

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit



PETITIONER

VS.

Case No. H-24-23

MALVERN SCHOOL DISTRICT

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

Issue Presented:

Whether the Malvern School District (hereinafter “District” or “Respondent”) denied [REDACTED] [REDACTED] (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between February 28, 2023, and November 17, 2023.

Procedural History:

On November 17, 2023, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate a due process hearing from [REDACTED], (hereinafter referred to as "Parent" or "Respondent"), as parent of [REDACTED] (hereinafter referred to as "Student"), against the Malvern School District, (hereinafter referred to as "District" or "Petitioner")¹

This is the Third Due Process Hearing Request (H-23-20, EH-24-17) between these same parties. Parent filed for due process on November 9, 2022, and the parties reached a settlement agreement in which Student would be privately placed at The Farm, a program for people with developmental disabilities. After almost a year in the program at the Farm, the district filed EH-24-17 an expedited due process hearing request seeking an order allowing the District to change Student’s educational placement to an appropriate interim alternative education setting for not more than forty-five (45) school days because maintaining the current placement of the Student was substantially likely to result in injury to the Student or others. This hearing officer issued her decision in EH-24-17 on December 6, 2023, denying the District’s request. Parent filed this Due Process Hearing request (H-24-23), on November 17, 2023.

¹ District request for expedited Due Process Hearing EH-24-17.

In response to the Parent's request for a Due Process hearing, the Department assigned the case to this impartial hearing officer. Thereafter, the Prehearing conference was scheduled for January 2, 2024, and the Due Process Hearing set for January 3-5, 2024.² On December 6, 2023, the Respondent filed a motion to continue stating the District was on winter break January 3-5, 2024 and the central office would be closed. This hearing officer granted the Respondent's motion to continue, and the due process hearing was rescheduled for the week of January 29, 2024. On January 26, 2024, the parties filed a joint motion for a continuance stating that both parties had a conflict for the week of January 29, 2024. This hearing officer granted the joint motion for a continuance and the hearing was rescheduled for April 16-18, 2024.

The Prehearing conference was conducted via zoom on April 16, 2024.³ Counsel for both the District and the Parent 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.⁴ Further discussed was District's motion to dismiss in which the District asserted that the parties were under a binding settlement agreement and therefore this hearing officer lacked jurisdiction to hear the case. This hearing officer found that the settlement agreement in question involved issues raised in H-23-20, and was signed on February 24, 2023, and H-23-20 was dismissed on February 28, 2023. The District filed an expedited due process hearing request on October 17, 2023. This due process hearing request H-24-23 was filed on November 17, 2023, and covers the time period from February 28, 2023, to November 17, 2023, and does not involve issues raised in the H-23-20 due process hearing. This hearing officer further found that a settlement agreement does not

² See Hearing Officer file, Scheduling order.

³ Transcript, prehearing conference.

⁴ Id.

alleviate the District's obligation to provide Student a FAPE. Although this hearing officer agreed that she does not have the authority to enforce settlement agreements, I found that Parent was not challenging the settlement agreement in this case and thus, this hearing officer had jurisdiction to hear the due process hearing.⁵ The District makes this assertion in its post hearing brief, and this hearing officer, for the reasons supra finds the District's argument fails.

Thereafter testimony was heard in this case on April 17th and 18th, 2024.⁶

Present for the Hearing were Cody Kees, attorney for the District, Theresa Caldwell, attorney for the parent, [REDACTED] parent, Audie Alumbaugh, advocate, Laura Loy, special education supervisor, and Janet Blair, Superintendent.

The following witnesses testified in this matter: Janet Blair, Benjamin Dial, Audie Alumbaugh, Jennifer Williams, Laura Loy and [REDACTED] ⁷

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, both submitted their briefs within the timeline set forth by this hearing officer. ⁸

⁵ See hearing officer filed Order denying District's motion to dismiss.

⁶ Hearing Transcripts Vols. I-II.

⁷ Id.

⁸ See Hearing Officer File-post hearing briefs.

Findings of Fact

1. Student is a thirteen-year-old girl, identified as a child with a disability as defined by the IDEA, 20 U.S.C. 1401(23).⁹
2. Student has been diagnosed with autism spectrum disorder and exhibits profound deficits in cognitive and academic functioning.¹⁰ Additionally Student carries a diagnosis of type II diabetes.
3. Student is in the eighth grade at Malvern Middle School in the Malvern School District.¹¹
4. On April 2, 2022, Student's IEP team met and developed Student's IEP to provide services between August 22, 2022, and May 18, 2023.¹² The IEP provided for 245 minutes per week of direct instruction in literacy, 245 minutes per week of direct instruction in math, 245 minutes per week of direct instruction in science, 480 minutes per week of direct instruction in social studies/social skills, and 885 minutes of direct instruction in living skills.¹³ Additionally, Student was to receive 30 minutes of occupational therapy one time per week and 60 minutes of speech therapy one time per week.¹⁴
5. On November 9, 2022, Parent filed H-23-20, the first Due Process Complaint filed between these parties. As a result of this complaint Parent and the District agreed Student would attend The Farm in Benton, Arkansas.¹⁵ A settlement was entered into

⁹ Parent Exhibits, pg. 1.

¹⁰ Id., at pg. 14.

¹¹ Parent Exhibits, pg. 1.

¹² Id., at 17.

¹³ Parent Exhibits, pg. 42.

¹⁴ Id., at pg. 43.

¹⁵ EH-24-17, Transcript Vol. I., pg. 31.

- between the parties on February 24, 2023.¹⁶This settlement agreement stated that a new IEP would be developed after the execution of the settlement agreement. There was not an IEP developed until the annual review held on April 24, 2023.
6. In January of 2023, Student began receiving occupational therapy (OT), Speech therapy (ST) and applied behavior analysis (ABA) at a private placement named The Farm, which is located in Benton, Arkansas. The District was responsible for transporting Student to The Farm and back to Malvern middle school in the afternoon.¹⁷
 7. Student was transported to school by Parent and arrived daily around 7:30 a.m. Student was then transported by the District to The Farm, a program for individuals with developmental disabilities. The Farm offers services in a natural environment for the development and progression of skills in all areas. It allows for functional therapy through exploration, play, and activities of daily living. Around 1pm, the District would pick Student up and return her to school. From 1:30-3:30 everyday Student was to receive services at the District.¹⁸
 8. On April 24, 2023, Student's IEP team met for Student's annual review. Student's 2023-2024 IEP was developed.¹⁹ Student's duration of services was from August 21, 2023, to June 3, 2024. The IEP Stated that Student "received special education in the self-contained classroom for students with severe disabilities."²⁰ The IEP team determined that Student would continue to attend The Farm where she would receive

¹⁶ Parent Exhibits, pgs. 220-223.

¹⁷ Id., at pgs. 2 and 249.

¹⁸ Id., at pg. 3

¹⁹ Parent Exhibits, pgs. 248-273.

²⁰ Id., at 1-2.

OT, PT, and Speech therapy as well as ABA therapy. Student would continue to be transported to The Farm by the District.²¹

9. Student returned to District campus around 1:30 p.m. where she was to receive services implementing the educational goals in her IEP.²² Student's 2023-2024 IEP included one English goal, one math goal, and one science goal.²³ The IEP team also stated that a "complete behavior intervention plan created by Pediatric plus (The Farm) is attached to this IEP."²⁴ The District also developed a behavior plan for Student. As a result, Student had two Behavior Intervention plans and to resolve this issue the IEP team stated, "PEDS BCBA²⁵ and Malvern School District Behavior Specialist are working together to bridge Behavior Intervention Plans that will work across both settings".²⁶ The IEP team revised the District's Behavior Intervention plan to address transportation and a new maladaptive behavior, urinating in inappropriate areas.²⁷
10. Student's maladaptive behaviors at school continued and escalated following the April 24, 2023, IEP meeting and revised behavior intervention plan.²⁸ However, the District failed to appropriately address Student's maladaptive behaviors as they worsened.
11. On October 5, 2023, according to the testimony of Laura Loy, district special education director, Student liked to play in water, and it had rained. When Student

²¹ Id., pgs. 3, 9.

²² Id., pg. 3.

²³ Id., at 7.

²⁴ Id., at 2.

²⁵ Board Certified Behavior Analyst.

²⁶ Parent Exhibits, pg. 3.

²⁷ Id., pg. 2.

²⁸ Parent Exhibits, pgs. 172-186.

returned to the district after being at The Farm (where they have water activities), she went into a mud hole to sit and play, and Jennifer Williams (Student's teacher) tried to stop her, and Shamee (Student's paraprofessional) got hurt. According to Mrs. Loy, Student hit Shamee on her hand causing injury to her hand. There is no write-up of this incident, so the only information provided in evidence is Mrs. Loy's testimony. Mrs. Loy did not personally observe the incident on October 5, 2023; therefore her testimony is from information she obtained from the individuals involved in the October 5, 2023 incident.²⁹ Student was suspended for one day for the October 5, 2023 incident.³⁰ It is unclear from the record and testimony the extent of the paraprofessional's injuries on October 5, 2023.

12. Mrs. Loy testified that on October 12, 2023, Student was being transported to The Farm and she had feces in her diaper, and feces got all on one side where she was seated. Again, there was no write up of this incident and no documentation written.³¹

13. Mrs. Loy also testified the following as to why there were no write ups of incidents before October 12, 2023:

"I mean, I know she can be aggressive. I mean, unless she brought blood or she was causing a safety hazard for the other kids, we didn't write her up and we didn't call [Parent]"³²

14. On October 16, 2023, an IEP meeting was held to discuss an evaluation, particularly adaptive behavior. The IEP team determined that an adaptive behavior scale would

²⁹ Hearing Transcripts, Vol. I, pgs. 70-72.

³⁰ EH-24-17 District Exhibits, pg. 28.

³¹ EH-24-17, Hearing Transcript, Vol. I., pg. 74.

³² EH-24-17, Id., at 75.

be conducted on Student.³³ The IEP team reviewed Occupational therapy data, physical therapy data, speech-language data and previous psychological evaluation. The IEP team determined that reevaluations were needed to gather information for instructional planning.³⁴ Student was to continue attending The Farm daily where she was receiving occupational therapy, physical therapy, speech therapy and ABA therapy. South Central Arkansas Transit (SCAT) will continue to pick Student up from The Farm at 1:00pm., and transport Student back to Malvern school district where Student was to receive services from 1:30-3:30.³⁵ The IEP team agreed Student needed extended year services and discussed that The Farm had requested a Gilliam Autism Rating Scale (GARS) or Autism Diagnostic Observation Schedule (ADOS) be conducted on Student to confirm Student's autism diagnosis.³⁶

15. On October 17, 2023, Mrs. Loy received a phone call from Student's driver. On the way back from The Farm, Student had gotten out of her seatbelt and smeared feces all over the Expedition she was being driven in.³⁷
16. The District introduced a video of the incident on October 17, 2023, from the time the expedition Student was being transported in arrived on the District campus until Parent picked up Student. This video is 28:08 minutes long. It shows Student being kept inside the car for twenty-five minutes. Staff can be seen walking around outside the vehicle. No one attempts to help Student out of the car. However, two staff members are covered in what look like gowns for protection. District staff were

³³ Id., pg. 239.

³⁴ Id., pg. 241.

³⁵ Id., pg. 244.

³⁶ Id., pg. 244.

³⁷ Id., at pgs., 76-77

aware that Student was nude from the waist down yet no one got Student a towel, sheet or anything that Student could put on so that she could exit the vehicle. Instead, the District leaves Student in the vehicle in feces for 25 minutes. You can see Student doing a rocking motion inside the car. Student doesn't seem to be violent while in the car. Mom arrives and immediately helps Student out of the expedition. Student appears cooperative. Student is still nude from the waste down, and the Expedition is parked in front of the school building with classroom windows that look directly on the incident. Students could see what was happening. No one attempts to assist Parent or shield Student in any way. After getting Student out of the expedition, Parent helps Student put on pants. Parent and Student then proceed toward Parent's car.³⁸

17. Pictures show the inside of the expedition with feces all over it.³⁹
18. Student was suspended for three days for the October 17, 2023, incident. Student was to return to school October 23, 2023.⁴⁰
19. After the October 17, 2023, incident, the District refused to transport Student to The Farm and filed an expedited due process request seeking an order to change Student's placement to an appropriate interim alternative education setting for not more than forty five (45) school days because the District alleged that maintaining Student in her current placement was likely to result in injury to Student or others.⁴¹
20. On October 23, 2023, Parent's attorney sent an email to District's attorney confirming the temporary placement of Student for the week of October 23-27, 2023. Student

³⁸ EH-24-17, District video District page 95, 10-17-2023 digital file.

³⁹ EH-24-17, District Exhibits, pgs. 51-69.

⁴⁰ District Exhibits, pg. 27.

⁴¹ EH-24-17 Due process hearing request.

- was to return to the District and would receive her ST, OT, PT and ABA in the self-contained classroom. In the event there were no ABA services set up for that week Parent was willing to forego ABA for the week of October 23-27, 2023.⁴²
21. Student never returned to The Farm after the October 17, 2023, incident because the District refused to provide transportation for Student.
 22. On November 6, 2023, Parent was provided a notice of Conference stating that the IEP team would be meeting on November 28, 2023, at 1:00p.m. to review test results.⁴³
 23. November 7, 2023, the District unilaterally changed Student's placement to homebound and did not modify Student's IEP or provide services in accordance with Student's 2023-2024 IEP that was in place prior to Student being placed on homebound services.⁴⁴ District's attorney sent an email November 7, 2023, stating that "we must remove her from the school environment until we can get an agreement on placement."⁴⁵
 24. After student was sent home November 7, 2023, Student did not return to school until December 15, 2023.⁴⁶
 25. On November 17, 2023, Parent filed her due process complaint in this case.

⁴² EH-24-17, District Exhibits, pg. 29.

⁴³ Parent Exhibits, pg. 236.

⁴⁴ Transcripts Vol. I., pgs. 80-83.

⁴⁵ Parent Exhibits, pg. 236.

⁴⁶ Id., pg. 282, Transcript Vol. I, pgs. 87-89.

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 District'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 District.

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. 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 352.⁴⁷

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.*

In the present case petitioner does not allege any procedural violations under IDEA. Therefore, this hearing officer need not address this issue. However, it is now necessary to consider whether the District substantively denied FAPE to Student by failing to implement Student's IEP after suspending Student for disability related behavior on October 18, 2023 to November 17, 2023, when Parent filed this Due Process Hearing Request.

Substantive Violations of FAPE

Parent alleges that the District failed to provide Student a FAPE between February 28, 2023, and November 17, 2023, however, there is no argument or evidence presented that Student's 2022-2023 IEP failed to provide Student a FAPE. To the contrary, when Student began attending The Farm in January of 2023, Student appeared to be making progress with maladaptive behaviors while at The Farm. According to The Farm:

“Student began working on several items. In January of 2023, she began working on identifying objects with 50% progress by March 2023; Requesting attention with 100% progress; Requesting held with 60% progress; Requesting /Manding with 50% progress; Fasten Buttons with 67% progress; Washing face with 0% progress; Zipping zippers with 60% progress. In February of 2023, [Student] began working on following routine instructions with 87% progress; bathroom routine with 20% progress. In March of 2023,

she began working on completing activities with a beginning and an end with 0% progress; imitating actions with objects with 50% progress; Manding to be all done with no progress; Keep eating areas clean with 100% progress.”⁴⁸

Additionally, The Farm stated that Student was making adequate strides at The Farm. The Farm was seeing gains for Student in communication and decreases in behavior.⁴⁹ While Student was making significant strides at The Farm, the District was continuing to see maladaptive behaviors, while transporting Student and during the time Student spent at the District in the afternoon between 1:30pm to 3:30 pm to receive special education services contained in Student’s IEP.⁵⁰ From the progress notes on Student’s 2022-2023 IEP, Student did not make much, if any, progress on the goals contained in her IEP. District’s documents regarding Student are incomplete and often confusing and difficult to follow. However, taken as a whole, Student made progress in many areas and Parent failed to produce evidence that the District did not provide Student the services contained in her 2022-2023 IEP and thus this hearing officer finds that between February 2023 and May 2023, Student received a FAPE.

Parent’s main argument is that after Student was suspended on October 17, 2023, the District failed to implement Student’s 2023-2024 IEP. Student was suspended for three (3) days following the October 17, 2023, incident, in which Student defecated on herself, removed her clothes, got out of her seatbelt and proceeded to get feces all over the expedition she was being transported in.⁵¹ On October 23, 2023, an agreement was reached that Student could return to school the week of October 23-27, 2023, where she was to receive her speech therapy, occupational therapy, physical therapy and applied behavior analysis (ABA) therapy. However,

⁴⁸ Parent Exhibits, pg. 2

⁴⁹ Id.

⁵⁰ Id., pg. 3.

⁵¹ EH-24-17, District video, District Exhibits, pg. 95, 10-17-2023 digital file.

the agreement included that if ABA services could not be set up that Parent agreed to forego ABA for the week of October 23-27, 2023.⁵² On November 7, 2023, Student was sent home and not allowed to return to school until December 15, 2023.⁵³ Between November 7, 2023, when Student was unilaterally sent home and not allowed to return to school and November 17, 2023 when parent filed her Due Process hearing request, the District did not provide any services to Student.

Student's 2023-2024 IEP provided that Student would attend a special day school where she would receive 60 minutes of physical therapy one time per week, 120 minutes of speech therapy one time per week, 120 minutes of occupational therapy one time per week and ABA therapy. All parties are in agreement that Student needed ABA therapy. Student's 2023-2024 IEP also included one English goal, one Math goal and one Science goal to be implemented by the District between 1:30pm and 3:30 pm when Student returned to school from her time at The Farm.⁵⁴ District acknowledged through testimony that it had not modified Student's IEP since she was suspended on October 17, 2023 or after she was sent home on November 7, 2023 and not allowed to return to school.⁵⁵ Further, there is no evidence that the District adequately addressed Student's worsening maladaptive behaviors. Student did not return to The Farm after the October 17, 2023, incident because the District refused to transport Student. Because Student did not return to The Farm she lost her placement and can not return but was placed on a waiting list for placement at The Farm. Testimony and evidence showed that the District reached out to other providers for therapy services for Student, but failed to hold an IEP meeting,

⁵² EH-24-17, District Exhibits, pg. 29.

⁵³ Parent Exhibits, pg. 282, Transcript Vol. 1, pgs. 87-89.

⁵⁴ Id., pgs. 7-8.

⁵⁵ Transcript Vol. II, pgs. 9-10.

or provide the special education or therapy services designated on Student's 2023-2024 IEP between October 18, 2023 and November 17, 2023.

Having considered Parent's argument that the District failed to implement Student's IEP between October 17, 2023 and November 17, 2023, and in light of the findings and conclusions supra, it is the conclusion of this Hearing Officer that the District's failure to implement Student's IEP between October 18, 2023 and November 17, 2023 denied Student a FAPE and substantively violated the requirements of IDEA.

PRIVATE SCHOOL PLACEMENT

Parent argues in her post hearing brief that because of the denial of a FAPE, Student is entitled to private school placement. Parent failed to provide any evidence of a private school placement for Student to attend. Further, there was no evidence provided that any private placement was appropriate for Student and could meet her unique needs. As such, Parent failed to provide sufficient evidence for an award of private school placement.

Order

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 the District denied Student a FAPE between October 18, 2023 and November 17, 2023.

District is hereby ordered to take the following actions regarding Student:

1. The District is ordered to conduct an IEP meeting and revise Student's IEP within fifteen (15) days of this decision.
2. The District is ordered to provide Student with four hours of compensatory services in physical therapy.

3. The District is ordered to provide Student with six hours of compensatory services in speech therapy.
4. The District is ordered to provide Student with six hours of compensatory services in occupational therapy.
5. The District is ordered to provide Student with 40 hours of compensatory services in applied behavior analysis (ABA) therapy services. These hours are to be spread over time taking into account Student's ability to tolerate additional instruction. These hours will be carried forward in Student's IEP until completed.
6. Within 30 days the District is to conduct a Functional Behavior Assessment (FBA) to determine the function of Student's maladaptive behaviors and recommend appropriate programming to address Student's maladaptive behaviors. The FBA shall be conducted by a Board Certified Behavior Analysis (BCBA) that is not an employee of the District.
7. Within 15 days after the completion of the FBA, and any written reports regarding the FBA, the District shall convene an IEP meeting to discuss and determine a plan to address Student's maladaptive behaviors. At a minimum the IEP team shall consider the FBA and any other data or information. The District shall have the BCBA who conducted the FBA attend the IEP meeting to discuss his/her findings and help develop an appropriate behavior intervention plan for Student.

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

6/2/2024

DATE