

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit

**[REDACTED] AS
PARENT OF [REDACTED]**

PETITIONER

VS.

Case No. H-24-03

**GREENWOOD SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Greenwood School District (hereinafter “District” or “Respondent”) denied [REDACTED] (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between January 4, 2023, and July 14, 2023, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as “IDEA”), by: Denying Student a FAPE after January 4, 2023 through July 14, 2023.

Procedural History:

On July 14, 2023, the Arkansas Department of Education (hereinafter referred to as the “Department” or “ADE”) received a request to initiate a due process hearing from [REDACTED] (“Parent” or “Petitioner”, as the Parent of [REDACTED] (hereinafter referred to as “Student”), against the Greenwood School District (hereinafter referred to as “District” or “Respondent”). Parent requested the hearing because she believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as “IDEA”) and the regulations set forth by the Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.¹

This is the fourth due process complaint filed by Parent. The first due process complaint filed by Parent was Arkansas Department of Education Due Process Hearing H-22-03. H-22-03 was filed on July 2, 2021. On August 20, 2021, this Hearing Officer received an email from Theresa Caldwell, parent’s attorney, with the subject line Settlement Reached. In the body of the email Ms. Caldwell stated that she wanted to let everyone know that a settlement had been

¹ See hearing officer File-Petitioner Complaint.

reached and asked that the hearing scheduled for August 23-25, 2021, be cancelled. This hearing officer then sent an email out to the parties cancelling the Due Process Hearing scheduled for August 23-25, 2021, based on Ms. Caldwell's earlier email stating the case had been settled. After not hearing from any of the parties, nor receiving a motion to dismiss, this Hearing Officer sent an email to the parties on September 14, 2021, stating that if I did not receive a motion to dismiss by September 17, 2021, I would issue an order dismissing the case with prejudice. I received a response from District's attorney stating they would take care of it. I did not receive a response from parent's attorney. At no point did either party notify this hearing officer that the case had not settled, or that the case needed to be rescheduled. On September 20, 2021, after not receiving any communication for thirty days and having been told the case was settled, I issued my order dismissing the case with prejudice. Parent filed her second due process hearing complaint H-23-02, on July 5, 2022, and a decision was issued on February 23, 2023. Parent filed her third due process hearing complaint H-23-25 on January 4, 2023, and decision was issued October 20, 2023. The records from the previous three hearings are incorporated with agreement of the parties into this hearing H-24-03.

At the time that Parent filed H-24-03 request for a due process hearing, Student was a 7-year-old boy who had just finished his first-grade year at Westwood Elementary School within the Greenwood School District.² Student was a student with a disability under 20 U.S.C. §1401(3). Student was diagnosed with a rare genetic condition involving the [REDACTED] associated with muscle weakness, language delay, and intellectual problems. Additionally, Student has a diagnosis of Autism with Global Delay and profound speech language delay.³

² H-23-25-See Hearing Officer File-Petitioner Complaint, pg. 2.

³ H-23-25-See Hearing officer file-Petitioner Complaint, pgs. 8-9.

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the Prehearing conference was scheduled for August 28, 2023, and the Due Process Hearing set for August 30, 2023, through September 1, 2023.⁴ On August 22, 2023, attorney for Respondent filed a motion to continue stating that she had a conflict and asking for a brief continuance. On August 23, 2023, this hearing officer granted Respondent's motion to continue, and the prehearing conference was rescheduled for September 11, 2023, and the due process hearing rescheduled for September 12-15, 2023.

The Prehearing conference was conducted via zoom on September 11, 2023.⁵ Counsel for both the Parent and the District participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.⁶

Thereafter testimony was heard in this case on September 13, 14, 15, 2023 and October 5, and 9, 2023.⁷

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Sharon Streett, attorney for the District, [REDACTED] Parent, [REDACTED] (Zoom), Parent, Audra Alumbaugh (Zoom), Advocate, Demaris Barnett, Special Education Director.

The following witnesses testified in this matter: Kim Gill, Layton Pruett, Deann Denison, [REDACTED] John Ciesla, Demaris Barnett, and Dr. Sheila Barnes.⁸

⁴ See Hearing Officer file, Scheduling order.

⁵ Transcript, prehearing conference.

⁶ Id.

⁷ It is important to note that there were several delays in this case because of document issues, health issues etc. Several hearing days did not begin on time or ended early because of these issues. There were long breaks to address said issues throughout the hearing days.

⁸ Transcripts, Vol. I-VIII.

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, Dana McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, petitioner submitted her brief within the timeline set forth by this hearing officer. Attorney for Respondent had a death in her family and requested a short continuance in order to file her brief which this hearing officer granted.⁹

Additionally, the facts from H-23-02 and H-23-25 are included in the findings of fact in this case because this hearing officer believes the history is relevant.

Findings of Fact

1. Student is a 7-old boy in the Greenwood School District. Student is a second-grade student at Westwood Elementary School within the Greenwood School District.¹⁰
2. In October of 2017, he was diagnosed with a rare gene mutation involving the [REDACTED] [REDACTED] associated with muscle weakness, language delay and intellectual problems.¹¹
3. In May 2019 Student was three years and two months old. Mary Scott, Ph.D. with Schmieding Developmental Center completed a neuropsychological evaluation. This evaluation, found Student to be severely delayed in cognitive development; nonverbal and using hand leading and occasional use of Picture Exchange Communication System (PECS) with prompting as communication strategies; and delayed adaptive behavior skills. The diagnoses made following this evaluation included Autism, Global

⁹ See Hearing Officer File-post hearing briefs.

¹⁰ See Hearing Officer File-Parent's Due Process Hearing Request.

¹¹ H-23-02, District Exhibits, pg. 276.

Developmental Delay, and Profound Speech-Language Delay requiring very substantial support Level 3. The examiner indicated that the evaluation was constantly modified, and behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities. During this evaluation, Student was chewing and mouthing objects including a pacifier. Dr. James Cheshier, MD with Schmieding Developmental Center agreed with the findings of the evaluation of Autism Spectrum Disorder; Developmental Coordination; Mixed Receptive and Expressive Language Delay; and Global Developmental Delay.¹²

4. August 11, 2020, Amanda Chilton, Physical therapist with Learn. Play. Grow. Children's Therapy Services, found Student to have a functional range of motion but increased tightness and muscle tone bilaterally. Chilton noted that toe walking had decreased since beginning Botox injections [no date or provider specified]; but Student continued to curl toes when walking. Student was found to have a significant delay in all gross motor skills. Parent and Chilton agreed to continue hippotherapy in addition to outpatient therapy to improve ambulation skills.¹³
5. December 1, 2020, Corkie Howard, MS, CCC-SLP, with Learn. Play. Grow. Children's Therapy Services identified a profound expressive and receptive language delay. He was unable to complete formal evaluations of sound production but was observed to produce a small number of sounds /b, d, g, p, n, h/. According to the evaluation, Student did not possess many words and would be observed further as his language developed.¹⁴

¹² H-23-02, District Exhibits, pgs. 275-293.

¹³ H-23-02, Id., pgs. 265-269

¹⁴ H-23-02, District Exhibits, pgs. 270-273.

6. December 3, 2020, Jennifer Marley, OTR/L with Learn. Play. Grow. Children’s Therapy Services found Student had a significant delay in Activities of Daily Living (ADL) in areas of eating, grooming, bathing, dressing, and toileting. Additionally, he presented with difficulty processing sensory information.¹⁵
7. February 1, 2021, and February 8, 2021, Parent was provided two Notices of Conference to consider a referral for special education and related services.¹⁶ Parent requested a conference be rescheduled to March 8, 2021. At the referral conference the parent provided the neuropsychological evaluation from May 2019 as a summary of Student’s abilities. The referral indicated that Student’s delays in academics, development and behavior substantially impaired his daily activities and academic learning.¹⁷ The referral conference decision was to conduct evaluations for IQ, achievement, autism observations, classroom based assessments, adaptive behavior rating scale, social history, hearing and vision, PT, OT, and speech evaluations.¹⁸ The option to not evaluate was considered but the committee determined that updated information was needed.¹⁹ Parent agreed to the immediate implementation of the committee decision and provided consent to complete these evaluations.²⁰ During the referral conference, Parent requested that Student be provided ABA therapy at school and that Dr. Barnes’ RBT and BCBA be allowed to come to school with Student so he could be placed in the general education classroom. The District’s Special Education Director, Demaris Barnett, told Parent this could be discussed at a later meeting, but she

¹⁵ H-23-02, Id., pgs. 261-264.

¹⁶ H-23-02, Id., pg. 507.

¹⁷ H-23-02, Parent’s Exhibits, pg. 124, District Exhibits, pg. 8

¹⁸ H-23-02, District’s Exhibits, pg. 10.

¹⁹ H-23-02, Id., pg. 11.

²⁰ H-23-02, Id., pgs. 10-11.

- needed to first talk to the Superintendent, John Ciesla.²¹
8. On March 9, 2021, Parent emailed the Superintendent expressing her concern about the lack of ABA therapy and a BCBA at school. She asked that Dr. Barnes' RBT and BCBA be allowed to attend school with Student so Student could be placed in the general education because of the peer modeling and socialization benefits from exposure to nondisabled peers.²²
 9. March 11, 2021, Parent provided Student's most recent vision evaluation completed on October 19, 2020, by Brita S. Rook, MD with ACH Eye Clinic which indicated diagnoses of alternating esotropia; hypermetropia of both eyes; and developmental delay. Student is prescribed glasses for daily wear.²³
 10. April 7, 2021, Jodi Kurstin, PT, DPT with Pediatric Therapy Connections completed the physical therapy evaluation for the Greenwood School District.²⁴ Evaluation determined that Student had severe gross motor deficits with limited range of motion; Ankle Dorsiflexion; and Knee Extension.²⁵ Student also presented with deficits that impact the efficiency of his movement and overall independence.²⁶
 11. April 9, 2021, Sue Featherston, School Psychology Specialist for the Greenwood School District completed the psychoeducational evaluation including ratings of adaptive behavior and social history.²⁷ A behavioral observation was pulled from the May 2019 Schmieding evaluation which indicated that the evaluation was constantly modified and

²¹ H-23-02, Parent's Exhibits, pg. 139.

²² H-23-02, Id., at pg. 342.

²³ H-23-02, District's Exhibits, pgs. 294-300.

²⁴ H-23-02, Id., pgs. 301-305.

²⁵ H-23-02, Id., pg. 303.

²⁶ H-23-02, Id.

²⁷ H-23-02, District's Exhibits, pgs. 306-322.

behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities.²⁸ A nonverbal assessment was used to assess Student's intellectual abilities because of the Student's weak fine motor skills, attention difficulties, and frequent distractibility. Student obtained a Nonverbal IQ of 47 which the examiner felt was not a valid assessment due to his inattention to tasks.²⁹ Two standardized assessments of academics were attempted but Student was not able to complete any of the tasks.³⁰ The examiner used observation, parent reports and informal assessment measures which indicated limited academic skills. He was observed to respond to his name being called and noises within his immediate environment but could not follow multistep directions.³¹ Student was in beginning stages of using his AAC device to request snacks primarily.³² Student continued to display significant delays in ADLs as per parent report.³³ Student displayed Severe Symptoms of an Autism Spectrum Disorder.³⁴ The conclusion of the evaluation gave recommendations that the committee consider the categories of Multiple Disabilities and Autism.³⁵

12. April 16, 2021, Deann Denison, M.S., CCC-SLP for the Greenwood School District completed a speech-language evaluation.³⁶ Hearing was screened informally through

²⁸ H-23-02, Id., at pg. 309.

²⁹ H-23-02, Id., at pg. 309.

³⁰ H-23-02, Id., at pg. 310.

³¹ H-23-02, Id.

³² H-23-02, Id., at pg. 311.

³³ H-23-02, Id., at pg. 312.

³⁴ H-23-02, Id., at pg. 313.

³⁵ H-23-02, District's Exhibits, pgs. 302-322.

³⁶ H-23-02, Id., at pgs. 331-337.

observation and found to be functional for the purposes of the evaluations.³⁷ Speech evaluation indicates delayed expressive and receptive language abilities which are directly impacted by a limited phonetic inventory. Additionally, Student presents with pragmatic skills which are below average.³⁸

13. April 16, 2021, Chelsea Percy, OTR/L with A Plus Therapist, Inc. completed the occupational therapy evaluation for the Greenwood School District.³⁹ The evaluation revealed strengths as being sweet; motivated with rewards or preferred toy; redirected well; and supportive family.⁴⁰ Limitations identified include grasping; visual motor integration; visual perception; motor coordination; self-care; upper extremity and core strength; and sensory processing all of which are severely delayed.⁴¹
14. May 4, 2021 and May 11, 2021, Parent was given notice of conference scheduled for May 18, 2021 for committee review of the evaluations completed by the district and assist the committee in making programming and placement decisions for Student.⁴²
15. Parent requested a change of conference date to June 7, 2021.⁴³
16. On June 7, 2021, an evaluation conference was held. After initial introductions of all committee members, the physical therapist reviewed the evaluation with the committee.⁴⁴ The recommendation made to the committee was for Student to receive 90 minutes weekly of physical therapy at school because Student needs extra support with mobility and his age equivalency.⁴⁵ Goals recommended addressed both increasing strength of

³⁷ H-23-02, Id., at pg. 337.

³⁸ H-23-02, Id.

³⁹ H-23-02, District Exhibits, pgs. 323-330.

⁴⁰ H-23-02, District Exhibits, pgs. 323-330.

⁴¹ H-23-02, Id., at pg. 329.

⁴² H-23-02, Id., at pgs. 12-18.

⁴³ H-23-02, Id., at pg. 14.

⁴⁴ H-23-02, Evaluation Recording June 21, 2021, minutes 2:00 – 8:23.

⁴⁵ H-23-02, Evaluation Conference recording June 21, 2021. Minute 8:08.

core muscles, more efficient and accurate movements as well as increasing flexibility.⁴⁶ Student's occupational therapy evaluation was reviewed with committee.⁴⁷ The recommendation made to the committee was for the Student to receive 90 minutes weekly occupational therapy at school.⁴⁸ Goals recommended address upper extremity and core strength, fine motor strength, and sensory integration.⁴⁹ Student's speech-language evaluation was reviewed with committee.⁵⁰ The recommendation made to the committee was for 120 minutes weekly of speech therapy at school.⁵¹ Goals for speech therapy would incorporate increasing functional vocabulary through the use of LAMP ("Language Acquisition through Motor Planning") device or sign, using functional word approximations, following directions, making requests, improving self-regulation, taking turns in joint activities.⁵² Student's psychoeducational evaluation that was completed by Sue Featherston was reviewed with the committee by Carley Sykes school psychology specialist for the district.⁵³ Sykes points out that a large portion of the evaluation is from previous evaluations and via parent interviews.⁵⁴ Sykes reports that the evaluator did not feel that the evaluation was a valid measure of Student's abilities.⁵⁵ After completing a review of all the evaluations and recommendations from the evaluators, the committee first discussed the disability category for eligibility.⁵⁶

⁴⁶ H-23-02, Id., at minutes 6:65-8:06.

⁴⁷ H-23-02, Id., at minutes 8:28-15:03.

⁴⁸ H-23-02, Id., at minute 13:43.

⁴⁹ H-23-02, Id., at minutes 8:28-15:03.

⁵⁰ H-23-02, Id., at minutes 15:04-22:39.

⁵¹ H-23-02, Id., at minute 22:35.

⁵² H-23-02, Id., at minutes 22:35-23:27.

⁵³ H-23-02, Id., at minutes 23:34-28:53.

⁵⁴ H-23-02, Id., at minutes 23:46 and 28:04.

⁵⁵ H-23-02, Id., at minute 24:23.

⁵⁶ H-23-02, Id., at minute 22:35.

17. The committee, including the Parent, agreed that Student had multiple areas of deficit and that the most appropriate category for eligibility was Multiple Disabilities.⁵⁷
18. Committee discussed the provision of special education services with Mrs. Stenhouse presenting the option for some time in special education and general education.⁵⁸ Stenhouse explained that students who need to develop the soft-skills for a classroom (e.g., walking in a line with peers, sitting at a desk or table for group instruction, transitioning in the building with students of all ages) usually receive special education and general education for a few weeks.⁵⁹ Barnett shared that the goal is for a smooth transition to general education and to decrease time in special education as soon as possible.⁶⁰ The recommendation of Stenhouse was based upon the evaluations, observations reported during testing, and Stenhouse’s years of experience and educational training in working with children - not his disability nor Student’s measured intelligence. Mrs. Stenhouse acknowledged that was, “hard to . . . know what we should and shouldn’t do without being able to see him in a classroom setting”.⁶¹ The District made a recommendation of direct special education instruction to include 90 minutes of reading instruction, 60 minutes of written expression, and 90 minutes of math.⁶² A paraprofessional was suggested to help the Student navigate through the school. District asked if Student could attend the Summer School program at school in order to observe his behavior in the classroom setting with peers and working on a routine and have a

⁵⁷ H-23-02, Id., at minute 30:13. Parent’s Exhibits, pg. 142.

⁵⁸ H-23-02, Id., at minute 30:34.

⁵⁹ H-23-02, Evaluation Conference recording June 21, 2021, minute 30:34.

⁶⁰ H-23-02, Id., at minutes 31:21, 31:49.

⁶¹ H-23-02, Id., at 32:20.

⁶² H-23-02, Id., at minutes 30:43, 32:35-32:46.

more informed opinion.⁶³ Parent did not want to agree to summer school without first addressing the issue of the Registered Behavior Technician (RBT). Once Parent understood that the summer school was only special education and not a general education summer program, she did not want Student to participate.⁶⁴

19. Dr. Sheila Barnes a BCBA-D attended the June 7, 2021 evaluation conference with Parent. Dr. Barnes stated that Parent wanted the Student in the general education classroom with his nondisabled peers and that she didn't want special education services for academics. Parent reiterated her position several times throughout the evaluation conference. Additionally, mom stated that she wanted Student to be accompanied by a Registered Behavior Technician supervised by Dr. Barnes as part of his Applied Behavior Analysis (ABA) program.⁶⁵ Demaris Barnett, the District special education coordinator stated in the evaluation conference that the RBT was not going to come to school with Student and made it known that the RBT was not up for discussion because she had contacted other school districts and the state department and was told that ABA was not a related service and therefore the District wasn't required to provide it.⁶⁶
20. Parent explains that Autism is a disability, and ABA is a therapy for that disability. She said Student can receive physical therapy, occupational therapy and speech therapy for disabling conditions but cannot have a behavior therapist to address his Autism diagnosis. Parent reiterated that she wanted general education classroom with supplemental aids and services, with an RBT under the supervision of Dr. Barnes, paid for by Medicaid.⁶⁷

⁶³ H-23-02, Id., at minute 32:55.

⁶⁴ H-23-03, Id., at minute 33:48.

⁶⁵ H-23-02, Id., at minutes 37:16, 52:28, 54:34, 100.02

⁶⁶ H-23-02, Id., at minutes 37:45, 39:44.

⁶⁷ H-23-02, Id., at minutes 37:55-39.44.

21. Parent also stated that she wanted general education instruction for Student and no special education instruction for academics.⁶⁸
22. There was extensive discussion about Parent providing a stroller for safety.⁶⁹
23. The District discussed a paraprofessional for Student and that the paraprofessional would be there to assist student around the campus, but would not be helping with academics.⁷⁰
The District discussed having Student in the general education classroom with pullouts to address deficits. Parent once again stated that she wanted Student to start school in the general education classroom without special education pullouts for academics.⁷¹
24. Parent states that her goal is for Student to start in the general education classroom with the RBT and to phase that out once Student is comfortable. Parent doesn't know how long that will take, but she wants to try the general education classroom first. District says they would like to work up to that and Parent reiterates that she wants to start there with supplemental aids and services.⁷²
25. The issue of compromise is discussed during the evaluation conference and the Parent offers for the District to try Student in the general classroom with an RBT and if they believed it wasn't successful they could come back to the table and discuss their concerns.⁷³ The District states that parent could take child out early from school daily to receive his ABA therapy and it will not be counted against Student.⁷⁴

⁶⁸ H-23-02, Id., at minutes 41:03-41:15.

⁶⁹ H-23-02, Id., at minutes 47:14-48:10.

⁷⁰ H-23-02, Id., at minutes 49:51-51:00.

⁷¹ H-23-02, Id., at minute 54:10.

⁷² H-23-02, Id., at minutes 59:07-101:10.

⁷³ H-23-02, Id., at minutes 102:15-103:05.

⁷⁴ H-23-02, Id., at minute 105:34.

26. The District explains that they haven't seen ABA be generalized in the educational setting and that Parent is asking them to let someone in who doesn't work for the school district.⁷⁵ Dr. Barnes explains that her program generalizes across settings. She explains that they program for generalization across people, settings and behaviors. The District then explains that they don't think ABA is beneficial because they don't see it generalized across settings.⁷⁶
27. Parent offers to start Student in general education class with support and services (no RBT) and if Student isn't successful return to the table to discuss concerns. The District then states that they believe Student should start in the special education classroom and then move out. Student will still receive some general education classes. District believes this is the best road to success for Student.⁷⁷
28. District then proposes reducing time in special education. Parent states that a compromise would be to start in general education with an RBT and meet back in a month and if the District felt the RBT wasn't helping take it away.⁷⁸
29. Parent states that she will agree to special education if the District will allow the RBT. If Student thrives better in special education class than general education Parent is willing to revisit it. The District once again said no to the RBT, and declined to compromise.⁷⁹
30. The evaluation conference ends with Parent stating that the District should draft a purposed IEP and provide it to Parent. After that the team could reconvene and discuss the proposed plan.⁸⁰ There was no discussion about what would happen if Parent refused

⁷⁵ H-23-02, Id., at minutes 109:03-109:42.

⁷⁶ H-23-02, Id., at minutes 1:08.32-1:10.28.

⁷⁷ H-23-02, Id., at minute 1:13.52.

⁷⁸ H-23-02, Id., at minute 1:16.05.

⁷⁹ H-23-02, Id., at minute 1:20.15.

⁸⁰ H-23-02, Id., at minutes 1:30.29-1:33.04.

for Student to be placed in special education during the evaluation conference. Nor was there discussion that Parent could accept some items in the IEP and decline other services contained in the IEP.

31. On June 10, 2021, a Notice of Action was sent to parent. The Notice stated:

“The committee met and reviewed all available evaluation data including parent reports and concerns. The committee determined that Student does require some time in special education in order to address his educational and behavior needs. The IEP committee determined that Student qualifies for special education and related services including the following: physical therapy 90 minutes weekly (2X45 minutes), occupational therapy 90 minutes weekly (3X30 minutes), speech/language therapy 120 minutes weekly (4X30 minutes), special education Reading 45 minutes daily, special education math 45 minutes daily, and special education written expression 45 minutes daily. Behavior goals will be addressed across all settings. The committee determined that Student needs adult 1:1 supervision for all the time that he is on campus for safety and for academic support. Special education staff members will be cross-trained in order to cover absences and breaks of staff members. He will have a dedicated paraprofessional for 6 hours a day with a paraprofessional to be with Student when his dedicated paraprofessional is at lunch and on breaks. The committee offered specialized transportation with additional adult supervision; however, Parent said she will bring him to school. Student had a Nonverbal IQ of 47. He was not able to complete the Brigance or the WIAT-IV due to verbal language limitations. Mrs. Featherston observed that he did not point to any numbers, but pointed to some letters. He is able to let you know what he wants, like more mac and cheese, a specific toy to play with, etc.”⁸¹

Further, the Action contained, “The Greenwood School District and Parent could not come to an agreement on services for Student. Parent did not sign any of the special education paperwork (Evaluation/Programming Conference Decision Form, and Notice of Action) at this meeting. The IEP was in the process of being developed at this meeting and was not completed. A draft IEP was completed and the draft version will be sent to Parent’s email - per her request. An additional conference will be held after the draft document has been reviewed and the parent’s feedback has been provided.”⁸²

32. On July 2, 2021, the Parent filed her first due process complaint claiming that the proposed IEP would not provide the student with a free appropriate public education because it did not include ABA therapy.⁸³

⁸¹ H-23-02, District Exhibits, pg. 174.

⁸² H-23-02, Id., at 176.

⁸³ H-23-02, Id., at pgs. 19-38.

33. On July 8, 2021, a notice of conference was sent to the Parent for a Resolution conference.⁸⁴
34. July 9, 2021, Parent's counsel requested a change to the conference date to July 15 but needed to ensure that the Parent was available.⁸⁵
35. July 14, 2021, Parent's counsel was contacted regarding clarification of the issues in the complaint as they were different than those expressed during the conference.⁸⁶
36. July 22, 2021, Hearing officer reset hearing for August 4-6. District counsel requested a continuance for cause and the hearing was reset for August 23-25. July 23, 2021, District contacted Parent to offer LAMP training for Student's device on August 5 to which Parent initially indicated agreement.⁸⁷ However, Parent realized that her first due process hearing (H-22-03), had been set for August 4-6, 2021, therefore she stated she would have to wait and train later.⁸⁸
37. July 26, 2021, District offered to pay for the Parent's LAMP training on an alternate date or notification that she would be available on the August 5th date to which Parent responded she would be available.⁸⁹ August 3, 2021, District confirmed the Parent's registration for the LAMP training.⁹⁰
38. On August 14, 2021, District counsel on behalf of the District made an Offer of Settlement designed around what Dr. Barnes proposed during the evaluation

⁸⁴ H-23-02, Id., at pgs. 49-51.

⁸⁵ H-23-02, Id., at pg. 352.

⁸⁶ H-23-02, Id., at pg. 50.

⁸⁷ H-23-02, Id., at pgs. 353-354.

⁸⁸ H-23-02, District Exhibits, pgs. 353-354.

⁸⁹ H-23-02, Id., at pg. 354.

⁹⁰ H-23-02, Id., at pg. 355.

conference.⁹¹ Mrs. Streett, counsel for the District, provided the following as a settlement offer:

Identification under the category of Multiple Disabilities; 90-day IEP as a diagnostic placement with Dr. Barnes's proposal that Student be in general education with a paraprofessional; Occupational therapy; Physical therapy; Speech therapy; and no other direct special education. A written agreement with a description of how school, BCBA, and RBT will plan collaboratively for the student's competing needs for ABA therapy and educational instruction, what information will be shared and how they will share information. The outside RBT from Barnes' clinic would be allowed into the school under the District's existing policy for outside providers including copies of insurance, clear background checks, confidentiality agreements, notification of absence of RBT, daily check-in with the front office and most important a written agreement. District's offer included payment of reasonable attorney's fees with the settlement and that the District would be released of claims.⁹²

39. August 20, 2021, this Hearing Officer was notified by Mrs. Caldwell that a settlement had been reached and a motion to dismiss would be forthcoming to dismiss.⁹³
40. August 30, 2021, Barnett emailed Parent to determine if the date of September 17, 2021, was agreeable for a meeting to write an IEP for the Student. On the same date and ten days after Petitioner's attorney had notified this hearing officer that a resolution had been reached, Petitioner's attorney, directed the parent "Don't respond" to the request to set a date for the IEP meeting.⁹⁴

⁹¹ H-23-02, Parent's Exhibits, pg. 422, District Exhibits, pg. 52.

⁹² H-23-02, District's Exhibits, pgs. 52-53.

⁹³ H-23-02, Id., pgs. 59-60.

⁹⁴ H-23-02, Id., pg. 54.

41. On September 3, 2021, the District sent a notice of conference to Parent attempting to set up a time for IEP meeting to establish consent for placement and to develop an IEP for Student.⁹⁵
42. On September 10, 2021, the District sent a second notice of conference to Parent attempting to set up a time for an IEP meeting to establish consent for placement and develop an IEP for Student.⁹⁶
43. Parent never responded to the District's request for an IEP meeting. There was no IEP developed (only a purposed IEP) and the Parent did not sign a Notice of Action providing consent for placement and programming at this time. The District did allow the BCBAs and RBTs to attend school with Student. The kindergarten classroom teacher provided additional space in the classroom to accommodate the Student's RBT to sit near him. The kindergarten teacher pulled the Student for extra intervention small group time to work on reading skills. The District allowed the Parent to check the student out of classes early without penalty in order for him to access his private occupational, physical, and speech therapies.⁹⁷ The District provided support and accommodations as appropriate to Student without the provision of any special education services. In addition to the RBT, a paraprofessional was assigned to work with Student on academics in the classroom, provide direction for transitions, and encourage social interaction during appropriate times. A licensed teacher was assigned to do Student's campus based general education intervention "What I Need" WIN Time, one on one with Student.⁹⁸ Assessments and assignments were modified by the classroom teacher, and the interventionist in both

⁹⁵ H-23-02, Id., pgs. 55-56.

⁹⁶ H-23-02, Id., pgs. 57-58.

⁹⁷ H-23-02, Id., pg. 800.

⁹⁸ H-23-02, District's Exhibits, 499-637.

mode of presentation and accepted response to accommodate the use of the Student’s communication device. Materials from the classroom reading program, Foundations, were provided to the parent to inform any outside providers of order and method that the letters and sounds would be taught in the classroom. The materials used for intervention (WIN) time were copied and provided to the Parent as well, however, she returned them saying that they were not needed. When the teacher became concerned about Student’s rate of progress in the general education classroom without special education services, the kindergarten teacher discussed her concerns with the Parent during midterm conferences. The teacher requested to increase his individual intervention time to address his deficit areas. However, the Parent denied the teacher from increasing intervention supports in general education.

44. Progress during the What I Need intervention time (WIN Time) August 2021 – March 2022, was based on accuracy with the level of prompting. The levels of prompting used from highest level of prompting to lowest: 1) Full physical prompt; 2) partial physical prompt; 3) modeling; 4) gesture; 5) verbal prompt; 6) positional prompt; 7) independent.

School Intervention Data	Level of Prompting and Percent Correct			
Labeling of colors	100% Modeling	95% Gesture	38% Independent	90% Positional
Imitating Lines and Curves	100% Full Physical	100% Partial Physical	58% Gesture	
Receptive Id. Capital Letters	100% Partial Physical	97% Gesture	50% Independent	89% Positional
Receptive Id. Lowercase Letters	20% Independent	70% Positional		
Capital Letter Sounds	33% Independent	70% Positional		
Numbers	100% Partial Physical	26% Gesture	86% Positional	
10 Frame Numbers	72% Gesture	90% Positional		

Receptive Id. of Sight Words	50% Gesture	87% Positional		
------------------------------	----------------	-------------------	--	--

45. In February of 2022, after a call with Suzy Wilson, assistant superintendent, who had spoken with Parent about having an IEP meeting, Mrs. Barnett, the LEA supervisor, sent Parent a Notice of Conference for an IEP meeting regarding Student.⁹⁹ Parent responded with an email requesting the IEP meeting be held on February 18, 2022, stating that they needed to discuss his IEP, phasing out the RBT, training the paraprofessional as well as the behavior specialist and teachers. Parent waived all timelines in favor of meeting quickly and stated that if they couldn't get these issues resolved she would need to file for a second due process hearing.¹⁰⁰
46. February 21, 2022, an IEP meeting was held, and Parent attended.¹⁰¹ An IEP was developed for Student. Parent emphasized the importance of teaching Student to communicate using his LAMP device. The IEP team agreed to allow Dr. Barnes to provide staff training.¹⁰² The District, as it had done previously, brought a draft IEP to the meeting.¹⁰³ The committee went through each page of the IEP getting the input of the parent on each page. Parent took out some of the goals and objectives that she felt were not needed at this time of the school year.¹⁰⁴ Parent stated she wanted to look at them again at the end of the school year. Parent did not think Student would benefit from any direct special education instruction. The committee discussed Student working on his letters, sight words, speech goals, and numbers for his goals until the end of this school

⁹⁹ H-23-02, Id., at pgs. 57, 360.

¹⁰⁰ H-23-02, Id., at pg. 361.

¹⁰¹ H-23-02, District Exhibits, pgs. 138-167

¹⁰² H-23-02, Parent Exhibits, pg. 148.

¹⁰³ H-23-02, Id., at pgs. 138-167.

¹⁰⁴ H-23-02, Id., at pg. 68.

year.¹⁰⁵ The committee determined that Student will receive speech/language therapy 60 minutes weekly in the general education classroom, special education reading 75 minutes weekly in the general education classroom, special education written expression 75 minutes weekly in the general education classroom, and special education math 225 minutes weekly in the general education classroom. Occupational therapy and physical therapy were considered, but Parent denied services at this time and felt his outside services were adequate. Parent did ask about Student's school therapies and the committee discussed that the school district will not bill Medicaid for related services. The team added a cool down room as an accommodation on the Student's IEP.¹⁰⁶ Parent did not want Student removed from the room for the cool down room unless it was a last resort. The committee determined that Student would be tested on state assessment individually. District agreed to Parent's request that Student be accompanied by a private RBT under the direction of a private BCBA and this will be faded out after instruction from the private BCBA (Dr. Barnes) to the school staff (teacher, paraprofessional, and behavior consultant).¹⁰⁷ The RBT will not be responsible for creating curriculum during the school day, will follow all school guidelines and expectations (such as signing in at the office daily, etc.) while on school grounds, and will follow the confidentiality agreement. Barnes stated she would come to the school and provide training for the staff and do modeling and coaching with the staff.¹⁰⁸ Barnes stated she will begin to fade out the RBT on week two or four after she begins her training.¹⁰⁹ The committee decided to

¹⁰⁵ H-23-02, Id., at pgs. 144-163.

¹⁰⁶ H-23-02, District Exhibits, pg. 142.

¹⁰⁷ H-23-02, Id., at pg. 140.

¹⁰⁸ H-23-02, Id., at pgs. 196-205.

¹⁰⁹ H-23-02, Id., at pg. 196.

do an annual review in May to look at new goals for the next school year. Parent signed the consent for placement in special education on March 4, 2022.¹¹⁰

47. May 20, 2022, an annual review was held.¹¹¹ Parent attended the meeting to review the student's progress for the IEP February – May 2022 period. During a review of factors associated with extended school year services, Mrs. Cooper, special education teacher reported that the District did not have any concerns about Student's behavior problems, there was no regression in behavior; however, Parent reported that "everyone's seeing it" outside of school.¹¹² She contributed it to his overstimulation and need for movement based upon comments from his occupational therapist.¹¹³ The District suggested allowing more sensory breaks during the day with access to a swing or trampoline in an effort to provide him with feedback and help to reduce the overload experienced during the day, yet the parent declined this offer for sensory breaks or sensory diet.¹¹⁴ The special education teacher reported that Student had made progress in special education as well as general education, but she felt that he could make more progress if he had some direct specialized instruction in a smaller group with decreased distractions, yet the Parent refused to allow this instruction for placement in general education.¹¹⁵ The District's occupational therapist ("OT") and special education teacher explained the benefits of a sensory diet to the Student's success and attention in the classroom and after school. The descriptions included the use of a swing, body sock, balance board, heavy lifting, and other activities to provide proprioceptive feedback which could be provided

¹¹⁰ H-23-02, Id., at pg. 67.

¹¹¹ H-23-02, District Exhibit's, pgs., 231-256.

¹¹² H-23-02, Annual review conference 5-2-22, at minute 42:00.

¹¹³ H-23-02, Id., at minutes 45:00-50:00.

¹¹⁴ H-23-02, Id., at minute 54:00.

¹¹⁵ H-23-02, Id., at minutes 54:00-1:02.00.

across the day; however, when the Parent heard that the swing, balance boards, trampolines were located inside a special education classroom and that the Student would have to leave the general education classroom in order to access those items, she refused to allow him to access these for his sensory needs. Parent stated, “I would do it... I’ll just deal with it when I get to do it... at home.”¹¹⁶ The District expressed concerns about the rate of progress in all areas of academics and considered extended year services; however, the Parent declined instruction from certified classroom teachers to continue time at Dr. Barnes’ clinic. She requested that a list of weekly skills be sent home so that she could work more one on one at home.¹¹⁷ Parent along with Dr. Barnes had no objections to the recommended time in special education nor the goal areas to be addressed. Dr. Barnes indicated that the RBT was beginning to fade out at school and that the goal would be for the RBT to begin the first week of school and if everything went well to fade out completely.¹¹⁸ Parent did not sign the IEP created during the meeting but instead requested to take a copy and review it at home and “breathe” as it was a lengthy meeting with a lot of different information.¹¹⁹

48. Parent provided written feedback on the IEP for the 2022-23 school year.¹²⁰ On May 24, 2022, Parent emailed District to confirm changes from the District’s “Draft” IEP that were agreed to at the May 20, 2022 IEP team meeting. First, the District had removed Student’s RBT from the IEP, but the IEP team agreed that the RBT was needed for the beginning of the school year and may be needed throughout the school year, and the IEP

¹¹⁶ H-23-02, Id., at minute 1:04.00

¹¹⁷ H-23-02, Id., at minutes 1:04-1:08.

¹¹⁸ H-23-02, Id., at minutes 1:23-1:25.

¹¹⁹ H-23-02, Id., at minute 1:31.

¹²⁰ H-23-02, District Exhibits, pgs. 72-74, 230-260, 405.

should allow for that.¹²¹ Second, Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing -- needed to be cut in half.¹²² Third, Parent reiterated her concern that Student’s language goals were not appropriate because Student cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “Student spent most of his school year learning the same few letters . . .”¹²³ Fourth, Parent complained that, despite the IEP requiring everyone working with Student to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it.¹²⁴ And lastly, Parent reported that in two weeks Dr. Barnes taught Student the sound of all letters and numbers. Even so, the District refused to update his goals telling Parent they had to wait until he was reevaluated. Parent asked, “How long into the school year will it take to have that reevaluation and form a new goal?”¹²⁵

49. On May 27, 2022, the District responded to Parent’s email regarding changes to the IEP. The District agreed to Parent’s changes. In the email the District did state that “we have everyone signed up for the LAMP training who we anticipate will work with Student.

¹²¹ H-23-02, Parent’s exhibits, pg. 2.

¹²² H-23-02, Id.

¹²³ H-23-02, Id.

¹²⁴ H-23-02, Id.

¹²⁵ H-23-02, Id.

Most of the people working with him this year will be the same as last year, with the exception of the general education teacher.”¹²⁶

50. Student spent 2 years in Dr. Barnes Clinic receiving ABA therapy. In her Hope 4 Autism Clinic - Dr. Sheila Barnes, a doctoral level BCBA (“BCBA-B”), provided Student with therapeutic level ABA services.
51. Prior to Student starting kindergarten, Dr. Barnes had gotten approval and developed a treatment plan for Student beginning March 13, 2021.¹²⁷
52. Dr Barnes’ treatment plan states that the rationale for services requested are:
“Student is a young male with significant deficits in social communication and social interaction. These deficits adversely affect his ability to use language to interact with his family within his home environment and in other settings. His mother reports that he bites others and has broken the skin. Currently he has no means of functional communication.”¹²⁸
53. On July 26, 2022, the parties held a resolution conference where there was an attempt to schedule direct training by Dr. Barnes for the persons who would be new to Student in the first grade.¹²⁹
54. The training with Dr. Barnes did not come to fruition, and so the District facilitated a meeting with personnel who had served Student in the spring of 2022 and the new personnel who would serve Student in the first grade so that they could provide

¹²⁶ H-23-25-Parent’s Exhibits, pg. 4.

¹²⁷ H-23-25-Parent’s Exhibits, pg. 243.

¹²⁸ Id.

¹²⁹ H-23-25-Resolution conference audio July 26, 2022.

information, and background about working with Student, as well as share information provided by Dr. Barnes and her RBT's.¹³⁰

55. Student was placed in a first-grade classroom with Mrs. Shook. Mrs. Shook has a Bachelor of Science in early childhood education, pre-K through fourth grade, and a Master's degree in school counseling. She taught pre-K for two years, and first grade for seven years.¹³¹
56. District assigned an experienced paraprofessional to work one on one with Student. District sent the paraprofessional through forty hours of ABA training online and LAMP training before school started.¹³²
57. On August 12, 2022, before school began, the Assistant Principal proposed a communication sheet to go back and forth between Dr. Barnes and the District to improve communication between the parties. Dr. Barnes stated her concerns about the communication sheet stating that it was seeking opinion rather than scientific data.¹³³
58. Dr. Barnes and her RBT came to the first day of school to observe Student. Additionally, people Student was familiar with were present to assist with his transition. Student's speech therapist, his special education teacher, and the District's BCBA from the previous school year were present.¹³⁴
59. On September 9, 2022, Parent sends an email to District stating that:

Due to the extreme influx in undesired behaviors Student has exhibited in the past few weeks, it is now medically necessary that he return to Dr. Barnes Clinic immediately for some intense in-patient ABA therapy. Over the next few weeks Student will be going to Dr. Barnes Clinic so she can address the regression of behaviors that have redeveloped in the recent weeks that I haven't seen in years!

¹³⁰ H-23-25-Hearing Transcripts, Vol. III., pgs. 121-122.

¹³¹ H-23-25-Hearing Transcripts Vol. I, pg. 14.

¹³² H-23-25-Hearing Transcripts Vol. III., pg. 117, Exhibits, Vol. III., pg. 209.

¹³³ H-23-25-Exhibits Vol. III., pgs. 110-112.

¹³⁴ H-23-25-Hearing Transcripts Vol. IV, pgs., 11, 20; Hearing Transcripts vol. V., pgs., 82, 121.

Please understand, these very behaviors he is presenting with in school and now throughout different aspects of his life, has been what I have been trying so hard to avoid. Your interference with his ABA therapy the past 4 weeks have erased 4 years of work!

135

60. On September 9, 2022, in response to Parents email, the principal Kim Gill responded and requested that they set up a meeting.¹³⁶
61. After being made aware of Student's behaviors in Parent's September 9, 2022, email, the District's LEA supervisor wrote criteria for several behaviors and asked the District's BCBA to instruct the paraprofessional on how to gather data.¹³⁷ Additionally, the LEA supervisor then directed Student's paraprofessional to gather scatter plot data on his behavior so the LEA could see if it was improving or not.¹³⁸
62. On October 3, 2022, Parent sent an email to Jasmine Wright, explaining that while Parent isn't a BCBA she sat on the Board of ARKABA (Arkansas Association for Behavior Analysis) as a parent representative, and went on to explain that it goes against Ms. Wright's code of ethics to provide any behavioral analytic services without a parent's informed consent and Parent went on to state that she had not given Ms. Wright her informed consent.¹³⁹
63. On October 7, 2022, Dr. Barnes observed Student at school. Dr. Barnes became concerned that Ms. Wright (the District's BCBA) was providing ABA services to Student without parental consent and interfering with the RBT who was attending school with Student under the supervision of Dr. Barnes. Dr. Barnes stated one of the issues was the

¹³⁵ H-23-25-Exhibits Vol. 3, pg. 113.

¹³⁶ H-23-25-Exhibits, Voll. III, pg. 114.

¹³⁷ H-23-25-Exhibits, Vol. IV., pg. 284.

¹³⁸ Id., pgs. 285-290, 290-388.

¹³⁹ H-23-25-Exhibits, Voll. III., pg. 115.

use of the timer with Student. She was concerned that Wright and district staff were using the time to signal the end of a reinforcing activity. Teaching student that the timer meant “I’m losing something of value”. Dr. Barnes explained that the timer should only be used to signal a reinforcer, letting Student know, “you are going to get something you want.” Dr. Barnes stated that as a result just bringing out the timer would trigger maladaptive behaviors.¹⁴⁰

64. On October 7, 2022, Parent again sent an email to Jasmine Wright in which she stated: “ Jasmine, you continue to disregard my previous email about administering analytics services. You have not properly identified your role with my child, obtained any form of consent, or bare minimum returned my email addressing my concerns while continuing to administer services to my child. If this continues, I will have no choice but to file an ethics complaint”¹⁴¹
65. On October 11, 2022, Dr. Barnes sent an email to the Parent and Ms. Wright stating that she was officially notifying Ms. Wright that she intends to fulfill her ethical obligation to report that Ms. Wright has provided ABA services to Student without parental consent and despite Parent objections.¹⁴²
66. On October 11, 2022, parent sent an email to Kallie Cooper, stating that she has noticed Student missed minutes with her and asked her to let her know how many minutes he had missed.¹⁴³
67. On October 13, 2022, Kallie Cooper, responded to Parent’s October 11, 2022, email stating that Student missed 3 literacy sessions, and 3 math sessions without a substitute.

¹⁴⁰ Exhibits, Vol. III., pg. 138, Hearing transcripts, Vol. IV., pgs. 29-32, 36-37,

¹⁴¹ Id., at. Pg. 116.

¹⁴² Id., at pg. 117.

¹⁴³ Exhibits, Vol. III, pg. 133.

She further explained they would be making those up by adding 15 minutes to 9 of his math sessions and 6 of his literacy sessions.¹⁴⁴

68. On October 13, 2022, Mr. Shumate the assistant principal sent an email to Parent requesting dates and times for a meeting.¹⁴⁵
69. On October 20, 2022, Dr. Barnes and Parent met with the Principal and Assistant principal and shared Dr. Barnes concerns from when she observed Student on October 7, 2022, and provided some recommendations.¹⁴⁶
70. On October 25, 2022, Dr. Barnes sent an email outlining recommendations she made at the October 20, 2022, meeting. Dr. Barnes recommendations included:
 1. Align SPED instruction to gen ed instruction (gen ed instruction is evidence based)—this was because of Dr. Barnes’s observation on October 7, 2022, that Student’s general education teacher was using evidence-based reading program but that special education teacher was not.
 2. implement teaching trials that include transfer procedures (follow prompted trial with a non-prompted trial)
 3. Use timer ONLY to signal an “improving condition” not a “worsening condition”.
71. Student’s maladaptive behavior increased as the school year went on in both frequency and duration. Examples of maladaptive behavior include:
 - a. September 16, 2022, room and grabbed and pulled Mrs. Jordan’s hair, threw her glasses across the room, and ripped an earring out of her ear. He had

¹⁴⁴ Id., pg. 134.

¹⁴⁵ Id., at pg. 131.

¹⁴⁶ H-23-25-Recording of October 20, 2022, meeting.

¹⁴⁷ H-23-25-Exhibits, Vol. III, pg. 138.

another outburst where he threw her glasses for the second time and pulled her hair.

b. October 12, 2022, Student hit and gave paraprofessional a black eye.

Student was crying, screaming, thrashing, hitting, and biting.

c. November 9, 2022, Student was crying, slamming, head banging, hitting/pulling hair and screaming.

d. December 6, 2022, Student crying, thrashing, hitting, biting, throwing, screaming, pulling hair.¹⁴⁸

72. There was no evidence presented that the District ever discussed these behaviors with Parent or sought to address behaviors with any type of interventions.

73. Dr. Barnes testified that as a result of the District's failure to address Student's maladaptive behaviors, and review his IEP, Student's maladaptive behaviors escalated "to the point I was concerned about self-injurious behavior and getting hurt in the school environment..." Dr. Barnes testified that she had no doubt that Student would hurt himself or others in the school environment because the behaviors got worse and worse.¹⁴⁹

74. On December 28, 2022, Parent sent an email providing District with a letter from Student's Doctor concerning Student's inability to remain in the school environment. The Letter from Student's doctor stated:

"I follow Student (student's name) in my Internal Medicine -Pediatrics Practice. Student has a history of Pervasive Developmental Delay. He is currently having an educational emergency and requires immediate clinical services so he can

¹⁴⁸ H-23-25-Exhibits Vol. IV., pgs. 288-390.

¹⁴⁹ H-23-25-Hearing transcripts, Vol. IV, pgs. 52-54.

receive medically necessary therapy until his behavior is under control enough to reintegrate into a regular classroom. I am recommending homebound school to allow for re-initiation of intensive psychosocial rehabilitation through ABA therapy. Please contact me with any additional questions or concerns.”¹⁵⁰

75. On January 12, 2023, the IEP committee met to discuss homebound services requested by Parents. It was here that Parents provided the District with the letter from Student’s doctor stating that Student “is currently having an educational emergency and requires immediate clinical services so he can receive medically necessary therapy until his behavior is under control enough to reintegrate into a regular classroom.”¹⁵¹ The committee determined that the school district had no evidence of significant behavioral problems at school that would warrant moving Student from least restrictive environment 100% of his school day in the general education classroom to the most restrictive environment of homebound services. The team went over the Department of Education Special Education guidance for homebound placement for behavioral and medical reasons. Parent would not allow the District to communicate with Student’s doctor regarding the reasons for Student’s home bound placement. The District was not opposed to providing homebound services if they could be justified. The District’s practice was to provide homebound services after school with a currently employed teacher. The District would have to see if they could find a teacher who could provide services during the school day and who was willing to go to Dr. Barnes clinic, where Student would be receiving intensive ABA services. The team determined that the school and Dr. Barnes would explore options to provide homebound services with an

¹⁵⁰ H-23-25-Parent Exhibits pg. 93. District Exhibits, pgs. 144.

¹⁵¹ Parent Exhibits pg. 41.

appropriate educator.¹⁵² Ultimately the team felt there was insufficient information to justify homebound placement for educational or behavioral issues at school since the school stated they were not seeing behavioral issues with Student. The team discussed providing homebound services on Saturdays.¹⁵³

76. On January 27, 2023, the District sent an email to Parent, Dr. Barnes and Ms. Gill. It stated:

We have found a qualified teacher certified in special education and general education who can begin to provide services next Thursday, February 2nd and Friday, February 3rd from 2:30p.m. until 4:30 p.m. at Dr. Barnes' clinic. We need the address for the clinic Dr. Barnes would like us to provide services and also need to know if Dr. Barnes has contacted her Oklahoma providers to see if they are available in case, we need a more long-term solution.

Parent responded to the District's email and asked if it would be 4 hours of instruction per week and if it would be general education or special education. The District responded yes weather permitting it will be every Thursday and Friday from 2:30 -4:30 pm.¹⁵⁴ The four hours of instruction per week appears to be an arbitrary number but is also the minimum number of hours that can be provided if a student is homebound.

There is no evidence that the four hours of instruction provided by the District at Dr. Barnes' clinic was ever discussed and the amount determined at an IEP meeting. Further no IEP was developed to include changes to Student's 2022-2023 IEP.¹⁵⁵

77. Parent became aware that Student wasn't going to receive state testing because he was not at the school but was at Dr. Barnes' clinic. Parent contacted the ADE about her concerns and to figure out the process for offsite testing. Parent learned from the ADE

¹⁵² Id., pg. 41.

¹⁵³ Parent's exhibits pg. 42.

¹⁵⁴ Id., at pgs. 47-48.

¹⁵⁵ Id., at pgs. 51-52.

that Student was not coded as a “homebound” student and therefore could not receive off site state testing. The District then changed Student’s status to “homebound” and backdated that in their attendance system starting January 3, 2023.¹⁵⁶

78. The IEP in effect on January 12, 2023, was the IEP developed May 20, 2022.¹⁵⁷ This IEP contained a statement of Student’s present levels of academic achievement and functional performance, measurable annual goals, and a list special education and related services to be provided to the child.¹⁵⁸ This IEP provided that Student receive fifteen minutes per day of direct instruction in reading, forty-five minutes per day of direct instruction in math, and fifteen minutes per day of direct instruction in writing. It also provided for sixty minutes per week of speech therapy.¹⁵⁹ The District worked on the goals contained in this IEP at Dr. Barnes’ clinic.
79. The District administered the NWEA MAP (Measures of Academic Progress)¹⁶⁰ reading and math tests in May of 2023. Student’s reading score decreased from 123 to 113, and his math score decreased from 123 to 115.¹⁶¹
80. Ms. Gill testified that Student’s NWEA MAP tests did show Student minorly regressed, but stated that was probably because he was not in school on campus.¹⁶²

¹⁵⁶ Id., at pg. 147, Hearing Transcript, Vol. I, pgs. 39, 45.

¹⁵⁷ Parent’s exhibits, pg. 1.

¹⁵⁸ Id., pgs. 1-28.

¹⁵⁹ Id., at pg. 9.

¹⁶⁰ The NWEA MAP Test is an assessment tool used to measure achievement and growth in math, reading, and language use.

¹⁶¹ Parent’s exhibits, pg. 146.

¹⁶² Hearing Transcript, Vol. I, pg. 57.

81. Deann Denison, Student's speech therapist testified that Student was not provided speech therapy between January 12, 2023, through the end of the 2022-2023 school year.¹⁶³

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Before consideration of the Parent's claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, the burden of persuasion, in this case, must rest with the Parent.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Albright ex rel. Doe v. Mountain Home Sch. Dist.* 926 F.3d 943 (8th Cir. 2019), *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive.

The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. The documentation and testimony were sometimes

¹⁶³ Hearing Transcript, Vol. II, pg. 124.

conflicting, although this hearing officer does not necessarily find that any one witness was intentionally untruthful, these inconsistencies did play a role in this hearing officer's decisions. In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

Applicable Legal Principles

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is " 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's individual circumstance". The U.S. Supreme Court considered the application of the *Rowley* standard, and it observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make

progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09). The *Andrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352.¹⁶⁴

Andrew, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Andrew F.* In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.' " *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A free appropriate public education (FAPE), as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07 A procedural violation occurs when a district fails to abide by the IDEA's safeguard requirements. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* The IDEA further provides that if a parent refuses to consent to the receipt of special education and related services, or fails to respond to a request to provide such consent, "the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency request such consent." 20 U.S.C.

§1414(a)(1)(D)(ii)(III)(aa). Although a parent always retains the right to withhold consent, after consent is withheld, the school district cannot be held liable for denying a FAPE. Additionally when parents waive their children's rights to services, school district may not override their wishes. *Fitzgerald ex rel. S.F. v. Camdenton R-II School District*, 439 F.3d 773 (8th Cir. 2006); *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998).

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set 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). Pursuant to *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. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Andrew F.*

LIMITATION OF ISSUES

This hearing officer agrees with the District's post hearing brief in that the Parent is limited in her due process proceeding by her due process hearing complaint. Both the federal law and regulations, and the Arkansas Department of Education Procedural Requirements and Program Standards Governing Special Education and Related Services, provide that the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees. 20 U.S.C. 1415 (f)(3)(B); 34 C.F.R.511(d). It would be unfair to ask the District to prepare its case without notice of the issues to be determined. The facts in Parent's complaint raise the following issues: 1) whether the district's refusal to change the student's educational placement to homebound (home services) at the January 12, 2023 IEP meeting denied the student FAPE; 2) whether the District's

failure to adopt a homebound IEP denied the student FAPE; and 3) the type and amount of compensatory education to which the student is entitled for these alleged denials of FAPE.

PROCEDURAL VIOLATION OF IDEA

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this hearing officer notes that Parent alleges that the District failed to develop an IEP that reflected homebound services for Student.

The IDEA codifies the goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d). In addition, the IDEA mandates that participating states extend various procedural protections and administrative safeguards to disabled children, parents, teachers, school officials, and educational institutions. 20 U.S.C. § 1415. For example, under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an "impartial due process hearing." Id. § 1415(b)(2) & (f). Once the available avenues of administrative review have been exhausted, aggrieved parties may file a civil action in state or federal court. Id. § 1415(i)(2)

The IDEA includes a number of procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-12, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

Here, at the January 12, 2023, IEP meeting, the District stated it did not have enough information to place Student on homebound instruction. However, on January 27, 2023, the District sent an email to Parent Stating:

“We have found a qualified teacher certified in special education and general education who can begin to provide services next Thursday, February 2nd and Friday, February 3rd from 2:30p.m. until 4:30 p.m. at Dr. Barnes’ clinic. We need the address for the clinic Dr. Barnes would like us to provide services and also need to know if Dr. Barnes has contacted her Oklahoma providers to see if they are available in case, we need a more long-term solution.”

Further when asked if the instruction would be four hours per week the District responds yes weather permitting. The District didn’t hold an IEP meeting to change Student’s IEP, or develop an IEP to include these services, instead the District led Parent to believe Student would be receiving homebound services. IDEA requires that an IEP is in effect before special education and related services are provided to an eligible student.¹⁶⁵ 34 C.F.R. 300.323, ADE rule and regulation 8.03.2.1 A. The District argues that it did not have an obligation to develop an IEP to include homebound instruction, but the facts do not support the District’s argument. The District did everything to indicate it was providing homebound instruction to Student at Dr. Barnes’ clinic. The District found and employed the teacher, was working on goals contained in Student’s 2022-2023 IEP and even changed Student’s status to homebound in its attendance system. The District failed to hold an IEP meeting to develop an IEP that reflected any of the services Student was receiving at Dr. Barnes’ clinic.

The District argues in its post hearing brief that this was an unusual situation that had never arisen before in the District, nor in Counsel’s practice. However, the District as discussed supra never addressed anything that occurred in Student’s IEP. The IEP is the centerpiece of

¹⁶⁵

IDEA and the District is knowledgeable in the process that must be followed. The District doesn't get to provide staff for four hours of instruction a week working on goals on Student's IEP, change their attendance records to say Student is on homebound, and then not document any of this on Student's 2022-2023 IEP. IDEA has a procedure that must be followed so "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d). Here, no matter how good intentioned the District may have been they should have amended Student's 2022-2023 IEP once they determined they would be providing special education services to Student at Dr. Barnes' clinic.

Based on all the evidence and testimony the District failed to develop an IEP to reflect the homebound instruction Student was receiving and thus procedurally violated the IDEA.

SUBSTANTIVE VIOLATIONS OF IDEA

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District procedurally violated IDEA by not developing an IEP that reflected the homebound instruction Student was receiving, it is now necessary to consider whether this procedural violation resulted in a substantive denial of FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the child a FAPE. *K.E. v. Indep. Sch. Dist.* 15, 647 F.3d 795, 804 (8th Cir. 2011). "An IEP should be 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." *Lathrop R-II Sch. Dist. v.*

Gray ex rel. D.G., 611 F.3d 419, 424 (8th Cir. 2010) (quoting *Indep. Sch. Dist. No. 283*, 88 F.3d at 562).

Here, the District provided special education services to Student at Dr. Barnes' clinic, without an appropriate IEP in place. Because of this Parent was not able to fully participate in the development of the IEP because there was no IEP that reflected the Homebound instruction Student was receiving. Particularly, Deann Denison, Student's speech therapist testified that Student was not provided speech therapy between January 12, 2023, through the end of the 2022-2023 school year. Had the District held an IEP meeting and the Parent had been allowed to participate the lack of speech services most likely would have been addressed. This seriously hampered the parent's opportunity to participate in the formulation process. As such the District substantively violated IDEA.

I. Whether the district's refusal to change the student's educational placement to homebound at the January 12, 2023, IEP meeting denied the student FAPE?

Parent fails to present enough evidence that student's educational placement should have been changed to homebound at the January 12, 2023, IEP meeting. Parent provided the District a letter from Student's doctor that stated Student had an educational emergency and needed homebound services. When asked for additional information Parent failed to provide anything further. Additionally, once the District agreed to and began providing homebound instruction in February 2023, the District had an obligation to develop an IEP that reflected these changes and failed to do so. This failure as discussed supra was both a procedural and substantive violation of the IDEA and thus denied Student a FAPE. However, on January 12, 2023, the District's decision was based on the information provided by Parent, and Parent

failed to present enough evidence that Student's educational placement should have been changed to homebound on January 12, 2023.

Compensatory Education

Having found procedural and substantive violations of the IDEA, we now look at Parent's request for compensatory education services. The IDEA confers "broad discretion" upon hearing officers and courts to order remedies that are " 'appropriate' in light of the purpose of the Act." Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); see also 20 U.S.C. § 1415(i)(2)(C)(3). Although compensatory damages are unavailable through the IDEA, compensatory education is allowed. J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 593 (8th Cir. 2013); "Birmingham v. Omaha Sch. Dist., 220 F.3d 850, 856 (8th Cir.2000)." J.B. ex rel. Bailey v. Avilla R-XIII School District, 721 F.3d 588, 593 (8th Cir. 2013).

"Imposing liability for compensatory educational services on the defendants merely requires them to belatedly pay expenses that they should have paid all along." Miener ex rel. Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (alterations and quotation marks omitted). Because of this backward-looking nature, the purpose of any compensatory-education award is restorative—and the damages are strictly limited to expenses necessarily incurred to put the Student in the education position he/she would have been had the District appropriately provided a FAPE. See Indep. Sch. Dist. No. 284, 258 F.3d at 774. In this case there was an IEP for the 2022-2023 school year. This IEP provided that Student receive fifteen minutes per day of direct instruction in reading, forty-five minutes per day of direct instruction in math, and fifteen minutes per day of direct instruction in writing. It also provided for sixty minutes per week of

speech therapy.¹⁶⁶ The District worked on the goals contained in this IEP at Dr. Barnes' clinic. Although the District did provide four hours of instruction per week while Student was in Dr. Barnes' clinic, the District never changed Student's IEP to reflect the changes. Additionally, Student did not receive any speech therapy from the District after January 12, 2023, to the end of the 2022-2023 school year. Because the District did not hold an IEP meeting and allow the Parent to fully participate in the development of Student's homebound program, this hearing officer will look to Student's 2022-2023 IEP for guidance in what compensatory services should be. The 2022-2023 IEP is being used for guidance alone as this hearing officer did not have to reach a decision on implementation of the 2022-2023 IEP. This hearing officer agrees with the Parent that Student is entitled to eighteen hours of speech therapy for compensatory services. Additionally, this hearing officer finds that Student is entitled to eighteen hours of special education services for the District's denial of FAPE from January 4, 2023 to July 14, 2023.

Conclusion

The results of the testimony and evidence warrant a finding for the Parent. Specifically, Parent introduced sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between January 4, 2023, and July 14, 2023. District is hereby ordered to take the following actions regarding Student:

1. The District is to provide eighteen hours of compensatory speech therapy to Student at a time agreeable to both the District and the Parent, and appropriate to Student's disability and endurance.

¹⁶⁶ Id., at pg. 9.

2. The District is to provide eighteen hours of compensatory education in special education service at a time agreeable to both the District and the Parent, and appropriate to Student's disability and endurance.

If Parent also alleges that the 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. See ADE Spec. Ed. Rules §10.01.22.1. Accordingly, to the extent Parent's due process complaints raise disability discrimination claims, those claims are dismissed.

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.

Dana McClain

HEARING OFFICER

12/1/2023

DATE