

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**XXXXXXXXXXXX, STUDENT, AND
XXXXXXXXXXXX AND XXXXXXXX,
PARENTS OF XXXXXXXXXXXXXXX,
Petitioner/Parents**

VS.

NO. H-23-23

**VILONIA SCHOOL DISTRICT,
Respondent/District**

HEARING OFFICER’S FINAL DECISION AND ORDER

XXXXXXXXXX (“Student”) is a male who, at the time the due process complaint in this case was filed, was 17 years of age and in the twelfth grade at Vilonia High School.¹ Student was diagnosed with Specific Learning Disability (“SLD”) in the first grade and received special education services in all but kindergarten and ninth grade at Vilonia School District (“District”). XXXXXXXXXXXXXXXXXXXX, the parents and then legal guardians of Student (“Parents” or “Parent”) filed the due process complaint on Student’s behalf alleging that District failed to comply with the IDEA, as well as regulations set forth by the Department, thus denying Student a free and appropriate education (FAPE) under the IDEA.

**I.
ISSUES PRESENTED**

Whether District denied Student a FAPE in violation of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (“IDEA”) by:

- (1) dismissing Student from special education in eighth grade without an evaluation and

¹ Parents’ Post-Hearing Brief, p. 2.

based on District's misrepresentation to Parents; and

(2) failing to develop appropriate Individualized Education Programs (IEPs) for eleventh and twelfth grades.²

II. PROCEDURAL HISTORY

On December 20, 2022, the Arkansas Department of Education ("Department") received from Parents, a request to initiate due process hearing procedures.³

In response to Parents' request for a due process hearing, the Department assigned the case to the undersigned impartial Hearing Officer. District responded on December 29, 2022, and simultaneously filed a Motion to Assign Burden of Proof to Parents and a Motion to Limit Length of Hearing. Following a pre-hearing conference on March 6, 2023, this Hearing Officer entered an order granting District's motion to assign burden of proof and denying District's motion to limit the length of the due process hearing.

The hearing was scheduled to take place on February 14-16, 2023. After granting two continuances, the hearing was ultimately rescheduled for April 10-12, 2023.⁴

On February 7, 2023, Student turned 18, the age of majority under applicable Arkansas law, and has not been determined to be incompetent under Arkansas law. On February 14, 2023, District sought to dismiss the due process complaint on the basis that Parents' rights under the IDEA transferred to Student when he reached the age of 18, leaving Parents without standing to

² See Parents' post-hearing brief, p. 21.

³ See, generally, Due Process Complaint.

⁴ See Order Granting Continuance and Rescheduling Pre-Hearing Conference and Due Process Hearing, March 4, 2023.

pursue this case.⁵ A hearing on the motion was held and for the reasons stated in the order, this Hearing Officer denied the motion to dismiss and added Student as a party.⁶

Having been given jurisdiction and authority to conduct the hearing pursuant to the IDEA, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Cheryl L. Reinhart, J.D., Hearing Officer for the Department, conducted a closed impartial hearing on April 5-7, 2023, and April 28, 2023, at the Vilonia School District, Vilonia, Arkansas. Present for the hearing were Parents and their attorney Ms. Theresa Caldwell, of Caldwell Law Office, Little Rock, Arkansas; Ms. Jennifer Jensen, District LEA Supervisor; and the District's attorney, Mr. Jay Bequette, of Bequette, Billingsley, and Kees, P.A., Little Rock, Arkansas. Student was not present.

The following witnesses testified in this matter: Marcia Starr, Student's twelfth grade special education teacher, District Pathways Program; Aaron Jackson, Student's eighth grade special education teacher; Jennifer Shock, District school psychology specialist; Jessica Wallace, District special education co-teacher, Geometry; Heather Thomas, Student's tenth grade Geometry teacher; Kaitlyn Austin, Student's eleventh grade English teacher; Brian Donahoe, Student's special education co-teacher, Algebra 2; Lisa Sloan, Student's eleventh grade Algebra 2 teacher; Toni Nolan, Student's twelfth grade Technical Math teacher; Lisa Evans, Student's twelfth grade English teacher, Pathways Program; Dr. Cathy Riggins, District Assistant Superintendent; John Sweeney, District Pathways Program teacher; Rebekah Stout, Student's tenth grade English teacher; Jennifer Jensen, District Special Education Director ("LEA"); and XXXXXXXX, Parent.

⁵ See District's Motion to Dismiss.

⁶ Order Denying Motion to Dismiss and Adding Student as a Party, April 2, 2023.

Both parties requested to provide post-hearing briefs in lieu of closing arguments. The deadline for providing briefs was May 17, 2023, and briefs were filed on that day.⁷

III. FINDINGS OF FACT

Kindergarten through Seventh Grade (2010-2017)

Kindergarten through Third Grade. Student attended the Vilonia School District from kindergarten through twelfth grade.⁸ He was referred for special education while in first grade, and District conducted an evaluation on November 29, 2011. Parent completed a social history indicating that Student would have some behavior problems, noting “attention, anxiety, and some processing.”⁹ The evaluation revealed that Student had Specific Learning Disabilities (SLDs) in reading and written expression.¹⁰ As a result, Student began receiving special education services in the general education setting in first grade, and continuing through the second and third grades.

Fourth Grade. In fourth grade, Student was re-evaluated by April Reed, School Psychology Specialist and Licensed Psychological Examiner.¹¹ Student’s scores from the evaluation are summarized as follows:

Wechsler Intelligence Scale for Children-IV. Student scored in the average range for full scale intellectual functioning.

Behavior Assessment System for Children (BASC-2) and a Teacher Rating Scale. Student’s social/emotional (adaptive) behavior functioning scores were within the average range.

⁷ See Order Extending Deadline for Filing Briefs.

⁸ Due Process Complaint, p. 3.

⁹ Parent Ex., pp. 202-203.

¹⁰ Parent Ex., p. 293.

¹¹ Parent Ex., p. 282.

Wechsler Individual Achievement Test (WIAT-III). Student scored average on all components except for spelling, which was below average.

Kaufman Test of Educational Achievement (KTEA-II). Student scored below average on reading comprehension (84), reading composite (83), spelling (74), and written language composite (78).

Oral expression was not re-evaluated as Student's first grade score was average.

New subject area testing was not requested, although first grade testing indicated below average scores in reading comprehension, reading fluency, and spelling.

A new perceptual assessment was not requested, as Student's first grade assessment indicated average visual perception skills.¹²

The District IEP team determined that Student still had a SLD that impacts his reading, spelling, and writing abilities.¹³

Fifth and Sixth Grades. The IEP team continued special education placement and services in the fifth and sixth grades.¹⁴

Seventh Grade. Two actions were taken by the IEP team for the seventh grade – an existing data review on September 28, 2017, and an annual review on March 29, 2018. The IEP developed for the seventh grade at the March 29, 2018, provided for 30 minutes per week of indirect services for literacy, plus accommodations.¹⁵ Parent did not attend the meeting.¹⁶

Although a triennial evaluation was due in the seventh grade, there is no evidence that the IEP team conducted one.

¹² Parent Ex., pp. 207-208.

¹³ Parent Ex., pp. 089-095 and p. 208.

¹⁴ Parent Ex., p. 181-182.

¹⁵ Parent Ex., pp. 172-173.

¹⁶ Parent Ex., p. 176.

The Notice of Action described Student’s progress as “doing great and requires no modifications in any of his classes.”¹⁷ A progress report showed that at December 14, 2017, Student had 70% progress, and on March 14, 2018, he had 85% progress.¹⁸ The IEP team continued his monitoring and indirect services for 2017-2018 with a view to possibly dismissing him from special education in the 2018-2019 school year.¹⁹

Eighth Grade (2018-2019 School Year)
Dismissal from Special Education

On March 14, 2019 (second semester of eighth grade), District provided a Notice of Conference to Parents that an IEP meeting would take place on March 28, 2019, to determine initial or continued eligibility for special education and related services.²⁰ The notice also stated that the team would review/revise the IEP, consider post-secondary transition, and conduct an annual review. The meeting took place on March 26, 2019, at Parent’s request.²¹

Parent attended the meeting along with Student’s science and language arts teacher, and Aaron Jackson, Student’s special education teacher.²² Jackson testified that he had no personal recollection of Student beyond what he could read from the exhibits, including about Student’s SLD, Student’s special education services, or Student’s dismissal from special education effective for his eighth-grade year.²³

District did not conduct an evaluation for the purpose of determining Student’s continued eligibility for special education. Jackson, who wrote the IEP, testified that he did not know

¹⁷ Parent Ex., p. 176.

¹⁸ Parent Ex., p. 178.

¹⁹ Parent Ex., p. 176.

²⁰ Parent Ex., p. 168.

²¹ Parent Ex., p. 171.

²² Parent Ex., p.168.

²³ See Tr. Vol. I, pp. 109-124.

whether or not an evaluation was done, but acknowledged that the Department's rules²⁴ require a school district to conduct an evaluation of the student before dismissing him from special education.²⁵

The IEP developed on March 26, 2019, for the remainder of the eighth grade and the 2019-2020 school year (ninth grade) stated that the IEP team determined Student's present level of academic achievement and functional performance based on the following:

- "Most recent assessment data," which was Student's fourth-grade evaluation;
- Grade reports that indicated Student made passing grades; and
- Teacher reports that Student "needs no accommodations and is keeping pace with his non-disabled peers."²⁶

According to the Notice of Action, the IEP team reviewed parent and teacher input, Student's current IEP, and state assessments.²⁷ Teacher input was a statement by one teacher that Student "is doing well in his classes, ... that he does not need accommodations or modifications to be successful ... works hard for [him] and puts forth a strong effort," and refuses accommodations offered to him.²⁸ The IEP does not indicate what "state assessments" were reviewed.

The Notice of Action also states that "[Parent] is happy with [Student's] progress and was in agreement with the team about [Student's] dismissal from special education."²⁹ Parent testified that at the time of the IEP conference, she did not question the recommendation of the IEP team because she believed that the IEP team had Student's "best interest in his education."³⁰

²⁴ Ark. Dept. of Education Rules, Special Education and Related Services, 6.00 Evaluation – Eligibility Criteria, § 6.05.05.

²⁵ Tr. Vol. I, p. 118.

²⁶ Parent Ex., p. 067.

²⁷ Parent Ex., p.170.

²⁸ Parent Ex., pp. 170-171.

²⁹ Parent Ex., pp. 170-171.

³⁰ Tr. Vol. IV, p. 56.

Parents did not know that an evaluation is required before dismissing a student from special education.³¹

The Notice of Action does not contain a description of what state assessments were reviewed. Parents' exhibits included Student's STAR Reading scores for assessments administered on December 13, 2018, (first semester of eighth grade) which indicated a grade level of 6.7 with 18.5 minutes spent on the assessment.³² When tested again on May 15, 2019, (second semester of eighth grade) Student's scores indicated a grade level of 5.5 after spending 22 minutes on the assessment. District's explanation for why Student's reading level dropped from 6.7 to 5.5 in two months was that Student was not putting forth his best effort.³³ At the time of the dismissal conference in March, the IEP team would have had the December 2018 STAR scores, but not the May 2019 scores.³⁴

The IEP team considered revising the IEP, but decided not to. The Notice of Action states as its reasoning for that decision, "[Student] is making adequate progress in all his classes without any modifications or accommodations ... [and] ... has shown grown [sic] great maturity and is able to get his work done on his own without any further help from special education."³⁵ There is no data in evidence for progress monitoring or reporting.

Ninth Grade (2019-2020 School Year)

Student did not have an IEP, accommodations, or special education services for the ninth grade. Also, the COVID pandemic began in Student's ninth grade year, and Student worked

³¹ Tr. Vol. IV, p. 65.

³² District Ex., p. 204.

³³ District Ex., p. 205.

³⁴ Tr. Vol. I, pp. 120-121.

³⁵ Parent Ex., p. 171.

online from home.³⁶ Parent testified that Student struggled during that time, particularly with Math.³⁷ Semester grade reports for the ninth grade showed that Student passed English 9 with an 86, and Algebra I with a 67.³⁸

Student was administered STAR Reading and Math assessments in the first four weeks of the ninth grade with the following results:

- STAR Reading Assessment, September 8, 2019, grade equivalent of 5.1, 18.5 minutes time spent on assessment.³⁹
- STAR Math assessment, August 29, 2019, grade equivalent of 7.4, with 21.5 minutes time spent on the assessment.⁴⁰

Tenth Grade (2020-2021 School Year) **Placement Again in Special Education**

Student's education was virtual during part of his tenth-grade year as a result of the pandemic.⁴¹ Parent observed that Student was having difficulty in math and again referred Student for special education.⁴² Jennifer Shock, School Psychology Specialist, conducted the evaluation for the District and issued a report on October 30, 2020.⁴³ The evaluation report states that Student was referred due to academic difficulties in math.⁴⁴ As part of the evaluation, Parents provided a social history that identified Student's diagnosis of anxiety.⁴⁵

The report further states that STAR Math and Reading Assessments were administered as part of the evaluation, with the following results:

³⁶ Tr., Vol. I, p. 124.

³⁷ Tr. Vol. IV, p. 56.

³⁸ District Ex., p.296.

³⁹ Parent Ex., pp. 268.

⁴⁰ District Ex., p. 183.

⁴¹ Tr. Vol. IV, p.56.

⁴² Tr. Vol. IV, p. 64.

⁴³ Parent Ex., pp. 268-281.

⁴⁴ Parent Ex., pp. 268.

⁴⁵ Parent Ex., pp. 268.

- STAR Reading Assessment, October 16, 2020, grade equivalent of 8.4 (no information on time spent)⁴⁶
- STAR Math assessment, October 30, 2020, grade equivalent score of 5.5 (no information on time spent)⁴⁷

The evaluator administered a battery of tests with the following results:

- The Behavior Assessment System for Children, 3rd Edition (BASC-3): Scores were in the average range on most areas tested, but at-risk in the areas of social skills and leadership, and clinically significant in anxiety and withdrawal.⁴⁸
- The Wechsler Intelligence scale for Children-V (WISC-V): Scores were average in all areas tested except as follows: Verbal Comprehension, low average; Visual/Spatial, very low; and Working Memory, low average⁴⁹
- The Woodcock Johnson Test of Cognitive Abilities (WJ-IV COG): Indicated strength on Fluid Reasoning, but low average on Crystallized Knowledge.⁵⁰ The Auditory Processing subtests of the WJ-IV COG showed that Student was average overall, but low average for phonological processing.⁵¹
- The WISC-V: Indicated Student's strengths in Fluid Reasoning, Auditory Processing, Processing Speed, but weaknesses in Crystallized Knowledge (low average), Long-Term Retrieval (low average), Visual Processing (very low), and Short-Term Memory (low average).⁵²
- The Wechsler Individual Achievement Test-IV (WIAT-IV): Student scored as: average on Oral Reading Fluency, Math Problem Solving, and Essay Composition; low average in Reading Comprehension, Word Reading, and Sentence Comprehension; and very low in Math Numerical Operations.⁵³
- The Developmental Test of Visual Motor Integration, 6th Revision (VMI): Student scored below average.⁵⁴

⁴⁶ Parent Ex., pp. 268.

⁴⁷ Parent Ex., p. 272.

⁴⁸ Parent Ex., p. 270.

⁴⁹ Parent Ex., p. 271.

⁵⁰ Parent Ex., p. 274.

⁵¹ Parent Ex., p. 273.

⁵² Parent Ex., p. 275.

⁵³ Parent Ex., p. 272.

⁵⁴ Parent Ex., p. 273.

Shock's evaluation revealed a drop in Student's IQ from 91 in the fourth grade to 85 at the time of the evaluation.⁵⁵ Shock testified that there could be a drop in IQ, but that it is usually only two to three points. Shock attributed a drop in IQ, generally, to changes in the WISC-V, a student's mental health issues, and sometimes a student just being an unmotivated teenager.⁵⁶

Overall, Shock identified a possible SLD in the areas of Reading Comprehension, Math Calculations, and Written Expression.⁵⁷ She recommended that the IEP team make the final decision for diagnosis and placement, but recommended six accommodations for Student at school.⁵⁸

District held an IEP meeting on November 13, 2020, which Parent attended. The IEP developed at this meeting acknowledged Student's weaknesses in the assessments given during the evaluation: verbal comprehension, visual spatial, long-term retrieval, word-reading, reading comprehension, numerical operations, and sentence composition. His withdrawal was clinically significant, and social skills and leadership in the at-risk range.⁵⁹

SLD areas of Reading Comprehension and Written Expression are not addressed in the IEP. Only one annual goal was included on the IEP, for mathematics: "Given teacher instruction and materials, [Student] will identify and/or verify properties of geometric figures using the coordinate plane and concepts from algebra with 60% accuracy by the end of the school year."⁶⁰ The IEP listed five of the evaluator's six recommendations: alternate locations upon request; extra time for completing assignments, including tests; copy of notes sent to email; not being singled out in class; preferential scheduling; and reduced assignments/appropriate activities,

⁵⁵ Tr. Vol. 1, pp. 138-139.

⁵⁶ Tr. Vol. 1, pp. 139-142.

⁵⁷ Parent Ex., p. 277.

⁵⁸ Parent Ex., p. 278.

⁵⁹ Parent Ex., p. 54.

⁶⁰ Parent Ex., p. 57.

including tests.⁶¹ Special education services would be provided as 2,040 minutes of co-taught services in math.⁶² The IEP places Student in the general education setting 100% of his time.⁶³ The IEP did not contain data collection or progress monitoring. Student's post-secondary transition is included for a projected career in education/coaching.⁶⁴

Another IEP meeting occurred on January 19, 2021, which Parent attended, for the purpose of developing an amendment to the IEP. The amended IEP states that Parent "was not happy about his progress in his English 10 class," and requested that she be contacted by teachers when Student "is not completing work or is making low grades (D's and F's)."⁶⁵ A STAR Reading assessment was completed on January 7, 2021, on which Student performed well below his tenth-grade level. Scores from that test and tests taken on January 19, 2021, are as follows:

- STAR Reading Assessment, January 7, 2021, grade level score of 7.1, with 10.25 minutes time spent on the assessment⁶⁶
- STAR Reading Assessment, January 19, 2021, grade level score of 6.6, with 8.5 minutes time spent on the assessment⁶⁷
- STAR Math Assessment, January 19, 2021, grade level score of 6.7, with 9.7 minutes time spent on the assessment⁶⁸

The amended IEP contained only one change, which was to Student's accommodations for the reduction of multi-choice options on tests.⁶⁹ The amended IEP still does not address SLD areas

⁶¹ Parent Ex., p. 55.

⁶² Parent Ex., p. 58

⁶³ Parent Ex., p. 59.

⁶⁴ Parent Ex., p. 62.

⁶⁵ Parent Ex., p. 39.

⁶⁶ District Ex., p. 174.

⁶⁷ District Ex., p. 186.

⁶⁸ District Ex., p. 185.

⁶⁹ Parent Ex., p. 41.

of Reading Comprehension and Written Expression. The amended IEP did not contain data collection or progress monitoring.

While semester grade reports showed that Student passed English 10 with a 71, and Geometry with a 70,⁷⁰ his ACT Aspire assessments taken in April 2021, show his readiness levels for English, Writing, Math, and Reading as “in need of support.”⁷¹

Jessica Wallace, special education teacher who co-taught Student’s Geometry course in the tenth grade, testified that Student is introverted and does not like to call attention to himself; that he struggles with asking questions.⁷² She further testified that when he needed help, Student chose to seek one-to-one help from the Geometry teacher during third period “Elevate” class rather than during Geometry class.⁷³

Heather Thomas is the general education teacher who taught Student’s tenth grade Geometry. Thomas testified that Student’s math skills were weaker than other students. She also observed that he was “very timid and shy.” Student would seek her help through e-mail and during the Elevate course.⁷⁴ When questioned about how to reconcile the STAR Math assessment showing Student at a grade equivalent of 5.5 with his grades in her class, she responded that Student would have been able to re-take her tests until he obtained an acceptable grade, but that the STAR assessments do not permit that.⁷⁵

Rebekah Stout, Student’s English 10 teacher, and also a National Board Certified Teacher (NBCT), testified that she recalled Student having a 504 plan for Math while he was in her class. She had no other recollection about Student having an SLD in an area other than Math. The IEP

⁷⁰ District Ex., p. 297.

⁷¹ Parent Ex., p. 329.

⁷² Tr. Vol. I, p. 171.

⁷³ Tr. Vol. 1, pp. 199-200.

⁷⁴ Tr. Vol. 1, p. 204.

⁷⁵ Tr. Vol. 1, p. 218-219.

was amended in the semester following her class so she would not have known about the amendment. She did agree that a student with SLD in Reading Comprehension and Written Expression would likely struggle in her class in grammar, punctuation, capitalization, length of writing, and ability to verbally express sentences. After reviewing a sample of Student's written work, Stout agreed that if it was the work of a tenth-grade student, she saw deficits, particularly concerning the sentence structure.⁷⁶ However, those deficits would be addressed in the regular classroom. Stout further testified that a student who reads on a fifth-grade level could possibly make a 70 in her course.⁷⁷

Eleventh Grade (2021-2022 School Year)

Student's IEP for the eleventh grade was developed at an annual review meeting held on April 13, 2021, which Parent attended.⁷⁸ The IEP calls for a continuation of indirect services for Math, consisting of 2,040 minutes in the regular education classroom.⁷⁹ The IEP still includes Student's transition activities for a career in education/coaching.⁸⁰ Student's behavior is discussed in terms of his preference not to be singled out for special education services, and his reliance on classmates for help with school work.⁸¹ The IEP team revised Student's Math goals to amend the existing goal and add two goals.⁸² The IEP did not contain data collection or progress monitoring.

⁷⁶ See Parents Ex., pp. 412-431 for the samples of Student's work.

⁷⁷ Tr., Vol. 3, pp. 119-137.

⁷⁸ Parent Ex., p. 23.

⁷⁹ Parent Ex., p. 30.

⁸⁰ Parent Ex., pp. 33-038.

⁸¹ Parent Ex., pp. 24-025.

⁸² Parent Ex., p. 29.

The IEP does not address a SLD in Reading Comprehension and Written Expression.

Yet, Student continued to score far below grade level in the STAR Reading and Math assessments, as follows:

- STAR Reading Assessment, November 9, 2021, grade equivalent of 5.5, with 8.5 minutes time spent on the assessment⁸³
- STAR Math Assessment, November 11, 2021, grade equivalent of 6.4, with 13.24 minutes time spent on the assessment⁸⁴
- STAR Reading Assessment, May 9, 2022, grade equivalent of 3.8, with 5 minutes time spent on the assessment⁸⁵
- STAR Math Assessment, May 9, 2022, grade equivalent 5.1, with 14.5 minutes time spent on the assessment.⁸⁶

Student took the ACT in March 2022, and earned a composite score of 13.⁸⁷ In Arkansas, students who score below 19 on the ACT are required to take remedial courses in college before taking regular courses needed for their degree plan.⁸⁸ Parent testified that to avoid taking the ACT and remedial courses in college, Student changed his desired career path from a college degree in coaching and asked to be enrolled in the Pathways program.⁸⁹

Semester grade reports for the eleventh grade showed that Student passed Algebra II with a 62, and English 11 with a 74.⁹⁰

Kaitlyn Austin, Student's eleventh grade English teacher, testified that she recalled Student performing adequately in her class. She did not recall specific or significant struggles. When asked to review Student's STAR Reading Assessment for eleventh grade, Austin stated

⁸³ District Ex., p. 175.

⁸⁴ District Ex., p. 187.

⁸⁵ District Ex., p. 177.

⁸⁶ District Ex., p. 179.

⁸⁷ Parent Ex., p. 328.

⁸⁸ Tr. Vol. II, pp. 98-100.

⁸⁹ Tr. Vol. IV, p. 75.

⁹⁰ District Ex., p. 298.

that for a student to spend just under five minutes on a STAR assessment indicated a lack of focus or effort from the student. Austin also testified that she did not believe Student's STAR assessments accurately reflected the abilities of a "C" student.⁹¹

Brian Donahoe, special education teacher, co-taught Student's Algebra II (eleventh grade) with Lisa Sloan. Donahoe testified that he has a Master's degree in special education and has taught special education for three years. Donahoe also has a son with special needs.⁹²

Donahoe stated that when he was writing the IEP, he included goals for reading comprehension and written expression because in Student's "psych eval, ... it looked like [Student] was struggling in reading comprehension and written expression. So, that's why I kind of added those extra things in there."⁹³

Sloan, the Algebra II teacher that Donahoe co-taught with, recalled that Student definitely struggled in her class, and that he would wait for a private moment with her or request tutoring rather than bring attention to himself in class.⁹⁴ Sloan stated that Student made progress in her class, bringing his grade up from "a 60 to a 64."⁹⁵ Sloan recalled that she did hold a failure conference for Student, and that tutoring was instituted at that time.⁹⁶

Twelfth Grade (2022-2023 School Year)

District held an annual review meeting on April 13, 2022, for the purpose of determining whether Student should be placed in special education in the 2022-23 school year (Student's senior year). The Notice of Action noted that Parent and Student attended the meeting, and that

⁹¹ Tr. Vol. III, pp. 49-50.

⁹² Tr. Vol. II, pp. 56-57.

⁹³ Tr. Vol. II, p. 121.

⁹⁴ Tr. Vol. II, p. 163.

⁹⁵ Tr. Vol. II, p. 168.

⁹⁶ Tr. Vol. II, p. 170.

Parent had stated, “[Student] is doing well in his classes,” but that he is very shy and is concerned about being pulled out of the classroom for special education.⁹⁷ Student’s continued placement was 91% in the regular classroom and 9% in a special education classroom. The IEP team determined that Student should continue receiving services that include “specially designed instruction in reading (30 min.), written expression (20 min.), and math (30 min.),” once a week for 80 minutes.⁹⁸ The twelfth grade IEP contained one goal only, for Math, which reads “Given a graphic organizer, [Student] will organize and solve math problems by sequencing ideas, with 60% accuracy for 6/9 attempts on work samples and teacher tests, bi-weekly.”⁹⁹

Accommodations are listed as:

Reading: text-to-speech; extended time for assignments and tests; provide “cheat sheet” for student to reference in order to compensate for memory deficits; reduced assignments due to short-term memory and crystallized knowledge deficits; and direct instruction in summarizing and paraphrasing.¹⁰⁰

Written Expression: text-to-speech; extended time for assignments and tests; provide “cheat sheet” for student to reference in order to compensate for memory deficits; reduced assignments due to short-term memory and crystallized knowledge deficits; provide pre-filled outline; provide a written list of tasks; front load new information related to charts/graphs/tables and anything visual; color coding and/or visual markers; accompany visual demonstrations with oral explanations due to low visual processing; and reduced multiple choice.”¹⁰¹

Math: front load new information related to charts/graphs/tables and anything visual; provide “cheat sheet” for student to reference in order to compensate for memory deficits; graphic organizers; color coding and/or visual markers; accompany visual demonstrations with oral explanations due to low visual processing; reduced multiple choice; and consult services.¹⁰²

⁹⁷ Parent Ex., p. 139

⁹⁸ Parent Ex., p. 139.

⁹⁹ Parent Ex., p. 17.

¹⁰⁰ District Ex., p. 93.

¹⁰¹ District Ex., p. 93.

¹⁰² District Ex., p. 94.

The IEP Data Collection Sheet does not contain any data and the Progress Monitoring sheet is blank.¹⁰³

The District was on a block schedule in Student's senior year.¹⁰⁴ Seniors had a mandatory day of the week to be on campus, which was Friday.¹⁰⁵

During his senior year, Student was administered seven STAR assessments, with the following results:

- STAR Reading Assessment, September 2, 2022, grade equivalent of 9.0, with 18 minutes time spent on the assessment¹⁰⁶
- STAR Reading Assessment, December 2, 2022, grade equivalent of 5.9, with 8.25 minutes time spent on the assessment¹⁰⁷
- STAR Reading Assessment, February 20, 2023, grade equivalent of 6.4, with 8.5 minutes time spent on the assessment¹⁰⁸
- STAR Reading Assessment, February 21, 2023, grade equivalent of 6.4, with 8.5 minutes time spent on the assessment¹⁰⁹
- STAR Reading Assessment, May 9, 2023, grade equivalent of 3.8, with 5 minutes time spent on the assessment¹¹⁰
- STAR Math Assessment, September 9, 2022, grade equivalent 6.7, with 15 minutes time spent on the assessment¹¹¹
- STAR Math Assessment, December 2, 2022, grade equivalent of 8.0, with 13.16 minutes time spent on the assessment¹¹²
- STAR Math Assessment, February 20, 2023, grade equivalent 6.4, with 11.16 minutes time spent on the assessment¹¹³

¹⁰³ District Ex., pp. 106-108.

¹⁰⁴ Tr. Vol. I, p. 28.

¹⁰⁵ Tr. Vol. II, p. 182.

¹⁰⁶ Parent Ex., p. 339.

¹⁰⁷ Parent Ex., p. 341.

¹⁰⁸ Parent Ex., p. 343.

¹⁰⁹ Parent Ex., p. 345.

¹¹⁰ Parent Ex., p. 350.

¹¹¹ District Ex., p. 217.

¹¹² District Ex., p. 218.

¹¹³ District Ex., p. 219.

Semester grade reports for the first semester of twelfth grade and first nine weeks of the second semester showed that Student earned an 83 in Technical Math and an 85 in English 12.¹¹⁴ Again, it is hard to reconcile the STAR assessment scores that indicate at best a three-year grade equivalency below the grade reports that indicate an average or better performance at the senior level.

Donahoe¹¹⁵ testified that he wrote Student's IEP for the twelfth grade. However, he answered "no" when asked if he knew the extent of Student's SLD. Donahoe's role as a co-taught teacher in Student's Algebra II class was to help when he was needed. Donahoe testified that Student "struggled at the beginning," but "passed the class."

Donahoe also testified that he did not assess the students in his Resource class, because he "just kind of knew the students based on where they could handle [sic]."

Donahoe stated that when he was writing Student's IEP for the twelfth grade, he reviewed handwritten progress notes – located in his classroom – and Student's test scores.¹¹⁶ Donahoe stated that he and the regular education teacher did not discuss Student's progress. Student's folder contained information regarding Student's progress in the class that he co-taught the first nine weeks of the eleventh grade. Donahoe stated that he "couldn't find" Student's reports for the second nine weeks, but that he sent progress notes to Parents at the end of each nine-week period. There were no notes from Donahoe submitted into evidence from either party. Donahoe acknowledged that Student's math deficits were not remediated at the end of the eleventh grade.

¹¹⁴ District Ex., p. 299.

¹¹⁵ See Donahoe's testimony, generally, Tr. Vol. II, pp. 56-154.

¹¹⁶ Tr. Vol. II, p. 60.

Donahoe did not know what Student's overall grade on the ACT was, but after reviewing the exhibit with the ACT scores, he agreed that Student's score indicated he would need remedial courses in college.

Donahoe further testified that he knew that a student's progress or lack of progress could be a reason to hold a conference, but did not think the District needed to hold a conference to change Student's IEP at that time. The District was on a block schedule, and despite the IEP stating that Student would have 80 minutes per week in "special education services," Student did not have a math class in the second nine weeks so didn't receive those services in the second nine weeks. Donahoe testified that Student was to receive one-half of those minutes from the regular education teacher and one-half from Donahoe as the co-taught teacher.

Donahoe denied ever having a failure conference for Student. He testified that he obtained information for the IEP from Student's teachers verbally. When setting goals for Student's IEP, he testified that "my main thing was ... the goals were to help him pass his class and graduate."

Donahoe stated that when Student changed his mind about college and wanted to enroll in the Pathways program, he (Donahoe) "adjust[ed] the Schedule of Services as needed" without meeting to change the IEP. Donahoe acknowledged that, for the 80 minutes per week of "specialized instruction," Student's special education teacher would be more of a tutor. Donahoe knew very little about the Pathways program that Student wanted to participate in, but knew that students were required to be on campus only one or two days a week, and the rest of the time they could "come and go as they want to."

Donahoe testified that he knew that Parent wanted the IEP to state that teachers would notify her when Student's grade dropped below 75. However, Donahoe did not put it in the IEP,

“[b]ecause I think I talked to someone about putting it in and they said, “No, we probably don’t need it in there.”

Donahoe explained that it was District procedure to submit IEP information to Jennifer Jensen, the District LEA, following an IEP annual review. Using a spreadsheet, Donahoe would submit the IEP goals, accommodations to Jensen, “when the conference was held, [whether] paperwork was finished or not” Once the LEA approved the IEP, it would be marked as “cleared and finalized.” The approval was returned by the end of the school year, and sometimes the process could take six weeks.

Marcia Starr was Student’s twelfth-grade special education teacher, and in charge of implementing his twelfth-grade IEP. She provided special education instruction to Student 80 minutes per week on Tuesday afternoons.¹¹⁷ Starr testified that Student had improved in his reading deficit, according to her assessments.¹¹⁸ Yet, she also testified that her progress notes (not in evidence) showed that Student had “zero” progress in Math, zero in Reading Comprehension, and zero in Written Expression.¹¹⁹ Her testimony also indicated that her special education services consisted of “speaking to him about his capitalization ... working on punctuation, [and] ... writing activities,” but that she has no specific program that she uses to remediate his deficits in Written Expression.¹²⁰

When Starr was questioned about whether remediation required direct instruction – not just accommodations – she first testified that instruction was necessary to remediate Student’s deficits, but stopped short of saying that it had to be direct instruction.¹²¹ She later testified that

¹¹⁷ Tr. Vol. I, p. 15.

¹¹⁸ Tr. Vol. I, p. 30.

¹¹⁹ Tr. Vol. I, pp. 34-35.

¹²⁰ Tr. Vol. I, p. 37.

¹²¹ Tr. Vol. I, p. 46.

over the course of Student’s education, he should have been receiving direct instruction to remediate his deficits, but that he had not.¹²² When she took assessments on Student’s progress in math, she noted that he completed his goal at 17%, not the 60% stated in the IEP, 100% in his writing goal, and 50% of his written expression goal. However, no supporting data was submitted in evidence.¹²³ Looking at her math assessment for Student, she noted that he had a “D” on the assessment, which “means he mastered that.”¹²⁴ Starr testified that Student did not have any failing grades, and was on the Honor Roll the first semester of his senior year.¹²⁵ She testified that she would consider Student’s ACT scores low, and acknowledged that Student would have to take remedial courses in college.¹²⁶

Toni Nolan was Student’s twelfth grade teacher for Technical Math in the Pathways Program. Technical Math is a senior-level math course developed from state standards to teach essential skills, with some customization for Student’s chosen career in Pathways.¹²⁷ Student “did fine” in her course and made a B.¹²⁸ Nolan would contact Parent when Student’s grades were getting low, using the Buzz platform that was in place for her hybrid course (instruction was part online, part on campus). Student was a cousin of Nolan’s, so she tutored him once at home for Algebra II test preparation.¹²⁹ Student worked with her on perimeters and measuring. Student used a calculator for math problems, so she wasn’t aware that he did not know his multiplication tables.¹³⁰ Nolan testified that she wasn’t aware Student had any problems with

¹²² Tr. Vol. I., pp. 48-50.

¹²³ Tr. Vol. I., pp. 52-56.

¹²⁴ Tr. Vol. I, p. 60.

¹²⁵ Tr. Vol. I, p. 71.

¹²⁶ Tr. Vol. I, p. 39-41.

¹²⁷ Tr. Vol. II, pp. 175-178.

¹²⁸ Tr. Vol. II, p. 180.

¹²⁹ Tr. Vol. II, pp. 191-192.

¹³⁰ Tr. Vol. II, pp. 184-186.

reading, that she didn't observe any issues with reading problems, and Student never asked her for help with that.¹³¹

Student's twelfth-grade English was a blended course at Pathways, taught by Lisa Evans.¹³² Evans was aware that Student had an IEP, and said she provided his accommodations but did not know any specifics about his disability. Student comes to her class once a week on Friday, and the rest is online. However, Friday is the day all seniors are on campus, and is also the day that the Pathways program schedules training, so there are some Fridays that he cannot be in her class.¹³³

Nolan also testified that she did not observe Student having problems with reading, because the course is mostly online. She does not "work with [him] one on one," and she probably spends one hour in a month when he is on campus. Nolan testified that she has not contacted Student's parents,¹³⁴ but when he has not completed work or is falling behind, she checks in (online) with Student or contacts his twelfth-grade special education teacher, Ms. Starr.

Dr. Bobbie Riggins, an assistant superintendent who oversees the Pathways program, testified that the Pathways program was established as a charter school within the school district and its purpose was "to allow students and parents that flexible option, but to also reinforce those workforce readiness skills so that students have another option as a pathway to go to direct work or to get concurrent credit in college."¹³⁵ Riggins also stated that a student with SLD would need remediation, and that the Pathways program can and does do that.¹³⁶

¹³¹ Tr. Vol. II, pp. 196-197.

¹³² Tr. Vol. II, p. 200.

¹³³ Tr. Vol. II, pp. 207-209.

¹³⁴ Tr. Vol. II, pp. 211-216.

¹³⁵ Tr. Vol. III, p. 7.

¹³⁶ Tr. Vol. III, p. 24.

John Sweeney, who teaches Student's construction courses in Pathways, testified that that Student came into the Pathways program late, but that he was given time to catch up.¹³⁷ Student obtained a job at Porter Refrigeration outside of the Pathways program.¹³⁸ Student was obligated to attend trainings and activities related to Pathways that were often scheduled on Fridays, the days seniors had a mandatory on-campus day.¹³⁹ The Pathways program involved the completion of certifications, and if students missed a Friday training that was related to a certificate, the certificate would not be awarded.¹⁴⁰ Student has missed some of those trainings.¹⁴¹ The Pathways program is flexible, so that if Student needed to attend a training on a Friday, he could see the teacher for the class he missed at another time.¹⁴²

Sweeney said that he was focused on Student completing his industry tests (EPA for refrigeration), and that Student would obtain help from Starr when he needed to prepare for a test.¹⁴³ Sweeney further testified, "I haven't seen frustrations from [Student] on any portion of anything" and that Student "is a good student and a good kid."¹⁴⁴ He has worked with Student one-on-one in his office where, "we've done an assignment, and he has worked on an assignment right there with me."¹⁴⁵ Sweeney testified that Student has taken and passed certification tests without accommodations.¹⁴⁶ Student would rather be at work at Porter Refrigeration than be at school.¹⁴⁷

¹³⁷ Tr. Vol. III, p. 57.

¹³⁸ Tr. Vol. III, pp. 57, 85.

¹³⁹ Tr. Vol. III, pp. 79-80.

¹⁴⁰ Tr. Vol. III, pp. 72-74, 94, 108-111.

¹⁴¹ Tr. Vol. III, pp. 98-100.

¹⁴² Tr. Vol. III, pp. 93-94.

¹⁴³ Tr. Vol. III, p. 67.

¹⁴⁴ Tr. Vol. III, p. 69.

¹⁴⁵ Tr. Vol. III, p. 78.

¹⁴⁶ Tr. Vol. III, p. 89.

¹⁴⁷ Tr. Vol. III, pp. 79-82.

Jennifer Jensen, District LEA, testified that she had not attended any IEP meeting for Student.¹⁴⁸ Parents alleged that the twelfth-grade IEP had been changed without Parents' knowledge and without an IEP meeting.¹⁴⁹ Jensen denied any changes were made or even discussed. She testified that she does review IEPs before they are finalized, but only to give feedback.¹⁵⁰ She acknowledged a telephone conversation about Student wanting to enroll in the Pathways program, and answered "yes" when asked if there should have been an IEP meeting to discuss Student's placement and supports in Pathways.¹⁵¹

Parent testified that she is concerned that Student does not have a signature, that he doesn't use cursive writing and always prints his name, that he doesn't know how to balance a checking account" and Student "not comfortable with math ... [and] doesn't know his multiplication tables."¹⁵² Student's struggles in the classroom began to cause him anxiety, and he received outside counseling for about three and one-half years along with anxiety medication.¹⁵³ Parent also testified that she felt that she understood the Pathways program and how Student's special education would be handled there.¹⁵⁴ She knew that he was to receive thirty minutes of special instruction, and was told that thirty minutes was "the minimum that was required for him to continue to receive services, and that if he needed more than that he could reach out to Ms. Starr or one of his teachers."¹⁵⁵

Parent has requested an evaluation of Student to include dyslexia screening. Parent is also seeking a remedy in the form of compensatory education, but through Student's enrollment in

¹⁴⁸ Tr. Vol. IV, p. 9.

¹⁴⁹ See Tr. Vol. IV, pp. 91-93.

¹⁵⁰ Tr. Vol. IV, pp. 47-49.

¹⁵¹ Tr. Vol. IV, pp. 24-29.

¹⁵² Tr. Vol. IV, pp. 59-61.

¹⁵³ Tr. Vol. IV, pp. 62-64.

¹⁵⁴ Tr. Vol. IV, pp. 80-85.

¹⁵⁵ Tr. Vol. IV, p. 81.

the Neruo-Development of Words (NOW!) Program.¹⁵⁶ Parent explained that the NOW! Program has one-on-one tutoring in reading, writing, spelling, and math. Parents and Student agreed that he would complete all four programs at the rate of at least two sessions a day, five days a week. The cost for that is at the rate of \$75.00 per session, about \$3,300.00 per month.¹⁵⁷ There was no testimony about how many sessions Student would need to complete. With regard to dyslexia, no evidence was introduced regarding whether Student had markers of dyslexia.

STAR assessments, in general.

For fourth grade through grade twelve, Student took twenty-four STAR Reading assessments and eight Math assessments. An analysis of the scores indicates the following:

- Out of approximately 32 STAR assessments (Reading and Math combined), Student performed at or above grade level only twice, once in the fourth grade and once in the fifth grade.
- In grade seven, Student performed at a grade equivalent of 6.6 on a STAR Reading assessment.
- In grade eight, Student performed at a grade equivalent of 6.7 (first semester) and 5.5 (second semester) on STAR Reading assessments.
- In grade nine, Student performed at a grade equivalent of 5.1 on a STAR Reading assessment, and at a 7.4 grade equivalent in STAR Math.
- In grade ten, Student performed at a grade equivalent of 6.6 and 7.1 on STAR Reading assessments, and a grade equivalent of 5.5 and 6.7 in STAR Math.
- In grade eleven, Student performed at a grade equivalent of 3.8 and 5.5 on two STAR Reading assessments, and a grade equivalent range between 5.1 and 6.4 on three STAR Math assessments.
- In grade twelve, Student performed at a grade equivalent of 5.2 and 9 on STAR Reading assessments, and at a grade equivalent of 6.7 and 8 on STAR Math assessments.

¹⁵⁶ Tr. Vol. IV, pp. 97-101.

¹⁵⁷ Tr. Vol. IV., pp. 97-100 and 115-117.

Donahoe testified that he “took [the STAR results] with a grain of salt,” and did not know why the District keeps administering STAR assessments. He also testified that when students don’t do well on a STAR assessment the District may have them re-take the test, and explained that process as follows:

... if a student read like at the sixth grade reading level [when] they took it, and then they took it the second time and they took like two minutes and they scored like a .2, or like second grade reading level, it will flash, like, “Hey, this student did not do this right.”

Nolan testified that “STAR tests don’t mean anything to [students] because they are not for a grade... When you spend 11 minutes to do 34 questions, I don’t know if I trust that score.”¹⁵⁸ Similarly, Starr and Evans testified that they question the results when the student spends only a few minutes on thirty-minute test.¹⁵⁹

Sweeney testified that the STAR assessments had a thirty-minute window, but that Student’s score sheets reflected much less time spent on the tests.¹⁶⁰ He stated that he believed Student was graduating at a higher reading level than what is reflected on the STAR tests.¹⁶¹

It seems improbable that the District would have administered the assessments so frequently if they are meritless. If the District believed that Student’s time and effort on testing was inadequate, it begs the question why this student with SLD in reading comprehension, written expression, and math was not devoting the time and effort the District would find adequate. Student was sometimes tested three or four times a year, and scored consistently at a grade equivalency that is two to three grade levels below his current year. District should

¹⁵⁸ Tr. Vol. II, p. 200.

¹⁵⁹ Tr. Vol. I p. 87, 99; Vol. II, p. 224.

¹⁶⁰ Tr. Vol. III, p. 46.

¹⁶¹ Tr. Vol. III, p. 50.

reasonably have been alerted to the fact that his STAR assessment scores were not aligned with his grades.

IV. 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.¹⁶² In 1982, in *Hendrick Hudson Dist. Bd. Of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.¹⁶³ Under *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the state, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA.

Procedural inadequacies are violations if they:

- impede the child’s right to a FAPE;
- significantly impede the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child; or
- cause a deprivation of educational benefits.¹⁶⁴

After an analysis of procedural compliance, it must be determined whether the IEP(s) meet the substantive requirements of the IDEA.¹⁶⁵ A district must develop a student’s IEP that is “reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances.”¹⁶⁶ The IDEA requires every IEP to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description

¹⁶² 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

¹⁶³ 458 U.S. 176, 206-07 (1982).

¹⁶⁴ 20 U.S.C. § 1415(f)(3)(E)(ii).

¹⁶⁵ *Id.*

¹⁶⁶ *Andrew F. v. Douglas Cnty. Sch. Dist. RE-I*, 137 S. Ct. 988, 197, L. Ed. 2d 335 (2017).

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 to be provided to student.¹⁶⁷ A district is also required to review the IEP for each special education student annually to determine if the student's IEP should be revised or whether the student is no longer eligible for special education services.¹⁶⁸ The IDEA also requires reevaluation every three years while a student is receiving special education services.¹⁶⁹

Issue 1:

Whether District denied Student a FAPE by dismissing Student from special education in the eighth grade without an evaluation and based on District's misrepresentation to Parents.

To determine whether this decision should consider Student's eighth-grade IEP requires an analysis of the statutory two-year time period covered by a due process complaint. Under the IDEA, the time period covered in a due process complaint filed by Parents is two years before the filing date.¹⁷⁰ Further, the two-year time period begins when the Parents or the District "knew or should have known about the alleged action that forms the basis of the complaint."¹⁷¹ If a district misrepresents to parents "that it had resolved the problem forming the basis of the due process complaint," or withholds information required to be provided to parents, the two-year timeline does not apply.¹⁷²

¹⁶⁷ 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

¹⁶⁸ 20 U.S.C. § 1412(a)(7).

¹⁶⁹ 20 U.S.C. 1414(a)(2); 34 CFR § 300.303(b)(2).

¹⁷⁰ 34 CFR 300.511(e).

¹⁷¹ 20 U.S.C. § 1415(f)(3)(C).

¹⁷² 34 CFR 300.511(f).

The statutory two-year period for this case would have been December 20, 2022, to December 20, 2020. Parents argue that at the time of the IEP conference to determine continued eligibility, the District misrepresented to Parents that Student’s SLD was resolved, when Aaron Jackson told Parents, “Everything is okay. He is all better now. He doesn't have any accommodations. Let's go ahead and dismiss him.”¹⁷³ Further, the District withheld required information from Parents of their rights in the process of making that determination of continuing eligibility by failing to conduct a mandatory evaluation. Therefore, the two-year timeline does not apply in this case.

It must now be determined whether the District denied Student a FAPE when it failed to conduct an evaluation before changing eligibility in Student’s eighth grade year. Evaluation is defined as a set of procedures under the IDEA used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.¹⁷⁴ For an initial evaluation or reevaluation, a district must review existing evaluation data to determine what, if any, additional data is needed.¹⁷⁵ The evaluation must comply with the IDEA’s requirement that it be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.”¹⁷⁶

The IDEA plainly states that an evaluation is required before determining that the child is no longer a child with a disability.¹⁷⁷ The requirement for an evaluation triggers a notice to parents that describes any evaluation procedures the agency proposes to conduct, and includes

¹⁷³ Tr. Vol. IV, pp. 55-56.

¹⁷⁴ 20 U.S.C. 1414(a)-(c); 34 CFR § 300.15.

¹⁷⁵ 34 CFR 300.305(a).

¹⁷⁶ 34 CFR 300.304(c)(6).

¹⁷⁷ 20 U.S.C. 1414(a)-(c); 34 CFR 300.305(e). *See also* Ark. Dept. of Ed. Rules Governing Special Education, 6.00 Evaluation – Eligibility Criteria, § 6.05.5.

the content prescribed by 34 CFR 300.503(b).¹⁷⁸ As previously stated, District failed to conduct any evaluation, as defined under the IDEA. Instead, District opted for an annual review, relying on an evaluation conducted in the fourth grade, anecdotal statements from teachers, and grade reports.¹⁷⁹ Its method for making the eligibility determination was not even remotely, much less sufficiently, comprehensive to identify all of Student's special education and related services needs. As a result, the District's procedural violation impeded Student's ability to obtain a FAPE for the entire ninth grade.

The Eighth Circuit has held that even if a procedural violation of the IDEA is found, a child's "IEP is set aside 'only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'"¹⁸⁰ The failure to evaluate in this case is not a slight procedural violation or harmless error. Although Student passed the eighth and ninth grades, it is impossible four years later and following Student's senior year to determine the extent of deprivation of educational benefit as a result of the violation. The procedural violation also hampered Parents' opportunity to participate in the formulation process. Parents did not have the information they needed or that was their right to have in order to adequately participate in the decision-making process, and were prevented from exercising their right to file a due process complaint. Therefore, this Hearing Officer finds that the District's procedural violation denied Student a FAPE.

Parents and Student seek (1) an independent evaluation to determine whether and to what extent Student continues to have a SLD, and (2) sufficient compensatory education to put

¹⁷⁸ 34 CFR 300.304(a).

¹⁷⁹ Parent Ex., pp. 66-75 (IEP); Parent Ex., pp. 170-173 (Notice of Action).

¹⁸⁰ *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011) (quoting *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010)).

Student in the position he would be absent a denial of FAPE. Parents request that District pay for Student to enroll in the Neuro-Development of Words (NOW!) Program, which has four sections – Reading and Spelling, Comprehension, Writing, and Math.¹⁸¹ Parent testified that Student agrees to pursue two sessions a day, five days a week. The sessions are one-on-one tutoring at a cost of \$75.00 per session.¹⁸²

Issue 2:

Whether District denied Student a FAPE by failing to develop appropriate IEPs in the eleventh and twelfth grades.

Parents assert that, based on Student’s grade reports and STAR Reading and Math scores for the eleventh and twelfth grades, the District failed to develop IEPs designed to remediate Student’s SLD in Reading Comprehension, Written Expression, and Math. Jennifer Jensen (LEA) testified that she agreed Student needed individualized services in the form of direct instruction to remediate his SLD, and that Student should have been receiving those services throughout his education.¹⁸³

Parents rely heavily on the disparity between Student’s passing grades and his poor performance on STAR assessments to call into question whether Student’s eleventh- and twelfth-grade IEPs contained appropriate services to remediate Student’s SLD. It is reasonable to accept that STAR assessments, as properly administered, would accurately depict Student’s grade level equivalency, providing evidence that despite Student’s passing grades, his grade equivalency was much lower than his actual enrolled grade. To the contrary, District asserts that the

¹⁸¹ Tr. Vol. IV, pp. 97-100.

¹⁸² *Id.*

¹⁸³ Tr. Vol. IV, pp. 37-39.

assessments should be “taken with a grain of salt” and that Student’s “earned” grades more accurately reflect his educational achievement.

Parents also argue that Student’s eleventh- and twelfth-grade IEPs contained goals that were not “sufficiently challenging.” While the IDEA does not require a school district to provide an education for a student with learning disabilities that results in the best possible outcome for the student, an IEP should contain goals that are sufficiently challenging to the student.¹⁸⁴ Under the IDEA, a student’s progress on completion of those goals must be documented in the IEP and reviewed annually.¹⁸⁵

In *Andrew F.*, the U.S. Supreme Court cited the 1982 *Rowley* decision to say that for a student with a disability who is “fully integrated in the regular classroom, an IEP typically should be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’”¹⁸⁶ Yet, for Student, advancing from grade to grade is incongruent with the assessments of his grade equivalency. The standard expressed in *Rowley* and *Andrew F.* for students fully integrated in the regular classroom should not be interpreted to allow District to pass Student from grade to grade, while not developing IEPs designed to remediate Student’s SLD.

Therefore, this Hearing Officer finds that Student’s eleventh- and twelfth-grade IEPs were procedurally deficient in the following ways: (1) lacked direct instruction sufficient to remediate Student’s SLD; and (2) lacked goals that were sufficiently challenging for Student, requiring only 60% completion. That these procedural violations denied Student educational

¹⁸⁴ See Parents’ Post-Hearing Brief, pp. 3, 8, 12, 14, 15, and 16, citing *Andrew F.*, 580 U.S. at 403, 137 S. Ct. at 1001, 197 L. Ed. 2d 335 (2017).

¹⁸⁵ 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

¹⁸⁶ *Andrew F.*, 137 S. Ct. at 996 (citing *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. Westchester Cty. v. Rowley*, 458 U.S. 176, 204 (1982)).

benefits is clear from the assessments that show Student's grade equivalency well below the eleventh or twelfth grade. As a result, District denied Student a FAPE.

Parents request a revised twelfth-grade IEP, the provision of services that comply with the revised IEP, and sufficient compensatory education to put Student in the position he would be absent a denial of FAPE. District has worked with this Student for thirteen years, most of those including special education services and accommodations. District is not now likely to develop IEPs and provide services to remediate Student after he graduates high school.

V. NON-JUSTICIABLE ISSUES

Parents also allege that District's conduct constitutes disability discrimination in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims.¹⁸⁷ Accordingly, to the extent Parents' due process complaint raises disability discrimination claims, those claims are DISMISSED.

VI. ORDER

Issue 1. Parents and Student have proven by a preponderance of evidence that District failed to provide a FAPE in Student's eighth-grade year, when it neither evaluated Student for the purpose of determining continued eligibility nor notified Parents of the right to request an evaluation, and that this procedural violation constitutes a denial of FAPE.

¹⁸⁷ See ADE Spec. Ed. Rules §10.01.22.1.

Parents and Student ask that Student be screened for dyslexia, because Student “deserves answers.” There was no testimony or evidence presented that Student had markers of dyslexia; therefore, the request for District to pay for dyslexia screening is DENIED.

Issue 2. District committed material procedural violation with respect to Student’s IEPs in the eleventh and twelfth grades which deprived Student of educational benefit and therefore denied Student a FAPE in those years.

Remedies. Student is entitled to compensatory education and services to remedy any educational or other deficits that result from the denial of FAPE, and put Student in the position he would be absent a denial of FAPE.¹⁸⁸ Parents and Student request an independent evaluation of Student at District’s expense that is sufficiently comprehensive to identify all of Student’s special education and related services needs. District is, therefore, ORDERED to pay for an independent evaluation of Student that complies with 34 CFR 300.304(c)(6). The independent evaluation shall be conducted within 60 days of the date of this Order.

Parents’ request for compensatory education in the form of the NOW! Program is GRANTED. District is ORDERED to pay for Student to enroll in the NOW! Program’s one-on-one tutoring sessions, currently priced at \$75 per session, at the rate of two sessions per day, five days a week. District shall provide said payment for a minimum of two months and a maximum of one year. Student shall provide a copy of the independent evaluation to the NOW! Program if the program requests it.

IT IS SO ORDERED.

/s/ Cheryl L. Reinhart
Cheryl L. Reinhart,
Hearing Officer

Dated: July 5, 2023

¹⁸⁸ *Miener v. State of Missouri*, 800 F. 2d 749 (8th Cir.1986)