Arkansas Department of Education
Special Education Unit

IN RE:

XXXXXXXXXXXXXXX
Parents in behalf of
XXXXXXXXXXX**,** Student **PETITIONER**

VS. NO. H-12-01

Hope School District **RESPONDENT**

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Petitioner alleges that the Respondent denied the Student with a free and appropriate public education (FAPE) during the second semester of school year 2010-11, as well as school year 2011-12 by:

1. Not providing him with an appropriate Individualized Education Plan (IEP);
2. Failing to educate him in the least restrictive environment (LRE);
3. Failing to implement the existing IEP; and
4. Failing to follow due process procedures by
   a. Not providing the Parents with progress reports;
   b. Not providing the Parents with written notice of meetings;
   c. Not having appropriate persons at the IEP meetings; and by
   d. Failing to provide adequately trained staff.

Issues raised by the Petitioner in their initial request for a hearing that were ordered by the hearing officer as non-judicable under IDEA included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973.

Procedural History:

On August 18, 2011, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from XXXXXXXX (hereinafter referred to as "Parents"), the parents and legal guardians of XXXXXXXXX (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Hope School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of September 22, 2011, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims as noted above, was issued on August 22, 2011. The District notified the hearing officer on September 1, 2011, that a resolution conference was conducted as ordered, but without resolving the issues contained in the Petitioner's complaint.

Due to the non-availability of counsel for the Petitioner a request for continuance was received and granted, without objection by the Respondent, with the hearing to begin on September 27, 2011, with a second day, if needed on September 28, 2011. The hearing began as scheduled on September 27, 2011 and continued on September 28, 2011; however, it was necessary to grant three continuances on the record in order for both parties to complete the presentation of their case. The hearing was concluded on October 25, 2011.

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, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa L. Caldwell, attorney of Little Rock, Arkansas and the District was represented by Pamela Osment, Attorney of Conway, Arkansas.

At the time the hearing was requested the Student was a twelve year-old, sixth grade, male enrolled in the District, having been identified as a child with a disability as defined in 20 U.S.C. §1401(3). The Student's disabilities as noted in the record included Mental Retardation (MR),

Attention Deficit Disorder (ADHD), speech and communication deficits, and developmental delays. The Parents alleged that the Student had also been identified with an Intermittent Explosive Disorder and Microcephaly; however, the school records presented as evidence did not reflect these diagnoses as being educationally related.

Prior to the current school year (2011-12) the Student was provided special education services in the District's Clinton Elementary School. For the current school year (2011-12) the Student was scheduled to attend the District's Beryl Henry Elementary School, with the first school day being August15, 2011. Three days later, on August 18, 2011, the Parents requested a due process hearing challenging the appropriateness of the special education services provided the Student, not only for the last semester of the previous school year, but his current school year as well.

A disagreement arose between the parties during the first semester of the previous school year; however, both parties reached an agreement on those issues in January 2011. The resulting agreement produced the IEP and its implementation which was the focus of the current case for the second semester of school year 2010-11. At the end of school year2010-11 an annual review conference resulted in the development of the current year's IEP which was also the focus of the current case.

A pre-hearing conference was conducted with counsel for both parties on September 16, 2011, at which time the specific unresolved issues that would be addressed in the hearing were decided, as well deciding on the witnesses and evidence which would be necessary to address the issues. At that time it was also decided that the burden of proof was to be born by the Petitioner. It was explained to both parties at the beginning and again at the conclusion of the hearing that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing. Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements; however, the only brief received within the ten-day time frame for inclusion in the record was that of the District. It is included as an exhibit in the Hearing Officer Binder of Orders and Pleadings.

Findings of Fact:

During the second semester of school year 2010-11 did the District deny the Student with FAPE by:

1. **Failing to provide him with an appropriate Individualized Education Plan (IEP)**

2. Failing to educate him in the least restrictive environment (LRE);

3. Failing to implement the existing IEP; and by

4. Failing to follow due process procedures by:

a. Not providing the Parents with progress reports;

b. Not providing the Parents with written notice of meetings;

c. Not having appropriate persons at the IEP meetings; and by

d. Failing to provide adequately trained staff?

1. The appropriateness of the IEP for the Student's second semester of school year 2010-11:

The IEP developed on May 21, 2010, was the initial education program designed for the Student's entire school year 2010-11.[1] The record in both exhibit binders reflects that it was modified during the second semester on February 3, 2011, and again on April 11, 2011, as a result of the Parents filing a due process complaint in December 2010 and the results of a subsequent settlement agreement reached in lieu of a hearing.

Decisions made by the IEP team at the February 3, 2011, meeting included obtaining additional evaluation information about the Student from the Dennis Development Center and Childrens Hospital (as referenced above) where he had previously been evaluated. It was also decided to obtain a speech and an occupational therapy evaluation from Easter Seals and to discuss the findings of an evaluation obtained by the Parents on December 17, 2010, at a future IEP meeting when the occupational and speech therapy evaluation results would be available.[2] The occupational therapy evaluation was conducted on February 24, 2011; however, the speech evaluation was not conducted until April 11, 2011.[3]

The adverse affect of the Student's agreed to disabilities and the impact they have had and continue to have on his obtaining an education was not disputed. However, the Parents are contending that the District has failed to recognize all of the Student's disabilities that they believe existed and that they believe to be relevant and necessary in order to develop an appropriate IEP. In addition to their own personal observations and opinions based on their experience in daily activities with the Student, they presented an independent evaluation conducted in December 2010 as evidence to support their belief.[4] The psychologist who conducted the evaluation based his

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1 Parent Binder, Page 17-31 and District Binder, Page B1-B15

2 Ibid

3 District Binder, Page D25-D33; and Parent Binder, Page 87-89 & 81-85

4 Parent Binder, Page 58-80

findings and opinions on nothing more than parental input and the results of an intelligence test, an academic achievement test, a sensory integration test, and a personality inventory. According to his findings he rendered an opinion that the Student suffered from a post concussion syndrome, an organic personality syndrome, and an appositional defiant disorder.[5] He provided recommendations for the Parents, which from the wording were designed for parents in general rather than to the Parents of the Student. This also held true for the additional recommendations that he included for children with sensory issues as might be necessary for children diagnosed with autism. A more compelling evaluation was that conducted by a psychologist and a physician at the Dennis Development Center in May 2009.[6] Their findings were much more consistent with previous evaluations conducted by the District's personnel in April 2004.[7] Of significance to the current issues and to the provision of educational services was their comments regarding parental concerns about sensory integration and possible autism. Their findings stated that "based upon several episodes of observations and interactions along with his past history, [the Student] is not suspected to have an Autistic Spectrum Disorder because of his social resiprosidy (sic), intact joint attention and social referencing, although he may have other, non ASD features such as a need for routine [and] sensory challenges."[8] The records provided indicate that although the independent evaluation obtained by the Parents was conducted in December 2010, it was not provided to the District until the IEP meeting in February 2011.[9] There was no evidence to indicate that any of their psychologist's diagnoses or recommendations were included in the revised IEP at that time, nor were they included at the IEP meeting in April 2011. However, testimony by the District's LEA supervisor was that the psychologist's report and findings were discussed and considered at the annual review conference in May 2011.[10]

The IEP modifications of February 3, 2011, included the addition of a Behavior Intervention Plan (BIP) proposed from an assessment conducted by a behavior intervention consultant on December 8, 2010.[11] The IEP modifications of February 3, 2011, also included the addition of a classroom aide as a related service.[12] In attendance at the IEP meeting held on February 3, 2011,

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5 Parent Binder, Page 58 and District Binder, Page D1

6 Parent Binder, Page 80a-80g

7 Parent Binder, Page 80h-80l

8 Parent Binder, Page 80f

9 Parent Binder, Page 37

10 Transcript, Vol I, Page 69

11 Parent Binder, Page 31 and District Binder, Page B15 and F1

12 Parent Binder, Page 37 and District Binder, Page C10

was legal counsel for both parties. Based on the fact of their presence it can be assumed that both parties were aware of the contents of the IEP that was developed; of the decisions made regarding the proposed evaluations; and all other proposed services for the Student.[13] The question as to whether or not the IEP developed in February 2011 being considered as appropriate would be difficult to challenge given that those present and participating in its development included legal counsel for both parties. Factual findings as to whether or not it was appropriately implemented is addressed below. As to the appropriateness of the IEP following the inclusion of additional information available at the next IEP meeting in April 2011 where legal counsel for the parties was not present is considered below.

On March 31, 2011, an IEP conference notice was sent to the Parents asking if they would be available for a meeting on April 6, 2011, to discuss the status of the occupational and speech therapy evaluations. The Parents indicated that they would not be available on that date and proposed that the meeting be held on April 7, 2011.[14] A second notice of conference was sent to the Parents on April 6, 2011, for the meeting to be held on April 11, 2011.[15] That meeting was held and the decisions reached included adding both speech and occupational therapy to the Student's IEP and for the services to be provided in his classroom, once weekly for thirty minutes.[16] The allegations of the District's failure to provide written notice of conferences within the required timelines is addressed below.

Prior to the modifications to the IEP in April 2011, the Student was scheduled to receive specialized educational instruction in reading, mathematics, and science while receiving language arts and social studies in the regular education instruction environment. However, his specialized instruction was also to be implemented in the regular education setting by the regular education classroom teacher with his course grades being decided jointly. He received specialized instruction in behavior affective activities only in the special education setting and after the modifications to the IEP in April, his speech therapy would also be in the special education setting. A full time aide was assigned the Student as a related service as a means of implementing the BIP which was also added to the IEP in February 2011.

The BIP addressed behavior problems which included property destruction and physical aggression. Examples given of property destruction included "throwing, flipping

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13 Ibid

14 District Binder, Page C13 and Parent Binder, Page 45

15 District Binder, Page C14 and Parent Binder, Page 43

16 District Binder, Page C20 and Parent Binder, Page 46

objects/furniture/computers, pulling items off wall, and tearing up items" and examples of physical aggression included "hitting, kicking, biting, pinching, scratching, pulling hair, and spitting."[17] The BIP provided specific instructions for the delivery of reinforcers for appropriate behaviors as well as reactive procedures by the teaching staff for the targeted behaviors. The targeted behavior success goal was zero occurrences per week for five consecutive weeks. The plan was to be implemented in all school settings across the entire school day.

The Student's IEP developed at the annual review the previous school year in May 2010 for implementation in school year 2010-11 included school-based mental health services on an as needed basis, as well as transportation to and from school. Those services remained on the IEP after both the February and April meetings. However, the Parents elected to provide the transportation of the Student, with his father testifying that they did not wish for him to ride a bus where he would "learn all other kind of crap."[18] Although neither parent was asked about the school-based mental health services not being provided, the District's LEA supervisor during school year 2010-11 testified that the provision of the mental health services was discussed and that the District was "trying to get them to continue and they [the Parents] did not want" the Student to receive services from the provider employed by the District.[19] There was no indication in the record of this discussion as testified to by the LEA Supervisor or of the decision by the Parents electing to refuse the school-based mental health services. Although the designation of such services being provided was not removed from the IEP at the meetings in February and April 2011, it was removed when the IEP team developed his IEP at the annual review conference for school year 2011-12.[20]

The records provided as evidence regarding the IEP developed by the IEP team for the Student's second semester of 2010-11 in February 2011 would have to be seen as appropriate based on the level of his disabilities as well as the fact that all interested parties, including legal counsel for both parties were present in its development.

The Parents challenged the appropriateness of the April 2011 IEP in that they believe that the District did not, but should have accepted the findings and recommendations of the independent psychological evaluation they obtained and presented to the IEP team. One area of concern that they considered important in the Student's educational programming was that the report they provided showed the Student to have an Full Scale IQ of 41; a Verbal IQ of 45; and a Performance

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17 District Binder, Page B15 and Parent Binder, Page 31

18 Transcript, Vol V, Page

19 Transcript, Vol I, Page 44

20 Ibid, Page 156

IQ of 51, according to the results of the administered Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV).[21] The District relied on a previous evaluation of intelligence for purposes of determining the presence of a disability at which time his Full Scale IQ was determined to be 61; his Verbal IQ as 66; and his Performance IQ as 62, according to the results of the administered Wechsler Preschool and Primary Scale of Intelligence - Revised (WPPSI-R).[22] The District's LEA supervisor testified that the IQ scores obtained on students with suspected mental retardation "are used to determine disability" and not necessarily for programming purposes.[23] However, the Parents were challenging the District, not as to eligibility for special education services, but rather as to how important the IQ scores might be in developing the Student's educational program. When challenged as to the importance of a twenty-point difference between full scale IQ scores and how this might occur or be relevant to educational programming the District's LEA supervisor stated that "20 points is significant when you're looking at IQs, but when you get down into the mentally deficient range, below the average sometimes the discrepancy of points is not so significant, as to what the child can or cannot do" and that "we know that sometimes children's test scores are not as accurate because of factors."[24] She went on to explain that the difference between scores obtained by different evaluators could also be explained by "one of these tests was not as reliable" or "that behavior was interfering and did not give a good test."[25] In fact a review of the evaluation provided by the Parents indicated that on the first day of testing when the intelligence test was administered the psychologist recorded that:

> "I went to get [the Student] from the waiting area, and he immediately gestured for his father to come with him. He appeared upset for a moment when I told him that he would be coming back alone with me. However, his mother and father then told him that they would wait 'right here' in the waiting room, and that reassured him."

He went on to report that:

> "He was quite resistant to being tested. He required almost constant redirection and reassurances to stay on task. He became frustrated extremely easily. He was very concerned that his parents were going to leave while he was in testing with me. He made many comments about that. After the first subtest of the IQ, he began asking

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21 Parent Binder, Page 69

22 Parent Binder, Page 80h

23 Transcript, Vol I, Page 79

24 Transcript, Vol I, Page 74

25 Transcript, Vol I, Page 80

> for his parents. I was able to redirect him and keep him calm until about half-way. He was becoming more agitated and whiny, so I told him we would take a break and go see his mom and dad. As soon as we walked into the waiting area, he told them. 'I'm done.' I told them that we were just on a break, but he insisted that he was not going back in. His father firmly told him he was going back in. He came in with me, but as soon as we sat down he became much more agitated and refused to do anything. He then pushed testing materials off the table and grabbed my pencil out of my hand. I went to get his father, and he came back to the testing room and got onto [him], telling him that they would not go out to lunch as planned if he didn't finish. [He] became extremely upset and agitated when his father walked out of the room. I suggested that dad sit in the hallway, right outside the door. [The Student] would not comply unless I left the door cracked a bit where he could see his father. [He] completed the remainder of the IQ test. He looked out the door every few seconds to check if his father was there. I had to remind him to look at me to stay on task. He was quite cooperative from then on, but he continued to get frustrated easily when he made a mistake or didn't know an answer."[26]

Although neither party attempted to use this information as a means of explaining the differences in IQ scores it can easily be understood from a parental view point, without knowledge of testing procedures, as to how important the difference might be. At the same time, as testified to by the District's LEA Supervisor, regardless of the actual level of intelligence, the Student was determined to be eligible for special education services by virtue of mental retardation. As such the appropriate educational programming needed to be based on his strengths and weaknesses rather than his intellectual abilities.[27] She further testified that although the IEP team elected not to accept some of the evaluation results with regard to Student's diagnoses (e.g., organic personality syndrome, post concussion syndrome, and appositional-defiant disorder), they had already and continued to implement some of the suggestions that were made by the psychologist.[28]

The Student's IEP developed in February 2011 with legal council present for both parties indicates that the Student would be receiving special education services in the same academic areas as previously deemed appropriate, with the only change being the presence of an aide on a daily basis. The duties of the aide were understood by the District as the individual who would be

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26 Parent Binder, Page 66-67

27 Transcript, Vol I, Page 108-109

28 Transcript, Vol I, Page 89

available to the Student for the implementation of a Behavior Intervention Plan (BIP) to address the Student's negative behaviors that impacted his learning. From their testimony the Parents, on the other hand believed that the aide would be assisting the Student in all of his academic areas as well as implementing the BIP.[29]

At the February 2011 IEP meeting the team elected no changes in the goals and objectives even though the reason given for the conference was "to discuss [the Student's] educational programming."[30] The LEA supervisor testified that the team elected to delay any changes other than implementing the BIP and to conduct another conference once the team had reviewed the independent evaluation provided by the Parents, to obtain the results of testing conducted by the Dennis Development Center, and to obtain speech and occupational therapy evaluations by Easter Seals.[31] That conference was held on April 11, 2011; however, the speech therapy evaluation was not available to the Parents prior to the meeting. In fact, the speech evaluation was not conducted until the day of the hearing.[32] Thus, neither party had the results of the evaluation prior to the meeting. Both the speech and occupational therapy evaluators, were however, present at the IEP meeting to explain the results of their findings.[33] The delay in obtaining the speech evaluation was explained by the LEA supervisor to be the result of not being able to bring Easter Seals onboard to provide the service.[34] The resulting effect of the additional information resulted in the IEP team adding speech and occupational therapy to the Student's IEP as related services. Speech therapy was to be provided once weekly for thirty minutes and occupational therapy once weekly for thirty minutes. The allegations of the due process failure in obtaining the evaluations in a timely manner are discussed below.

Neither the testimony elicited from the District personnel nor the evidence presented by the Parents rises to the level of judging the Student's IEP as developed at the February and April 2011 IEP team meetings as being inappropriate. The District responded accordingly to the concerns of the Parents as well as the additional information as noted on the decision forms.[35]

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29 Transcript, Vol IV, Page 246

30 Parent Binder, Page 35

31 Transcript, Vol I, Page 35-36

32 Parent Binder, Page 81

33 Parent Binder, Page 49

34 Transcript, Vol I, Page 57

35 Parent Binder, Page 37 and 46

2. Failing to educate the Student in the least restrictive environment (LRE) during the second semester of school year 2010-11:

This issue was addressed directly in testimony only once during the entire five days of hearings. The LRE was brought out in testimony by the behavior intervention consultant. He was asked by counsel for the Petitioner what he recommended "regarding how to decide the LRE" and if he provided "any suggestions to the District on how to determine the appropriateness of the least restrictive environment" to which he replied "we did not discuss it, because both placements last year and this year appeared to be appropriate."[36]

Given the fact that legal counsel for the Parents was present when the IEP was developed in February 2011, at which time the placement was decided, it can be assumed that there were no objections raised at that time as to whether or not it was the least restrictive environment. A comment by the Parents contained on the decision form recording the results of the annual review in May 2010 was that they were "pleased to know he would be staying and receiving his resource in the new resource class. . . she was glad to hear he would receive help with his behavior and social skills."[37] In testimony there was concerned expressed by the Student's mother that if he received his education in another school setting that he might run because some of their relatives lived close to the school property. However, given the lack of evidence and testimony to the contrary the complaint of the Student's education program not being provided in the least restrictive environment during the second semester of school year 2010-11is without merit.

3. Failing to implement the Student's existing IEP during the second semester of school year 2010-11:

As noted above this issue appears in testimony as being one of the major areas of complaint in the allegation of a denial of FAPE. With legal council present in February 2011, the Parents believed that the modifications for services to the Student's IEP and the evaluations as agreed to would be provided and implemented as required by the IDEA. One of the changes to the IEP of February 2011 was the addition of a behavior plan to address the Student's behaviors which interfered with the educational program he was receiving.

The behaviors to be targeted by the BIP included property destruction and physical aggression. Examples of property destruction included throwing, flipping objects such as furniture and computers, pulling items off the wall, and tearing up items [As noted above in the Student's

36 Transcript, Vol III, Page 175

37 Parent Binder, Page 18

response to the psychologist attempting to get him to take the intellectual examination.] Examples of physical aggression included hitting, kicking, biting, pinching, scratching, pulling hair, and spitting.[38] The observations by the behavior consultant which compiled these targeted behaviors were completed during the previous semester between November 2, 2010 and December 9, 2010.[39] The behavior goal was to achieve zero occurrences of the targeted behaviors per week for five consecutive weeks; with the designated time period being throughout the entire school day in all settings. The professionals designated as being responsible for implementing the decisions reached in February 2011 were the school principal and "special education."[40] The behavior consultant testified that he not only trained the teachers in how to implement the plan, but also observed them in doing so. He further stated that he met with the Parents "to review the plan and at one point when we were discussing the plan, I also met with them to discuss the possibility of the need for – well, to follow through – the need for – we may need to use physical restraint at some point, to make sure that, if we had to that that would be okay."[41] However, physical restraint was never needed according to his testimony. The District's LEA supervisor testified that it would be the responsibility of the full time aide, which was also included as an additional related services in February 2011, to implement the BIP. In response to being asked if the aide was to be "an instructional aide" she replied "at that time, she was helping – most of her duties dealt with behavior, because that was his whole problem, at that time, was the inappropriate behavior that was interfering with academics, with his ability to attend in class. So, mainly it was to keep his behavior under control, so that he could do his work."[42] As noted above this was a point of contention for the Parents in that they believed that the aide was to be responsible for assisting the Student with his academic assignments as well as the behavior. His mother testified that she had requested "over the years" that the Student be retained prior to the fourth grade because she believed that he needed "to be in a lower level, to where his brain could catch up to his grade, to his body, to his other things that he needed."[43] It would appear that complicating the picture of what she believed the Student could eventually achieve was their psychologist's report indicating that he was falling further behind rather than making progress because the IQ score he reported was twenty points lower than the previous evaluation. This position was difficult to justify in looking at the Student being educated

38 Parent Binder, Page 31

39 Transcript, Vol III, Page 146

40 Parent Binder, Page 37

41 Transcript, Vol III, Page 146

42 Transcript, Vol I, Page 36-37

43 Transcript, Vol IV, Page 248-249

along with same age peers by objecting later to his being classified as a fifth grader, functioning at the kindergarten level, and placed in classes with sixth grade students. From the evidence and testimony by all witnesses it would appear that the BIP was not only implemented during the second semester of school year 2010-11, but was successful in achieving the behavior goals.

The IEP meeting in February also decided the Student needed an occupational and a speech therapy evaluation. They decided that the evaluations would be conducted by Easter Seals. As noted above the District had difficulty obtaining the speech therapy evaluation and eventually conducted and provided an evaluation by their own speech/language pathologist. She testified that it was not clear to her as to why she was not asked to complete the evaluation following the IEP meeting in February; however, had she been asked she testified that it would have been completed within the required sixty days (e.g., April 3, 2011) rather than on the day of the evaluation conference of April 11, 2011, eight days past the deadline.[44]

The speech therapy evaluation as noted in evidence was without a signature. It was completed on February 24, 2011, by the occupational therapist at Easter Seals; however, the District's speech therapist testified that she did not receive a copy of the report until the last week of March 2011, a week prior to the April IEP meeting.[45] Although there was no indication on the conference decision form that the report was discussed at the April 11, 2011, IEP meeting the therapist testified that she read and reviewed the report with everyone present including the Parents.[46]

As to the implementation of the related services of OT and PT on the IEP developed on April 11, 2011, the record and testimony reveals that OT to be was provided once weekly for thirty minutes; however, it was only provided two times between April 11, 2011, and June 3, 2011, the final day of the school year. The first session was provided as indirect services by an occupational therapy assistant under supervision of the licensed therapist, after she "obtained permission on May 23rd" and the second session was provided as direct services by the occupational therapist on June 1, 2011.[47] No evidence or testimony was provided as to the delay in obtaining consent for provision of the services. Given that there were six weeks remaining in the school year after the April meeting the evidence and testimony reflects a failure by the District to provide four of the six sessions. The occupational therapist stated in testimony that she could explain why the four

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44 Transcript, Vol III, Page 97

45 Transcript, Vol III, Page 24

46 Transcript, Vol III, Page 26

47 District Binder, Page E4 and Transcript, Vol III, Page 11

sessions were missed; however, neither party followed up on her response other than the District objecting to the term "missed".[48] The Student was declared eligible to receive extended school year services (ESY) at the annual review conference held on May 24, 2011, which included occupational therapy.[49] However, the record shows, and the District's personnel responsible for implementing the ESY services testified, that he did not receive any occupational therapy and only one speech therapy session during that three week period of time.[50] The occupational therapist testified that it was her goal to make up the therapy sessions missed during the previous school year as well as during the summer ESY.[51] She stated that she was attempting to make up for the missed sessions by increasing the sessions during the current school year.[52] The speech language therapist noted in her progress notes that the Student did not receive speech therapy as scheduled on April 13, 2011, because the therapist was "attending parent conferences" at another school. On April 20, 2011, he received a therapy session. On April 27, 2011, she wrote that no therapy was provided because she was "holding annual review conferences."[53] She testified that there should have been three sessions provided for speech during the summer ESY; however, he received only one session, with no plan to provide additional sessions for those missed during the regular school year.[54]

The evidence and testimony is consistent in that the District provided the agreed to related service of implementing the BIP, as well as the speech and occupational therapy services. However, they failed to provide speech and occupational therapy services as scheduled on the IEP. Thus, the Parents are correct in asserting that the District failed to implement the IEP as developed on April 11, 2011. Although the District's personnel were challenged as to how the academic areas of the IEP were implemented, there was insufficient evidence or testimony provided that would indicate a failure to implement the IEP in those areas.

4. Failing to follow due process procedures during the second semester of school year 2010-11 by:

a. Not providing the Parents with progress reports.

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48 Transcript, Vol III, Page 16

49 Parent Binder, Page 50-56

50 District Binder, Page E16

51 Transcript, Vol III, Page 53

52 Ibid

53 District Binder, Page E15

54 Transcript, Vol III, Page 122-124

As noted above the District notified the Parents who actively participated in IEP conferences during the second semester of school year 2010-11 in February, April, and May 2011. Neither parent denied participation in the IEP meetings. Additionally, both parents testified that they maintained close contact, on an almost daily basis with the District personnel responsible for educating the Student.[55] Testimony was elicited by council for the Parents regarding the progress as noted on the Student's IEP goals and objectives which appeared to be inconsistent with the reported grades given to the Student at the end of the year. The Parents testified that they were not aware that the Student's final course grades were being modified to reflect his special education goals and objectives. His mother testified that she never received "papers from the school teachers about [the Student's] grades and work" during school year 2010-11.[56] At the same time she testified that in her opinion the Student "was going backwards, he's going right back to where we was at, you know, with him not wanting to be at school, with him not wanting to be a part of it anymore...He has kind of like, you know, on some issues he has basically stayed the same, on some issues he has stopped it all together, and on some issues he has gone backwards."[57] It could be assumed that in order for her to make such an assessment and opinion of the Student's progress, or lack thereof, that she would have had some measure or measures of progress being provided to her. The Student's special education teacher testified that the Parents were provided with "a copy of his grades and then they get a copy of the goals and objectives, the progress on the goals and objectives" on a periodic basis.[58] The Student's classroom teacher testified that the District no longer indicated on a student's report card as to whether or not the grade was modified.[59] So even though the Student was assigned to the District's fourth grade, his report card for school year 2010-11 did not reflect grades such as might been achieved by non-disabled students in the class, but rather were modified to reflect his progress on the goals and objectives of his IEP. Whether or not this information was communicated directly to the Parents, or whether or not they understood the concept of modified grades, was unclear from the testimony. The evidence showed only that he was making good grades.[60] Such a grading system could easily be mystifying to any parent who observes their child functioning at a kindergarten level receiving grades from a fourth grade teacher reflecting adequate progress. However, there is no justification to warrant a decision that the Parent's were not

55 Transcript, Vol IV, Page 257 and Vol V, Page 45-48

56 Transcript, vol IV, Page 257

57 Transcript, Vol IV, Page 222-223

58 Transcript, Vol I, Page 265

59 Transcript, Vol II, Page 148

60 Parent Binder, Page 96A

provided with periodic progress reports as to the Student's progress with his academic goals and objectives as well as progress on his disruptive behaviors.

b. Not providing the Parents with written notice of meetings.

Both Parent and District binders contain copies of notices sent to the Parents notifying them of IEP meetings.[61] Neither parent denied being notified of IEP meetings and in fact were able to request and be granted meeting dates other than those proposed by the District.

c. Not having appropriate persons at the IEP meetings.

As noted above the February 2011 IEP meeting included legal council for both parties in addition to both parents, the Student's special education teacher, his regular education classroom teacher, the school principal, the assistant school principal, and the District's assistant superintendent.[62] However, the notice of conference provided the Parents indicated only that those in attendance other than themselves would be the Student's regular education classroom teacher, his special education teacher, and the District's LEA supervisor.[63]

The notices of conferences scheduled for April 2011, and the annual review conference held in May 2011, provided to the Parents included the same individuals as noted above for the February 2011 IEP meeting; however, those attending the meetings include the occupational therapist, the speech therapist, the school principal, the regular education classroom teacher, the special education teacher, and the LEA supervisor, in addition to both parents.[64]

The Parents were unaware from the notices of anyone else being included in the meetings. However, given their awareness of the previous meeting and the presence of legal council, it cannot be assumed that they were surprised at those present in subsequent meetings. There is no record of their objections at the time.

Although the notices to the Parents may not have included all of the appropriate persons who actually attended and participated in the conferences there was no evidence or testimony that the conferences did not include all of the persons necessary for providing information and reaching a decision on modifying the Student's IEP for school year 2010-11 in February and April 2011, or for the current school year in May 2011.

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61 Parent Binder, Page 32; 35; 41; and 43. District Binder, Page C1; C4; C11; and C14.

62 District Binder, Page C10 and Parent Binder, Page 37

63 District Binder, Page C1 and Parent Binder, Page 32

64 Parent Binder, Page 46

d. Failing to provide adequately trained staff.

The educational background and credentials were solicited from each witness during the process of the hearing. None were challenged at the time by council for the Parents as to their qualifications to perform the duties they were assigned. With the exception of the Student's mother's concern about his special education teacher in the current year losing "focus on things" and being "on medication" no other challenges were addressed as to the qualifications of the providers of the Student's education.[65] With regard to last year's teacher, the Student's mother testified that she was not pleased with her until after the behavior consultant provided and helped implement the BIP.[66] There was no challenge as to her qualifications in special education.

During school year 2011-12 has the District denied the Student with FAPE by:

1. **Failing to provide him with an appropriate Individualized Education Plan (IEP);**
2. **Failing to educate him in the least restrictive environment (LRE);**
3. **Failing to implement the existing IEP; and by**
4. **Failing to follow due process procedures by:**
    a. **Not providing the Parents with progress reports;**
    b. **Not providing the Parents with written notice of meetings;**
    c. **Not having appropriate persons at the IEP meetings; and by**
    d. **Failing to provide adequately trained staff?**

As noted above the Parents filed for a due process hearing to address these issues four days after the start of the 2011-12 school year. Consequently, this decision will be rendered on the actions taken or not taken and services provided or not provided within those first days of the school year. However, both parties have introduced evidence and testimony reflecting activities between the date of the filing for due process and the final date of the hearing on October 25, 2011. That which will be used in this decision will be only that evidence and testimony which contributes to the issues and alleged violations at the time the hearing was requested.

1. Failing to provide him with an appropriate Individualized Education Plan (IEP)

65 Transcript, Vol V, Page 47

66 Transcript, Vol V, Page 48

The Student's IEP for school year 2011-12, as previously noted, was developed at the May 2011 meeting and with those in attendance as discussed above. The IEP team decided to change the school campus where the Student's special education services would be provided. Age wise, and grade placement wise, he had been scheduled to make the transition to the new campus the previous school year. However, his IEP team at that time decided at their annual review conference in May 2010 for him to remain at the same campus with it being noted on the notice of decision form that the Parents were pleased with the decision.[67] Which meant that the Parents knew he was classified as a fifth grade student and that he would be receiving his education in a fourth grade regular education classroom as well as the special education resource classroom. They knew in May 2011 that for the current school year the change of school campuses would place him in a sixth grade regular education classroom, along side same-age non-disabled peers. The proposed schedule of services on the IEP developed at the May 2011 conference called for him to receive reading, language arts, mathematics, science and social studies in regular education classrooms and for him to receive special education services in reading, mathematics, science, and behavior affective services in the special education resource setting. Additionally, his IEP indicated that he would be receiving both speech and occupational therapies once weekly for thirty minutes in the classroom setting.[68] Although the behavior documentation maintained by his special education teacher during the previous school year indicated that he had successfully completed all of the goals and objectives, the current year's IEP continued to include the same BIP.[69]

From the testimony and evidence it would appear that it was the Student's behaviors and the parties' responses to that behavior during those first few days of school that actually was responsible for the Parents seeking a due process hearing. Although the school year began on Monday, August 15, 2011, the Student was absent that day because according to his father who drove him to the school, the Student "wanted to go back home."[70] On the second day of school his classroom teacher reported that when the Student came in from recess he "kept hitting" another student "in the face" and when told to stop "he turned around and did it again" and when asked to "get up" he told the teacher "no." She called for the aide assigned to the Student whose presence apparently was sufficient in that he returned to the classroom with the aide and sat in the back of the room until it

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67 District Binder, Page B2

68 District Binder, Page B16

69 District Binder, Page F3 and B31

70 Transcript, Vol V, Page 69

was time to change classes.[71] The Student was absent August 17, 2011, the third day of school and the Parents requested the due process hearing the next day, August 18, 2011. So, after only one day of attending school on the new campus the Parents filed a request with the Department asking for a due process hearing with allegations as noted above.

The Student's acting out behaviors were not contained even after the due process hearing was requested. On August 24, 2011, the school principal sent a letter to the Parents informing them that he had "been taking items off his desk and throwing them in the classroom while students were present." The principal asked the Parents to speak with him about "this inappropriate behavior."[72] On August 26, 2011, the principal sent them another letter informing them that the Student had "been reported hugging a female student from behind while in the classroom" which "caused the student to fall toward the desk."[73] The Student received a one-day in-school suspension which was to be served in his special education classroom, along with a five-day assignment to the school's "Better Choices Intervention Program" meeting from 7:00 a.m. to 7:45 a.m. The Parents were asked to bring the Student to the school for a meeting with the principal on August 29, 2011. The position taken by the Parents as to the appropriateness of the IEP cannot be justified by the record. The IEP in place was the IEP they participated in developing in May 2011. Their complaints and request for a due process hearing were initiated after only four days into the school year and after the Student was in attendance for one day. Consequently the four days of evidence is insufficient to measure the appropriateness of the IEP for in the new school year and in the new educational setting.

2. Failing to educate him in the least restrictive environment (LRE)

At the May 2011 IEP conference where the Student's IEP for school year 2011-12 was developed, with both parents present, the decision as noted above was made for the Student to receive his education on a different school campus. At that meeting the Parents expressed their concerns about the change. It was recorded that "His mother stated that they want him to grow up and be independent" and knowing that he would be on another campus gave them concern "about the safety of the school" because their family has "friends that live close too the school" and they thought that the Student might "try and leave school to go visit them." However, contrary to their testimony "they would like for him to ride the bus to school" which would also be a new

71 District Binder, Page J9

72 District Binder, Page J2

73 District Binder, Page J3

experience.[74] At the time these concerns were recorded the Student's behavior problems had subsided. It is doubtful from the testimony from any of the witnesses, including the Parents, that thought he would regress on being moved to another school campus. Could it have been projected that he might resist going to school on the new campus or that he would regress in acting out behaviors while at school. These questions and concerns were not addressed by either party prior the events themselves.

As noted in the findings of facts for the previous year, the topic of the least restrictive environment was not discussed in testimony other than with the behavior consultant. The Parents expressed considerable concern that the Student was being educated along with sixth grade students after being educated with fourth graders. However, his classroom teachers testified that they modified his school work to accomplish his goals and objectives as based on his level of academic achievement.[75] Physically he was on target in height and weight with his regular education classmates.[76] There is insufficient evidence to show that there was a lesser restrictive environment in which the District could have or should have provided for the Student. In hindsight and based on the Student's previous behavior they could have been more vigilant in anticipating a regression of behaviors on changing the educational setting.

3. Failing to implement the existing IEP.

Given there were only four days in the school year being challenged as to the implementation of the Student's IEP, there was no evidence or testimony provided on which to base an opinion much less a judgement of the District's failure to do so.

4. Failing to follow due process procedures by:

a. Not providing the Parents with progress reports;

b. Not providing the Parents with written notice of meetings;

c. Not having appropriate persons at the IEP meetings; or by

d. Failing to provide adequately trained staff.

Here again, the testimony and evidence regarding the four days of the current school year are insufficient to warrant a judgment against the District for not following due process procedures.

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74 District binder, Page B17

75 Transcript, Vol III, Page 261-263; Vol IV, Page 174-175

76 Transcript, Vol V, Page 43

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.[77] The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or 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.[78] The term "special education" means specially designed instruction.[79] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[80] As noted in this case the Student presented as being a child eligible to receive special education services due to mental retardation. The Department has outlined the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

In 1982, the Supreme Court was asked and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education" or FAPE. Given that this is the crux of the Parent's contention in this case it is critical to understand in making a decision about their allegations as to whether or not the District failed to provide the Student with FAPE. The Court noted that the following twofold analysis must be made by a court or hearing officer with regard to FAPE:

> (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
>
> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[81]

In 1988 the Supreme Court once again addressed the issue of FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by

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77 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

78 20 U.S.C. § 1401(3)(A)

79 20 U.S.C. § 1402(29)

80 34 CFR § 300.26(b)(3)

81 Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982)

addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[82] In this case the Parents have alleged that the District did not considered the Student's unique needs by virtue of a belief that there was a twenty point decrease in his IQ and that the District failed to provide not only the appropriate related services of occupational and speech therapy, but also failed to provide specifically designed instruction to address his goals and objectives. Under the IDEA, an IEP team must "consider" the results of evaluations when developing an IEP.[83] The evidence in this case indicates that the District did in fact consider the independent evaluation obtained by the Parents where his IQ was reported to have declined. However, as noted in the findings of fact the level of mental retardation was not relevant to developing appropriate goals and objectives. The testimony also reflected the fact that the District had either already incorporated or planned on incorporating many of the psychologist's recommendations.[84] In so doing they were not concentrating on the Student's disability classification, but on his unique academic and behavior needs.

Congress established and the courts have consistently agreed that FAPE must be based on **the child's unique needs and not on the child's disability**.[85] As is true in this case, too often this hearing officer has found that parents, school administrators and the legal counselors representing them, typically agree on the basis, but do not make this distinction in their arguments on the complaints or the differences they've encountered. The charge to education professionals is to concentrate on the unique needs of the child rather than on a specific disability such as the Parents have in this case. The District correctly addressed the Student's behavior difficulties associated with his eligibility criteria of mental retardation.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on the unique needs of the Student. They developed and implemented a behavior intervention plan (BIP) designed to address the Student's behaviors as manifested in both his regular classroom and special education classroom. The record shows that the plan was appropriately and successfully implemented during the course of the second semester of school year 2010-11. If provided with additional data and if the District had been gifted with foresight as to the Student's difficulties in encountering a new school setting, the plan most

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82 Honig v. Doe, 484 U.S. 305 (1988)

83 20 U.S.C. § 1414(d)(3)(A)(iii)

84 See G.D. v. Westmoreland School District, 930 F.2d, 942, 947 (1st Cir. 1991)

85 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

likely would, and eventually did, address the Student's acting out behaviors. Contrary to the Parents allegations there was insufficient evidence that one of his unique needs could have been associated with autism; however, there was sufficient evidence to attest to his behavior issues being associated with his mental retardation. Despite the devastating manifestation of his behavior problems, the evidence also shows that in spite of his low level of intellectual functioning he continued to make educational progress. Unfortunately, based on the educational science of learning his level of intellectual abilities will not progress to the degree of that wished for by his Parents. However, this is not to suggest that either the Parents nor the District not continue to expect more and more from the Student with regard to developing the skills for independent living.

It is necessary for this hearing officer to look only at the facts in this case as to whether or not the District, in cooperation with the Parents, developed IEP's which concentrated on the unique needs of the Student and not specifically at his disability and that the IEP team considered his unique needs in deciding on an appropriate educational placement to implement his education program in the least restrictive environment. The testimony by District personnel elicited in the course of the hearing suggests that they truly believed that the unique needs of the Student as indicated in the IEP with regard to his behavior problems could best be implemented with the BIP developed by the behavior consultant. Had the Parents given the time and opportunity for the District to concentrate on the acting out behaviors in the current school year and had the District with that knowledge advised his sixth grade teachers, some if not most of the disruptive behaviors could most likely have been avoided at the beginning of the school year. The IDEA does not require an educational agency or district to have such foresight; however, the regulations implementing the IDEA do require a district to take appropriate action in developing and adjusting an IEP consistent with changes presented to them by students with disabilities.

The question of whether or not FAPE was denied in this case also pertains to the specialized instructional intention of the Student's IEP. In more specifically defining what is meant by FAPE, the Court held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

(1). They are provided at public expense and under public supervision and without charge;

(2). They meet the State's educational standards;

(3). They approximate the grade levels used in the State's regular education; and

(4). They comport with the student's IEP.[86]

The definition of children covered under IDEA; however, is seen as being doubly circular in that a child with disabilities must be so disabled as to require special education and related services. Again, as noted above, special education and related services are those that meet the unique needs of a child with disabilities. Moreover, related services are those that assist a child to benefit from special education, which can only be received by a child with disabilities.

The issues addressed in this case have been presented by the Parents as being such egregious violations of procedural requirements of the Act that they have denied the Student with FAPE. Keeping in mind, 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, which meet the standards set forth by the Department. Thus the question boils down to: (1) looking at each individual issue to determine whether or not the District has been in compliance with that definition, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[87] agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.[88] Further, Rowley recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

"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.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)." [89]

The Eighth Circuit Court of Appeals has addressed the issue of the adequacy of an IEP in meeting the standards established in IDEA in order to provide FAPE. In *Fort Zumwalt School District v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible

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86 Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982)

87 Zumwalt v Clynes, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

88 Board of Education v. Rowley, (458 U.S. 176-203, 1982)

89 Light v. Parkway C-2 School District, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

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.[90] 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").[91]

A major question with regard to the current case and whether or not FAPE was denied is whether or not the IEP adopted by the District in February 2011 for the remainder of school year 2010-11 provided sufficient instruction and services to enable the Student to make progress. The fact that his parents believed that a subsequent and questionable IQ exam placed him lower than where he was two years previously was to them evidence of the District's failure to provide sufficient instruction and services. However, such findings and beliefs are not relevant as to whether or not the IEP was appropriate with regard to providing FAPE. FAPE cannot be said to have been denied if, as noted above, the instruction and services comported with the Student's IEP. The IEP's developed and implemented by the District contained sufficient indications of specialized instruction in all of the Student's academic areas and the testimony by his regular education and special education teachers reflected their knowledge of the Student's academic needs.

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 in the development of an IEP has been consistently emphasized in the IDEA.[92] 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 stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.[93] 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.'"[94] In this case there is no doubt that the Parents participated in the development of the Student's IEP. Additionally, there is a preponderance of evidence in the record showing that

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90 Fort Zumult School Dist. v. Clynes, 96-2503,2504, (8th Cir. 1997)

91 Ibid, at 26 IDELR 172

92 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

93 Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley,458 U.S. 176, 189, 205 (1982)

94 Independent School District No. 283 v. S.D. by J.D., 88 F.3d 556 (8th Cir. 1996) and J.P. v. Enid Public School, No. CIV-08-0937-HE (W.D. Okla. 9-23-2009)

they were provided with sufficient notice and progress made by the Student. Again, the degree of frustration they experienced most likely led to the rapidness with which they asked for a due process hearing and as such denied the District with the opportunity to evaluate and further assess the Student's needs going into school year 2011-12. Regardless, their testimonies reflected a history of active involvement in the Student's health, welfare, and education which can only be admired by those of us without such challenges as those that they meet daily.

Also, as noted earlier, the courts have agreed that an IEP must be designed to provide the possibility for a student to obtain an educational benefit from the proposed instruction. What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. Again, going back to the Rowley standard, progress according to the courts should be measured in terms of educational needs of the disabled child and should be more than "trivial" or "de minimis."[95] In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a child's potential and educational needs. In this case the Student's academic progress, although less than would be desired by the Parents, was shown to be more than trivial or de minimis by the evidence. It is not a mandate of the IDEA that a parent, anymore than a district, be able to forecast with ultimate certainty of the adequacy of a particular IEP. The IEP, 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. From the documents entered as evidence and the testimony of the educational professionals this would appear to be the case for this Student, even though as noted he may not have achieved academically to the degree believed possible by his parents.

How the Student's disruptive behavior was accounted for with regard to its impact on his academic achievement was one of the underlying issues not directly addressed by the Parents; however, it is important to the decisions reached in this case. The Eighth Circuit addressed this issue in *CJN v. Minneapolis Public Schools* by noting in its decision that it did not mean that a district satisfied its FAPE obligation simply because a student with behavior problems makes academic progress. Rather, it stressed that when a child's behavior, if uncontrolled, would curtail his ability to learn, the fact that he is learning indicates the district has addressed the problem, at least in part.[96]

The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported

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95 Polk v. Central Susquehanna Intermed. Unit 16, 853 F.2d 171 (3rd Cir. 1988); Ridgewood B. of Educ. v. N.E., 172 F.3d 238 (3rd Cir. 1999); and Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000)

96 CJN, by and through his parent and natural guardian, SKN, Appellant, v. Minneapolis Public Schools, Special School District No.1; Minneapolis Board of Education; Catherine Shreves, Chair; Carol Johnson, Superintendent, in their representative capacities, Appellees, (323 F.3d 630) (U.S. Court of Appeals, 8th Cir.) (2003)

by the court when the alleged violation has been based solely on procedural violations.[97] Case law attempting to interpret both Congress and comply with the findings of the Supreme Court have stated that procedural errors are sufficient to deny FAPE if such errors "[1] compromise the pupil's right to an appropriate education, [2] seriously hampered the parents' opportunity to participate in the formulation process, or [3] caused a deprivation of educational benefits."[98] The alleged violations of not following the IDEA's due process procedures such as not providing the Parents with sufficient notice of meetings, not providing them with regular reports of progress on a Student's goals and objectives, not having appropriate personnel present at IEP meetings, or not having appropriately trained staff to implement the IEP were not shown by the evidence or testimony to warrant a judgment that the District failed to follow due process procedures in regard to these allegations. However, for the District to have not made provision for the delivery of occupational and speech therapies as decided by the IEP team to be essential is a potential violation of FAPE. In deciding such; however, it is necessary to consider the possible negative impact on the Student's achievement of his goals and objectives. In this case the Parents have failed to demonstrate that such a failure resulted in any significant negative impact on the Student's academic achievement.

Order

The results of the testimony and evidence warrant a finding for the District; however, only in part. Although, there is not sufficient evidence to warrant a denial of FAPE, as alleged, the Parents have introduced sufficient evidence in the record to reflect that the District failed to take action with regard to the provision of the related services of speech and occupational therapies as deemed necessary by his IEP team. In order to compensate the Student for missed sessions it is hereby ordered that the District will include an additional thirty (30) minutes per week of both therapies for the remainder of school year 2011-12.

All other issues as noted above and as alleged by the Parents as a denial of FAPE are hereby dismissed with prejudice.

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97 Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207 (1982). See also Evans v. District No. 17 of Douglas County, 841 F.2d 824 (8th Cir.1988). (See also Independent School District No. 283 v. S.D. by J.D., 88 F.3d 556 (8th Cir. 1996). More recently see: Hiller v. Board of Education, (16 IDELR 1246) (N.D. N.Y. 1990); Bangor School Department (36 IDELR 192) (SEA ME 2002); *Jefferson Country Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *School Board of Collier County v. K.C.*., 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79*, 35 IDELR 159 (8th Cir. 2001).

98 Roland M. V. Concord Sch. Comm. 910 F.2d 994 (1st Cir 1990); accord Amanda J. ex rel. Annette J. V. Clark Cnty. Sch. Dist., 267 F.3d 877,892 (9th Cir. 2001).

Finality of Order and Right to Appeal

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 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so ordered.

Robert B. Doyle
Hearing Officer

December 1, 2011
Date