ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT

[-------------------]PETITIONERS
AS PARENTS OF
[---------------------]

VS. NO. H-09-24

BENTONVILLE SCHOOL DISTRICT RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issue and Statement of the Case

Issue

Did the Respondent deny the Student with a free and appropriate public education (FAPE) according the Individuals with Disabilities Education Act (IDEA) by not continuing to provide and include ----------- as assistive technology for the 2009-2010 school year?

Procedural History

On May 12, 2009, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from [----------------------] (hereinafter referred to as "Parents"), the parents and legal guardians of [---------------------] (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Bentonville School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act (20 U.S.C. Sections 1400-1485, as amended) (IDEA) (also referred to as the "Act" and Public Law 108-446) and the regulations set forth by

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

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

A pre-hearing conference was subsequently held, which assigned the burden of production and persuasion to the Parents.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended and Arkansas Code Annotated 6-41-202 through 6-41-223, Garry J. Corrothers, Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parents represented themselves and [] of Stillwater, Oklahoma acted as advisor/advocate for the Parents. The District was represented by Rudy Moore, Attorney of Bentonville, Arkansas.

At the time of the hearing the Student was a ------- year old male whose eligibility for receipt of special education services was under the category of -----------------. The school year IEP at issue was developed on April 30, 2009, at an annual review conference in order to determine the appropriate educational program for school year 2009-2010 where he would be entering the ---------grade.

It was explained to both parties at the conclusion of he hearing that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing.

Findings of Fact

According to the testimony, the Student had been wearing ------------------during the 2008-2009 school year. The --------------had been on the Student's IEP for the 2008-2009 school year on a page called the "special factors" page (District Exhibit Binder, IEP page 3, labeled "Consideration of Special Factors".) However, the District explained that they were advised by the Arkansas Department of Education that they had not been using the special factors page incorrectly. The District had been using the page as a "catch-all" page for all information about the Student. Heeding this advise, the District began training its staff members to use the page correctly. Therefore, the special factors page would no longer be used as a catch-all page. The District now understood that anything on the special factors page would "be a part of FAPE" and the financial responsibility of the District (Hearing Transcript (HT), page 64.)

The IEP developed for the 2009-2010 school year did not make provision for hearing aids on the IEP as assistive technology. The District arrived at the conference wherein this IEP was developed with a draft IEP. The Parents were involved in the annual review wherein the -------------were discussed (HT, page 65) and the review conference lasted four and one-half (4 ½) hours long (HT, page 103).

The District's position is that the Student could do without ---------------(HT, page 43). He would be able to participate in class with a ------------------------------(HT, page 48). -- ----------------services will also be on his upcoming IEP as an assistive technology device. -- -- ---services have been on the Student's IEP in the past and will continue to be on his IEP. -----------------services have been very successful with the Student (HT, pages 73-74).

The Student -------very well with the use of hearing aids (HT, page 49). There is no prohibition on the Student being able to wear his----------------, even if it is not written on his IEP (HT, page 96).

The Student has progressed from year to year and grade to grade. He had not had any credit deficiency (HT, page 91). He is being promoted or transitioning into his 11th grade year next year (HT, page 92).

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21. 20 U.S.C. Section 1412(a) and 34 C.F.R. Section 300.300(a). The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech and language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services. 20 U.S.C. Section 1401(3)(A). The provision of related services would include "assistive technology devices". The term assistive technology device, means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities. 34 CFR Section 300.5. A device such as a ----------------could be a covered device under this definition. In addition, under the Section 300.308, each public agency must ensure that assistive technology devices and assistive technology services, or both, as those terms are defined in 34 CFR Section 300.5 and 300.6, are made available to a child with a disability if required, as part of a child's special education under Section 300.17, related services under Section 300.16, or supplementary aids and services under Section 300.550(b)(2). Under Part B, each child's IEP must contain, among other elements, a statement of the specific special education and related services to be provided to the child. 34 CFR Section 300.346(a)(3). In addition, any supplementary aids or services to be provided to the child in connection

with the child's placement in the regular educational environment must be described in his or her IEP. Appendix C to 34 CFR Part 300, question 48. Therefore, a determination of whether a child with a disability requires an assistive technology device and/or service in order to receive FAPE must be made by the participates on that child's IEP team in accordance with applicable IEP requirements.

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities in its regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2000.

The United States Supreme Court provided guidance for determining whether a student has received FAPE in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court's first case involving the IDEA. In *Rowley,* the Court set forth a two fold inquiry for determining FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? This procedural test was based on Congress's belief that compliance with the requirements of the Act would probably produce substantive compliance. *Rowley* clearly established that a school district's failure to comply with the Act's procedures constitutes a sufficient basis for determining that a child has been denied a FAPE. Generally, courts only overlook procedural violations when they are technical and no harm has occurred to the student as a result. *See, e.g. Doe v. Alabama Dept. of Educ*., 915 F.2d 651 (11th Cir.

1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. The substantive part of the *Rowley* test requires that a student's IEP be reasonably calculated to provide educational benefits. The Court made it clear that the IDEA does not entitle a child to an IEP designed to enable him to reach his maximum potential. The IDEA ensures an "appropriate" education, not the "best" education. *Rowley*, 458 U.S. at 2001. However, courts interpreting *Rowley* have made it clear that the educational benefit must be "meaningful" and not "de minimis." *See e.g. Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988) *cert. denied*, 488 U.S. 1030 (1989); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). The child's past progress or lack of progress may be the strongest indicator. Courts have found that FAPE must produce progress, not regression or de minimis benefit. *Hall*, 774 F.2d at 629. In *Peterson v. Hastings Public School*, 31 F.3d 705 (8th Cir. 1994), the Eighth Circuit found that FAPE was generally provided when a child with a disability received personalized instruction with sufficient support services to permit the child to benefit educationally with instruction that approximated the grade levels in the school's regular program and allowed the child to meet the state's educational standards, achieve passing marks, and move from grade to grade. *Id. at* 707.

To determine if the IEP is reasonably calculated to provide educational benefits, the child's unique needs must be analyzed. The concept "educational benefit" embraces

more than academic subjects. *See* 34 C.F.R. Section 300.5 (1995); *Jefferson County Bd. of Educ. v. Breen*, 864 F.2d 795 (11th Cir. 1988); *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 (6th Cir. 1984). To determine FAPE for a child with a disability, an examination may also have to be made of a child's progress in socialization, adaptive behavior, daily living, speech or communication, mobility, and other nonacademic areas critical to a disabled child's education. *See* 34 C.F.R. Section 300.17, 300.532(f) (1995). In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a child's potential and educational needs. In the instant case the Student has made academic progress. However, post-hoc measures of progress are not the requirements for answering the question as to whether or not the Student's current IEP constitutes a violation of FAPE. As noted previously, in order to provide FAPE an IEP must be developed in such a manner so as to provide a reasonable calculation that it will enable the student to receive educational benefit.

The courts consistently agree that FAPE must be based on the child's unique needs and not on the child's disability. 34 C.F.R. Section 300.300(a)(3). Therefore, the charge to education professionals is to concentrate on the unique needs of the child rather than a specific disability.

The issue addressed in the instant case by the Parents as to whether or not the denial of the provision of -----------------on the Student's IEP for the upcoming 2009-2010 school year is such an egregious violation of the Act that the District has denied the Student

FAPE. As noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge; however, they must meet the standards set forth by the Department. The real question then becomes: Has the Student's IEP for the school year 2009-2010 been adequately developed in order to provide him with the opportunity to obtain as educational benefit by addressing his unique educational needs as manifested by the negative impact of his disabilities?

The Eighth Circuit Court of Appeals has addressed the issue of the adequacy of an IEP in meeting the standards established in IDEA. In *Ft. Zumwalt School District vs. Clynes*, No. 96-2503 (8th Cir. 1997), the majority is quoted as stating that the IDEA does not require the best possible education or superior results. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student. In their decision the court relied on the previously cited *Rowley* case by quoting *Rowley* at 203 (grades and advancement from grade to grade "an important factor[s] in determining educational benefit".) *Ibid*, at 26 IDELR 172.

It was the intent of the IDEA to encourage parental participation in the development of a disabled student's IEP. The value of parental participation is the development of an IEP has been consistently emphasized in the IDEA. 20 U.S.C. Sections 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2). As the Supreme Court stated in the previously cited *Rowley* case "It seems to us no exaggeration to say that Congress placed

every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every step of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley at* 189, 205 (1982). The previously cited Eighth Circuit case regarding the necessity of there needing to be serious procedural violations in order to declare a violation of FAPE, on the other hand, takes a strong opinion in the other direction when it comes to the requirement of parental participation: "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.'" *Independent School District No. 283 v. S.D. by J.D.,* 88 F.3d 556 (8th Cir. 1996). The Parents have alleged that the IEP was formulated prior to the annual review. However, they have presented no substantial evidence that this is case. The problem was a misunderstanding on the District's part as to the proper structure of IEP's in general. Furthermore, the annual review meeting lasted 4 1/2 hours and although the Parents did not like the result, they fully participated in the process of developing the Student's IEP.

The courts have been consistent in upholding Congress' intent and that an appropriate IEP reflect that disabled students be educated alongside their non-disabled peers to the maximum extent possible. Courts have rejected pleas from both parents and districts on the issue, especially when applied to the opportunity for the child to receive an educational benefit from his or her IEP. *A.S. v. Norwalk Bd. of Educ.,* 183 F.Supp. 2d 534 (D.Conn. 2002) and *McLaughlin v. Board of Educ. of Holt Pub. Schs.*, 133

F.Supp.2d 994 (W.D. Mich. 2001). Although the Parents alluded to the important issue of interaction with -----------------peers and access to all the classroom events and extracurricular activities, the Parents did not provide any testimony to support these assertions. These assertions were made in their pleadings and in closing statements, but were not put forth in the Parents' case-in-chief.

It is no a mandate of the IDEA that a district be able to forecast with ultimate certainty of the adequacy of a particular IEP. The IDEA, as noted above, must however, be developed in such a manner as to allow a student the opportunities to achieve an educational benefit from the educational program. Based on the evidence and testimony presented in this case the Parents have not shown that by excluding the ---------------from the IEP for 2009-2010, that the Student or his Parents have been denied FAPE. The IEP is reasonably calculated to provide the Student with an educational benefit. The Student is able to achieve FAPE with the use of------------------, the use of -----------services, and the use of-------------. That the IEP was developed contemplating the use of --------------- services and the -----------------indicates that the Student will be provided with FAPE.

Furthermore, although the Parents' have alleged that the IEP was predetermined prior to the IEP meeting, they have not shown this to be the case. In any event, regardless of whether the ----------------were inappropriately placed on the IEP for the previous year or years, the District and Parents held a lengthy annual review and determined that they were not necessary for the Student to receive FAPE. Although the Parents prefer -------------- and ---------may provide the best education to achieve FAPE, the provision of FAPE

does not require the best education but only an appropriate education.

Order

1. The Hearing Officer does not find that the District has denied the Student with FAPE in the development and implementation of the Student's IEP for school year 2009-2010.

2. The Parents request for inclusion of -----------------on the Student's IEP for the 2009-2010 school year is hereby denied.

Finality of Order and Right to Appeal

1. The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individuals with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2000, the Hearing Officer has no further jurisdiction over the parties to the hearing. It is so ordered.

DATED:	SIGNATURE:
July 30, 2009	S/ Garry J. Corrothers GARRY J. CORROTHERS, HEARING OFFICER