup> Regarding math, Student's NWEA Map scores in fall 2021 and spring 2022 were 136 and 155, respectively.<sup>129</sup> Based on this testing, Student was at the 4th percentile in math in fall 2021 and the 8th percentile in spring 2022.<sup>130</sup>

Progress monitoring assessments administered to Student during the 2021-2022 school year indicated that Student continued to struggle academically in the area of reading. Student was administered a total of 10 STAR reading tests during her first-grade year, with grade equivalent levels ranging between <K and 0.5 (kindergarten, fifth month).<sup>131</sup> District documentation indicated that Student's STAR reading level at the end of her first-grade year was <K, meaning that Student is reading at the level of a prekindergartner.<sup>132</sup> Throughout first grade, Student was scoring between the 1st and 13th percentiles based on her performance on STAR reading assessments.<sup>133</sup> Student's Lexia program progress showed that Student was at level 9, which is the grade equivalent to the

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<sup>125</sup> Parent Exhibits, pp. 436-38.

<sup>126</sup> *Id.* at p. 435.

<sup>127</sup> *Id.* at p. 366.

<sup>128</sup> *Id.* at p. 435.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at p. 424.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

end of first grade.<sup>134</sup> Student's fourth quarter interim report card indicated that Student was making progress or meeting standards on all literacy and math skills.<sup>135</sup>

Student was not offered ESY services. District stated that there were no significant concerns regarding Student's rate of progress or behavior.<sup>136</sup>

### **Second Grade (2022-2023 School Year)**

In August 2022, Parent sought another outside speech and language evaluation.<sup>137</sup> The evaluator administered the OWLS-II AND CASL assessments to Student.<sup>138</sup> The results of these assessments indicated that Student had a slight delay in expressive language and pragmatics.<sup>139</sup>

On April 29, 2022, prior to the end of Student's first-grade year, Student's IEP team convened for the purpose of conducting an annual review conference and creating an IEP for Student's second-grade year.<sup>140</sup> As part of this review, the IEP team considered Student's present level of academic achievement as of the date of the meeting.<sup>141</sup> The team noted that Student had mastered all three of her English Language Arts goals, and also her behavior goal pertaining to tasks.<sup>142</sup> Student had demonstrated the ability to listen and comply with requests when given directives.<sup>143</sup> Student's IEP noted that, although Student's NWEA Map scores fell in the "in need of support" range for reading and math, Student had made gains from the fall semester to the spring semester, as evidenced by the increase in her test

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<sup>134</sup> Parent Exhibits, p. 424.

<sup>135</sup> *Id.* at p. 381.

<sup>136</sup> *Id.* at p. 136.

<sup>137</sup> *Id.* at p. 198.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at p. 200.

<sup>140</sup> *Id.* at p. 15.

<sup>141</sup> *Id.* at p. 16.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

scores.<sup>144</sup> It was also noted that Student had been receiving Dyslexia interventions for 35 minutes, 3 times per week.<sup>145</sup> Regarding Student's behavior, the IEP noted that Student had demonstrated improvements with overall behavior, attention, and focus at school.<sup>146</sup> The IEP provided that positive interventions and supports were still needed to ensure that Student remained on task, specifically stating that Student continued to benefit from the use of fidget toys and other sensory tools.<sup>147</sup>

Student's April 29, 2022 IEP contained numerous accommodations, including, but not limited to: (1) preferential seating/proximity to teacher; (2) short instructions; (3) reduced assignments; (4) extra time for written response; (5) frequent feedback; (6) fidgets for sensory needs; (7) two-way communication between home and school; (8) extra time for completing assignments; (9) sensory breaks; (10) calm down areas; (11) supervision during transition times; and (12) sensory diet.<sup>148</sup> The schedule of services provided that Student would receive special education services for 150 minutes per week in literacy, 90 minutes per week in social skills, and 60 minutes per week in speech and language.<sup>149</sup> Student's occupational therapy services were decreased from 60 minutes of consultation per month to 30 minutes monthly on account of the fact that Student had shown improvements with overall behavior, attention, focus at school, staying in her area in the classroom, following directives, making better choices, requiring less redirection, and demonstrating increased compliance with classwork.<sup>150</sup>

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<sup>144</sup> Parent Exhibits, p. 16.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at p. 17.

<sup>147</sup> *Id.* at p. 18

<sup>148</sup> *Id.* at p. 19.

<sup>149</sup> *Id.* at p. 20.

<sup>150</sup> *Id.* at pp. 17, 141; District Exhibits, pp. 74, 89.

On August 26, 2022, Student's April 29, 2022 IEP was amended in light of the updated speech and language evaluation that Parents obtained at the start of the 2022-2023 school year.<sup>151</sup> Specifically, Student's IEP team determined that the results of Student's August 17, 2022 speech and language evaluation indicated that Student no longer had a deficit that required speech therapy.<sup>152</sup> It was noted that Student had made remarkable improvement in all areas evaluated, and that it did not appear that continued speech therapy was warranted.<sup>153</sup> It was noted, however, that Student would continue to receive social skills reinforcement through goals addressed in the resource setting.<sup>154</sup>

Student's IEP included four English Language Arts goals, and two behavior goals (one related to others and one specific to tasks). Student's English Language Arts goals included the following: (1) substitute an individual sound in a word to make a new word with 80% accuracy in four of five trials by the end of the IEP term; (2) demonstrate knowledge of the silent e and vowel team correspondences with 80% accuracy in four of five trials by the end of the IEP term; (3) retell stories, including key details, and understand the main topic of a text with 80% accuracy in four of five trials by the end of the IEP term; and (4) write and tell a story with 80% accuracy in four of five trials by the end of the IEP term.<sup>155</sup> Student's behavior goal regarding her relation to others stated that she would demonstrate the ability to react appropriately to her peers' emotions and wants with 80% accuracy in four of five trials by the end of the IEP term.<sup>156</sup> Finally, Student's behavior goal pertaining to tasks provided that she would follow directions by looking at the teacher,

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<sup>151</sup> Parent Exhibits, p. 140.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at pp. 8-9.

<sup>156</sup> *Id.* at p. 9.

verbally acknowledging the direction, or asking for clarification with three or less incidences of non-compliance per day by the end of the IEP term.<sup>157</sup>

Just prior to the filing of this due process complaint, specifically on September 30, 2022, Student had a behavioral incident at school. Student punched another student in the face in the cafeteria.<sup>158</sup> Student's explanation of the incident changed several times. Ultimately, Student stated that the individual that she hit had done nothing to her at the time of the incident, but that he had pushed her earlier in the day during recess.<sup>159</sup> Parents were contacted following the incident.<sup>160</sup> Parents were unhappy about how District handled the incident, and asserted that Student's behavior was attributable to her Autism diagnosis.<sup>161</sup> District suspended Student for one day on account of the incident.<sup>162</sup> District also contacted Student's clinical therapist to share what had occurred.<sup>163</sup>

As of October 13, 2022, Student was at level 13 of the Sonday System, indicating that she had progressed one level since the start of the 2022-2023 school year.<sup>164</sup> Student had been administered three STAR reading assessments between September 2, 2022 and October 5, 2022, and her scores on those assessments equated to a grade equivalent of 0.7 (kindergarten, seventh month), 1.0 (beginning first grade), and 1.0 (beginning first grade).<sup>165</sup> Student was administered the NWEA Map assessment for reading and math in fall 2022. Student's reading score was 152 and her Lexile score was BR235L, placing her at the

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<sup>157</sup> Parent Exhibits, p. 9.

<sup>158</sup> *Id.* at p. 245.

<sup>159</sup> *Id.* at p. 246.

<sup>160</sup> *Id.* at p. 245.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at p. 251.

<sup>164</sup> *Id.* at p. 348.

<sup>165</sup> *Id.* at p. 424.



9th percentile.<sup>166</sup> A Lexile score of BR235L is equivalent to a prekindergarten reading level.<sup>167</sup> Student's math score was 158, which placed Student at the 10th percentile.<sup>168</sup>

Since the filing date of this matter, Student has undergone three additional evaluations.<sup>169</sup> On November 15, 2022, a speech therapy evaluation was conducted for Student.<sup>170</sup> Student was administered the following assessments: (1) TOLD-P:5; (2) GFTA:3; (3) TOPL-2; and (4) PLSI.<sup>171</sup> The result of this evaluation indicated that Student's total language, articulation, voice, fluency, and oral motor skills were all within normal or functional limits.<sup>172</sup> Student continued to show a moderate delay with regard to pragmatic language.<sup>173</sup> The recommendation based on these findings was that Student should receive 180 minutes of speech therapy per week.<sup>174</sup>

On January 20, 2023, an occupational therapy evaluation was conducted for Student.<sup>175</sup> Student was administered the VMI, as well as observed by the evaluator.<sup>176</sup> The evaluator determined, based on test scores, that Student demonstrated possible sensory processing dysfunction, a moderate delay in visual motor integration skills, and a severe delay in visual motor coordination skills.<sup>177</sup> The recommendation based on these findings

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<sup>166</sup> Parent Exhibits, p. 433.

<sup>167</sup> *Id.* at p. 366.

<sup>168</sup> *Id.* at 433.

<sup>169</sup> The purpose of addressing these evaluations, which occurred after the filing of the above-referenced matter, is only to provide information on Student's current educational performance. This Hearing Officer will not consider whether these evaluations were properly completed or otherwise constituted a violation of the IDEA.

<sup>170</sup> Parent Exhibits, pp. 192-96.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at pp. 226-32.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

was that Student should receive up to 180 minutes per week of direct occupational therapy services to address the stated deficit areas.<sup>178</sup>

On February 6, 2023, an adaptive behavior assessment was conducted for Student.<sup>179</sup> Based on Student's assessment results, Student's adaptive functioning level is well below the normative mean for Students her age.<sup>180</sup> Student's percentile rank with regard to overall adaptive functioning is less than the 1st percentile.<sup>181</sup> Looking specifically at the adaptive behavior domains, specifically communication, daily living skills, and socialization, Student's scores placed her at the 1st percentile, 4th percentile, and 1st percentile, respectively.<sup>182</sup>

#### **CONCLUSIONS OF LAW AND DISCUSSION:**

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the United States Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). The first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. *Id.* Thereafter, it must be determined whether the student's education was reasonably calculated to enable a child to

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<sup>178</sup> Parent Exhibits, pp. 226-32.

<sup>179</sup> *Id.* at pp. 146-49.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

make progress appropriate in light of the child's circumstances. *Id.*; see also *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. \_\_\_ (2017), 137 S.Ct. 988 (2017).

### **1. Procedural Violations of FAPE**

It must first be determined whether District complied with the procedures set forth in the IDEA. Here, Parents alleged that District failed to provide them a meaningful opportunity to participate in the decision-making process regarding Student's educational placement and program.<sup>183</sup>

The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to participate. *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010). Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Such predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *Gray*, 611 F.3d at 424 (citation omitted). "The IDEA explicitly requires school district to include parents in the team that drafts the IEP to consider 'the concerns of the parents for enhancing the education of their child' and to address 'information about the child provided to, or by, the parents.'" *M.M. ex rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012). Certainly, a school district's obligation under the IDEA regarding parental participation in the development of a student's IEP "should not be trivialized." *Rowley*, 458 U.S. at 205-06.

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<sup>183</sup> See Due Process Complaint in ADE H-23-18, p. 7, para. 18.

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

Regarding dyslexia specifically, pursuant to the Arkansas Dyslexia Resource Guide, if a student with a disability exhibits the characteristics of dyslexia, the IEP committee can determine “whether the student needs special education services in this area, if the student’s needs can be met through the district’s general education dyslexia intervention program, or if a combination of the two are needed.” Ark. Dyslexia Res. Guide, p. 39.

In the present case, Parents specifically alleged in their due process complaint that District prevented them from meaningfully participating in Student’s education by failing to include Student’s dyslexia program on her first and second grade IEPs. The facts in this case do not support this allegation. Student began receiving dyslexia interventions in March 2022, midway through the second semester of the 2021-2022 school year (first grade). Parents were consulted and granted consent for Student to be screened for characteristics of dyslexia. Student began receiving dyslexia intervention services immediately thereafter. Approximately one month later, on April 29, 2022, Student’s IEP team met for Student’s annual review conference, at which time the team considered what services Student’s IEP should contain in the upcoming school year (second grade). Parents fully participated in

this IEP meeting. Student's April 29, 2022 IEP noted in the present levels of academic performance section that Student had been receiving dyslexia interventions for 35 minutes, 3 times per week. When Student's IEP was later amended on August 26, 2022, at the start of the 2022-2023 school year (second grade), this reference to Student's dyslexia intervention services remained in her IEP.

It is somewhat unclear, based on the due process complaint, whether Parents are alleging that Student's IEPs failed to provide special education instruction with regard to Student's dyslexia intervention, or simply whether Parents are alleging that the IEP did not reference the interventions that Student was receiving. To the extent that Parents are alleging the former, there is no requirement that dyslexia intervention services be provided through a Student's IEP, *i.e.* that dyslexia intervention services be listed as a special education service on the schedule of services. The Arkansas Dyslexia Resource Guide, described above, makes this point very clear. As such, the fact that District did not amend Student's IEP in March 2022 and add Student's dyslexia interventions is not a violation of the IDEA. District was permitted to offer these services through the general education curriculum, and it sought the permission of Parents to do so.

It is also noted that, within a month, Student's IEP team made note of these interventions during Student's annual review conference and included reference to these interventions in Student's April 29, 2022 IEP. To the extent that Parents are alleging that Student's IEP did not reference the dyslexia intervention services that Student was receiving, the record indicates otherwise. Every IEP occurring after March 2022, when Student began receiving dyslexia intervention services, made reference to this fact and outlined the services that Student was receiving.

As such, it is the opinion of this Hearing Officer that District did not procedurally violate the IDEA by failing to allow Parents to meaningfully participate in Student's education and programming with regard to addressing Student' dyslexia intervention services in the IEP.

## **2. Substantive Violations of FAPE**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District did not procedurally violate the IDEA, it is now necessary to consider whether other actions of District substantively denied FAPE to Student. Here, Parents allege that District substantively violated the IDEA by failing to provide IEPs for Student's kindergarten, first grade, and second-grade years that were reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances.

Prior to March 22, 2017, Eighth Circuit law provided that if a student received "slight" or "de minimis" progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court "rejected the 'merely more than *de minimis*' standard that had previously been the law of the Eighth Circuit." *Paris Sch. Dist.*, 2017 WL at 4 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. \_\_\_ (2017), 137 S.Ct. 988 (2017)).

In *Endrew F.*, the standard set forth by the Court is "markedly more demanding" as compared to the "merely *de minimis*" test outlined in *Rowley*. *Endrew F.*, 137 S. Ct. at 1000. The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom,

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

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

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

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a

description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

It is noted that behavioral issues, standing alone, can be the basis of a FAPE denial. "When a child's learning is impeded by behavioral issues, the IDEA requires that the IEP team 'consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.'" *M.M. v. Dist. 0001 Lancaster Cty. Sch.*, 702 F.3d 479, 479 (8th Cir. 2012) (citing 20 U.S.C. §1414(d)(3)(B)(i)). A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student. *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). The Eighth Circuit Court of Appeals has stated that "it is 'largely irrelevant' if the school district could have employed 'more positive behavior interventions' as long as it made a 'good faith effort' to help the student achieve the educational goals outlined in his IEP" *M.M.*, 702 F.2d at 479. Although a district must consider all outside evaluations, it is not required that such recommendations be adopted. To require this from a district would result in "requiring a school to change methodologies based on the preferences of each parent" and would create the potential that a school district could be required to provide more than one method for different students based on parents with different preferences.

In the present case, Parents alleged that Student's kindergarten (2020-2021 school year), first grade (2021-2022 school year), and second grade (2022-2023 school year) IEPs were inappropriate and resulted in a denial of FAPE because they generally failed to include ABA therapy, a BIP, speech therapy, occupational therapy, full-time paraprofessional, and



sufficient special education instruction pertaining to social skills, reading, math, written expression, and dyslexia intervention. For the reasons set out below, it is the opinion of this Hearing Officer that Student's kindergarten and first grade IEPs were reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances. Student's second grade IEP, however, was not appropriate for Student and constituted a violation of FAPE.

**Kindergarten IEP (2020-2021 School Year).** It is the opinion of this Hearing Officer that Student's 2020-2021 IEP was reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances.

From a technical standpoint, Student's IEP contained a thorough statement of Student's present levels of academic achievement and functional performance, with explanation of recent assessments, as well as Student's strengths and weaknesses. This section of the IEP also included an explanation of upcoming evaluations that the District could expect to occur. Additionally, Student's IEP contained three goals that had objectives and were well written. These goals pertained to English Language Arts, behavior in relation to others, and behavior related to completing tasks in the classroom. All of these were deficits identified in Student's recent evaluations. Finally, Student's IEP contained a description of special education services that Student would receive, including 150 minutes per week in reading, 150 minutes per week regarding social skills instruction, and 60 minutes per week occupational therapy on a consultative basis.

From a content standpoint, specifically considering what information Student's IEP team had at the time of IEP creation, Student's IEP was appropriate. First, Student's evaluations indicated that Student should be identified under the IDEA category of either

Emotional Disturbance or Other Health Impairment. Taking this information under advisement, Student's IEP team found her eligible for services pursuant to the category of Emotional Disturbance. Second, Student was found to have significant weaknesses in the area of reading. In response, Student's IEP contained an English Language Arts goal pertaining to use and application of grade level phonics and word analysis skills. In addition, this goal had three objectives, specifically that Student would be able to identify all uppercase, lowercase, and consonant letters with 80% accuracy by the end of the IEP term. Third, Student was found to have significant deficits with regard to social skills and adaptive behavior. Student's IEP team addressed this with a behavior goal pertaining to Student's relationships with others. This goal, which provided that Student would demonstrate awareness of socially acceptable rules of interpersonal interaction, had a single objective, namely that Student would show self control of her body and voice and focus on good personal space in the classroom. Additionally, Student's IEP provided for 150 minutes per week of special education instruction in the area of social skills. Fourth, Student's evaluations indicated that Student had some behavioral issues consistent with an Autism diagnosis. Student's IEP team addressed Student's impulsive behavior with a goal specific to task related behaviors. This goal provided that Student would demonstrate improved behavior skills by following directions to complete assignments and tasks appropriately 80% of the time by the end of the IEP term. Fifth, Student's IEP team also provided consultative occupational therapy, 60 minutes per week, to address Student's sensory deficits.

It is also noted that there were 14 accommodations on Student's IEP that addressed various areas of concern. Preferential seating, opportunity to repeat and explain

instructions, immediate feedback, behavior modeling, sensory tools, and cues for redirection, for example, all pertained to impulsive and task-related behavior. Similarly, adjustment of long assignments, oral and printed directions, visual aids, and praise pertained to improving Student's academic deficits. Student's IEP also provided for behavioral supports, with specific mention of a penny system for rewarding Student. It is also noted that most of these accommodations were suggested by Parents and incorporated into Student's IEP during IEP creation.

In sum, Student's IEP team addressed all known issues at the time that it drafted her IEP. Because Student was a kindergartner, District had little to no information about Student with the exception of what was provided on recent evaluations and observed in the classroom. In light thereof, Student's IEP team acted in accordance with that information.

It is noted that Parents alleged that Student's kindergarten IEP was inappropriate because it failed to provide ABA therapy, a BIP based on an FBA, and a one-to-one paraprofessional for Student. These issues were specifically raised by Parents in January 2021. At that time, Student's IEP team reconvened to discuss concerns that Parents had raised in this regard. The team determined that, despite Parents' requests, Student's behavior was being managed appropriately and did not warrant intervention of this nature. Student's IEP committee did discuss other alternatives with Parent, however, and the team determined that providing a taped zone for redirection in the classroom could be helpful for Student in terms of understanding boundaries. As such, Student's IEP was amended and this behavior tool was implemented on January 21, 2021. The fact that District declined to grant Parents' requests pertaining to ABA therapy, a BIP, and a paraprofessional did not result in Student's IEP being inappropriate. Here, District met at the request of Parents,

considered what Parents were seeking, and determined that the requested interventions were not necessary. By considering Parents requests, District complied with its duty pursuant to the IDEA. Certainly, District was under no obligation to grant Parents requests if the majority of the team disagreed.

In conclusion, it is the opinion of this Hearing Officer that Student's kindergarten IEP was reasonably calculated at the time of creation, as well as at the time of amendment in January 2021, to allow Student to make appropriate progress in light of her individual circumstances.

**First Grade IEP (2021-2022 School Year).** It is the opinion of this Hearing Officer that Student's 2021-2022 IEP was reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances.

At the end of Student's kindergarten year, her NWEA Map scores indicated that she had roughly stayed the same with regard to percentile ranks in reading. Specifically, Student began the year in the 41st percentile in reading, and ended her kindergarten year at the 37th percentile. Her Lexile score, although still showing that Student's reading level was prekindergarten, had improved slightly from BR400L to BR295L. Similarly, regarding math, Student's NWEA Map scores indicated that she began her kindergarten year at the 30th percentile and, by the end of that school year, had grown slightly to the 34th percentile. She had also mastered her English Language Arts goal, including all objectives, as well as her behavior goal pertaining to relationships with others. Although these scores and measures did not show astronomical growth, they did indicate that the IEP team's efforts were having a somewhat positive impact in that Student had maintained or slightly improved her academic position. In addition, and as explained fully below, District's response to this

information demonstrated that it reacted in a positive manner by taking steps to add goals and services to Student's first grade IEP.

Specifically, on September 21, 2021, Student's IEP team met for an annual review conference. The IEP team discussed Student's annual progress and the results of an outside speech evaluation from August 2021 which found that Student had delays in receptive and expressive language. The IEP team then determined that Student continued to be eligible for special education services pursuant to the IDEA, although it changed the IDEA category of eligibility to Autism based on Student's most recent psychological evaluation in May 2021.

Considering Student's first grade IEP from a technical standpoint, it contained a thorough statement of Student's present levels of academic achievement and functional performance, with explanation of recent assessments, as well as Student's strengths and weaknesses. Additionally, Student's IEP contained five goals, all of which had objectives and were well written. These goals pertained to English Language Arts, behavior related to completing tasks in the classroom, and speech. Finally, Student's IEP contained a description of special education services that Student would receive, including 150 minutes per week in reading, 150 minutes per week regarding social skills instruction, and 60 minutes per week of speech therapy.

From a content standpoint, specifically considering what information Student's IEP team had at the time of IEP creation, Student's IEP was appropriate. First, Student continued to have weaknesses in the area of reading. Whereas Student's kindergarten IEP contained one English Language Arts goal, her first grade IEP contained three goals to more robustly address her deficits. Also, Student's IEP provided for 150 minutes per week of

special education instruction in the area of reading. Second, Student had not mastered her goal with regard to task-related behavior during the prior year, likely as a result of her Autism diagnosis. As such, a similar goal was included so that Student could continue working in this area. Third, Student was provided with speech therapy, a related service that she had not received the previous year and would hopefully improve Student's receptive and expressive language skills and, thus, her academic performance. Fourth, Student's IEP once again provided for 150 minutes of social skills instruction each week so that Student could continue working on her personal interactions with others. Fifth, Student continued to have numerous accommodations, similar to the year before, to address these areas of concern.

In March 2022, District again acted appropriately when, considering Student's NWEA scores and STAR reading assessment tests, it contacted Parent and requested consent to test Student for characteristics of dyslexia. At that time, Student's winter 2021 NWEA scores in reading had dropped from the 37th percentile at the end of Kindergarten, to the 1st percentile in winter 2022. Student's dyslexia screening assessments indicated that she was performing considerably below the expected level. The following week, District began providing dyslexia interventions to Student. The following month, specifically on April 29, 2022, an annual review conference was held for Student and her IEP team noted this change on the IEP that it drafted for the upcoming school year.

As noted previously, the fact that District did not provide ABA therapy, a BIP, or a one-to-one paraprofessional does not automatically indicate that District failed to provide an appropriate IEP for Student. The record is clear that these issues were raised by Parent during the September 21, 2021 annual review conference and considered by District. The

determination by Student's IEP team that these interventions were not necessary is supported by the fact that there are no major behavioral incidents, up to this time, that have been documented for Student.

In sum, during Student's first-grade year, District made numerous adjustments in response to Student's performance at the end of kindergarten, as well as her performance in the middle of first grade. Increased goals, increased services, and dyslexia interventions were all added in an attempt to address Student's deficits. District made changes based on the new information that it had. Certainly, Student was losing ground during the school year in terms of her academic progress, but District was also reacting to this loss and attempting to make changes to counteract the same. As such, and considering District's actions based on the information that it had available at the time, it is the opinion of this Hearing Officer that Student's IEP during her first-grade year was reasonably calculated to allow her to make appropriate progress in light of her individual circumstances.

**Second Grade IEP (2022-2023 School Year).** It is the opinion of this Hearing Officer that Student's 2022-2023 IEP was not reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances.

At the end of Student's first-grade year, and despite numerous adjustments by District, Student's NWEA Map and STAR reading assessment scores all indicated that she was continuing to significantly struggle. Specifically, considering Student's NWEA Map scores in reading, she began the first-grade year at the 14th percentile, and ended that same year at the 15th percentile. Student's Lexile score at the end of first grade was BR180L, which was slightly better than her score at the end of kindergarten, but still placed Student in the prekindergarten level in terms of reading. Student was administered a total

of 10 STAR reading tests during her first-grade year, but was never able to achieve a score above that of a mid-year kindergarten student. At the end of her first-grade year, Student's STAR reading score indicated that she was still reading at the level of a prekindergartner. Essentially, Student ended the first grade two complete grade levels behind her same-age peers in reading. Regarding math, Student's NWEA Map score showed growth during kindergarten, resulting in Student finishing the year at the 34th percentile. However, her scores following the first grade showed a significant decline to the 8th percentile. Regarding her goal achievement, Student had mastered all three of her English Language Arts goals from the first-grade IEP, as well as her behavior goals pertaining to tasks. Other goals were ongoing.

On April 29, 2022, at the end of Student's first-grade year, her IEP team met for an annual review conference. The IEP team discussed Student's annual progress and determined that Student continued to be eligible for special education services pursuant to the IDEA Autism category. The team also drafted an IEP at that meeting, with Parents' input. With regard to ESY services, the team determined that there were no significant concerns regarding Student's rate of progress or behavior that required Student to receive special education services during the summer months between her first and second-grade school year.

Considering Student's second grade IEP from a technical standpoint, it contained a thorough statement of Student's present levels of academic achievement and functional performance. This section of the IEP also noted that Student was receiving dyslexia intervention services. Additionally, Student's IEP contained six goals, all of which had objectives and were well written. These goals pertained to English Language Arts and



behavior (one related to others and one specific to tasks). Finally, Student's IEP contained a description of special education services that Student would receive, including 150 minutes per week in literacy, 90 minutes per week regarding social skills instruction, 60 minutes per week of speech therapy, and 30 minutes per month of occupational therapy on a consultative basis. On August 26, 2022, Student's second-grade IEP was amended to remove speech therapy services on account of a speech and language evaluation that Parents provided at the start of the 2022-2023 school year.

From a content standpoint, specifically considering what information Student's IEP team had at the time of IEP creation, Student's IEP was not reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances. First, regarding reading, Student had four English Language Arts goals which included substituting an individual sound in a word to make a new word, demonstrating knowledge of the silent e and vowel team correspondences, retelling stories and understanding the main topic of a text, and writing and telling a story, all with 80% accuracy in four of five trials by the end of the IEP term. Given Student's reading level, specifically a prekindergarten level, these goals do not appear appropriate. In addition, Student's IEP stated that she would continue to receive dyslexia intervention services at the same rate as the prior year, specifically 35 minutes, 3 days per week. Student declined significantly during the first grade, despite this level of intervention toward the end of that year. District should have considered other alternatives pertaining to dyslexia intervention or, at the very least, increased the sessions that it was providing for Student in an attempt to close the gap regarding Student's two-year grade level deficit in reading. Second, Student's speech minutes were removed from the IEP in August 2022 when the IEP team decided to

discontinue speech services. This was counter to the most recent speech and language evaluation that Parents provided in August 2022, which indicated that speech therapy was still needed. Third, Student's IEP showed a reduction in social skills instruction, specifically from 150 to 90 minutes per week. This is particularly unusual given that the behavior goal pertaining to relationships with others was added back to Student's second-grade IEP after having been removed from Student's first-grade IEP. These two actions are inconsistent with one another. The fact that the IEP team felt that Student needed a specific behavior goal pertaining to social interactions indicates to this Hearing Officer that a reduction of special education instruction in this area was premature. Fourth, given Student's decline in math scores over the first-grade year, Student's second-grade IEP should have addressed math deficits. There is nothing in the IEP to address this issue in any capacity. Fifth, Student likely needed ESY services. Student made no academic progress during the first-grade year and could have benefited significantly from intensive summer services.

Parents allege that the lack of special education instruction in dyslexia, as well as the lack of dyslexia goals, is also indicative of an inappropriate IEP. This hearing officer disagrees with this contention. As stated previously in this decision, District has the option of providing dyslexia services through the schedule of services, *i.e.* providing special education instruction in this regard, or providing these services in the general education and referencing them on the IEP. The fact that there are no special education minutes specifically devoted to dyslexia intervention instruction does not, standing alone, result in Student's IEP being inappropriate.

Parents further allege that Student's IEP should contain a BIP based on an FBA. Parents cite an incident wherein Student punched another child in the face at the beginning

of third grade as evidence that Student has continuing behavior issues that need to be addressed with a BIP. This hearing officer disagrees. A review of the record in this case indicates that the incident wherein Student punched another student was isolated. Student's behavior issues up to that point had been more specific to being off task and requiring redirection. Certainly, if Student has any other violent outbursts at school, this issue should be revisited. At present, however, it appears that the punching incident was not the norm and does not require a BIP.

In summary, given Student's performance in the first grade, and particularly in light of the fact that District made numerous adjustments during Student's first-grade year to address data indicating academic loss, Student's second-grade IEP is not appropriate for Student. As of the date of filing, Student's NWEA Map score in reading placed Student at the 9th percentile, lower than her percentile rank at the end of first grade. Student's NWEA Map score in math fell at nearly the same percentage as it did at the end of first grade, despite the fact that Student had been in school for two months of her second-grade year at that time. Evaluations conducted after the filing date of the above-referenced matter indicate that Student continues to have delayed pragmatic speech, a moderate delay in visual motor integration skills, a severe delay in visual motor coordination skills, and issues with adaptive functioning. Student's IEP needs to be amended to address all of these deficits in a thorough manner.

**ORDER:**

The results of the testimony and evidence warrant a finding for Parents. Parents introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between April 29, 2022 and October 19, 2022

by failing to provide Student with an IEP that was reasonably calculated to allow Student to make appropriate progress in light of her individual circumstances. As such, District is hereby ordered to take the following actions regarding Student:

1. District shall ensure that Student is comprehensively evaluated to determine, at a minimum, current achievement levels and academic deficits (including testing for dyslexia), IQ, speech and language deficits, occupational therapy needs, and psychological needs/recommendations. All evaluations must be completed by June 15, 2023, and District is responsible for paying all necessary evaluation fees and costs. In this case, there are numerous existing evaluations from numerous providers. This Hearing Officer has concerns about the repeated evaluations within short periods of time, and particularly in light of the fact that some of the evaluations have been conducted by the same providers. For that reason, District has discretion as to which providers are selected to conduct the ordered evaluations; however, District must choose providers that neither District nor Parents have utilized to date so as to ensure that Student receives truly independent evaluation results.
2. District shall meet with Parents no later than August 1, 2023 for the purpose of developing a new IEP for Student. The IEP must contain appropriate and thorough goals, with objectives, and address the specific programming and modifications, as well as accommodations, that District will use to address Student's deficits. The IEP must also have progress monitoring and tracking incorporated. At a minimum, Student's IEP should address her deficits in reading (including dyslexia, if appropriate based on evaluation results),

math, speech therapy (to the extent that evaluations indicate a deficit), occupational therapy (to the extent that evaluations indicate a deficit), and any behavioral issues. Whether a BIP will be warranted will be dependent on the outcome of Student's evaluation results.

3. Throughout Student's third-grade school year, District shall hold an IEP conference at the end of every 9-week period of the school year for the purpose of determining Student's progress and making adjustments as necessary to Student's IEP.

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

**FINALITY OF ORDER AND RIGHT TO APPEAL:**

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

**IT IS SO ORDERED.**

/s/ Danna J. Young

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**HEARING OFFICER**

05/08/2023

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**DATE**