Arkansas Department of Education
Special Education Unit

IN RE:

X_____ X_____
as Parent in behalf of
X_____ X_____, Student PETITIONER

VS. NO. H-13-03

Benton School District RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

In the original complaint submitted to the Arkansas Department of Education the Petitioner alleged that the Respondent denied the Student with a free and appropriate public education (FAPE) during school year 2011-12 by:

1. Not providing an appropriate Individualized Education Program (IEP);
2. Failing to follow proper due process procedures;
3. Refusing to provide a dedicated aide;
4. Failing to properly accommodate for the Student's medical needs; and by
5. Failing to provide for the Student's safety and well-being during school hours.

In her opening statement; however, the Petitioner stated the issues differently. She alleged that the Respondent denied the Student with a FAPE during school year 2011-12 by:

1. Not providing for the safety and well-being of the Student while at school;
2. Not permitting the Parent access for grievance through a due process hearing;
3. Failing to allow the Parent to be involved and have a fair hearing; and by
4. Subjecting the Student to neglect and inadequate supervision while at school.

This decision will address the issues as presented during the course of the hearing.

Procedural History:

On July 24, 2012, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from X_____ X_____ (hereinafter referred to as "Parent"), the parent and legal guardian of X_____ X_____ (Petitioner) (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the Benton 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 August 31, 2012, 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 was issued on July 25, 2012.[1] The District filed a response to the notice of the hearing request on July 31, 2012.[2] The Parent requested the services of a mediator. The District notified the hearing officer on August 19, 2012, that a mediation conference was conducted; however, without resolving the issues contained in the Petitioner's complaint.

On August 22, 2012, the Petitioner filed a request for continuance, which was granted, with objection by the Respondent.[3] The hearing was ordered to begin on September 21, 2012.[4] The hearing began and ended as scheduled on September 21, 2012.

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

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[1] Hearing Officer Exhibit 1

[2] Hearing Officer Exhibit 2

[3] Hearing Officer Exhibit 3

[4] Hearing Officer Exhibit 4

impartial hearing. The Parent was represented by an advocate, Emily Kearns, 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 seven-year-old student, with multiple medical issues including cerebral palsy, developmental delay, nonverbal, seizure disorder, aphakia in her left eye, pseudoaphakia in her right eye, cataracts in both eyes, and osteoporosis. The District assumed the educational responsibility for the Student when she was enrolled by the Parent into the District's kindergarten program for school year 2011-12. In so doing the District has acknowledged that the Student is a child with a disability as defined in 20 U.S.C. §1401(3). The Student's disabilities as related to the above medical issues including gross developmental delay to include speech as well as fine and gross motor skills.

Since the Petitioner was challenging the District's appropriate implementation and adequacy of the Student's IEP 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 a closing statement as well as a post-hearing brief. The Petitioner elected to provide a closing statement but not a post-hearing brief and the Respondent elected to provide a post-hearing brief and not a closing statement. The Respondent's post-hearing brief is included as Hearing Officer Exhibit Number Five.

Findings of Fact:

During school year 2011-12 did the District deny the Student with FAPE by:

1. **Not providing for the safety and well-being of the Student while at school;**
2. **Not permitting the Parent fair access for grievance through a due process hearing;**
3. **Failing to allow the Parent to be involved and have a fair hearing; and by**
4. **Subjecting the Student to neglect and inadequate supervision while at school?**

1. Not providing for the safety and well-being of the Student while at school:

On March 17, 2011, the District sent the Parent notice that a conference would be held on March 31, 2011, for the purpose of determining the appropriate services that would be needed for

the Student's IEP when she entered kindergarten for school year 2011-12.[5] The record reflects that the Parent was notified and in attendance on the date the conference was held. The record also shows that at that time she granted the District permission to conduct a comprehensive evaluation and that she would provide the District with a social/developmental history.[6] The District's psychological examiner conducted the evaluation on May 12, 2011. The results of the evaluation concluded that the Student's motor development ranged between zero months to eleven months of age; that her perceptual development ranged from four months to twenty-four months of age; that her daily living skills ranged from zero months to twelve months of age; that her cognition was from zero months to sixteen months of age; that her speech/language was from one month to four months of age; and that her social development was from four months to nine months of age.[7]

On June 8, 2011, an IEP conference was held with the Parent being present for the purpose of developing the Student IEP for her kindergarten year (2011-12).[8] The Student's IEP team which included the Parent decided that the Student needed to receive 1644 minutes weekly receiving special education services as well as 581 minutes weekly in general education. They also concluded that she would need sixty minutes of speech related services; sixty minutes, twice weekly of occupational therapy; and sixty minutes, twice weekly of physical therapy.[9] The record also reflects that the Parent expressed a concern that the other students in the class might not feel comfortable around the Student, stating that she tends to be very active.[10]

Although not recorded as such at the June 2011 conference, the District's director of special education testified that the Parent had always maintained the position that she felt the Student should have a one-on-one dedicated aide throughout her school day.[11] It was noted in the

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[5] District Exhibit, Page B6

[6] Ibid, Page B13-14

[7] Ibid, Page D38

[8] Ibid, Page B21-23

[9] Ibid, Page C21

[10] Ibid, Page C22

[11] Transcript, Page 20

record at that time that the Student wore a helmet to prevent self-injury and that she took nutrition through a G-J tube that remained in place at all times.

Prior to entering school in August 2011, the District's school nurse developed an Individual Health Care Plan (HCP) in order to accommodate for the Student's multiple medical disabilities. The Parent signed the plan and was provided with a copy.[12] The plan noted that the Student required G-J tube care and feedings twice a day. It also noted that she required seizure precautions with the use of diastat as needed and that she was incontinent of bowel and bladder requiring total toileting care. The plan specifically states that "if the G-J tube becomes dislodged cover with 4X4 gauze & notify nurse..do not reinsert...nurse to call Mom."[13] An Emergency Plan was also developed by the school nurse which provided instructions for all District personnel in what to do when an emergency occurred that involved the Student.[14] The school nurse also provided documentation and training for school personnel with regards to the Student's seizure disorder as well as her cerebral palsy diagnosis.[15] The Parent provided the District with contact information in case of a seizure as well as what basic first aid procedures she would like for school personnel to implement in case of a seizure.[16]

The only possible seizure activity during school hours was reported by her teacher in September 2011. At that time both the teacher and the Parent testified that the Parent came to the school to view a video taken during the episode where the suspected seizure occurred. However, no further action was apparently required in that the testimony led no further.[17]

The school nurse's gastrostomy tube feeding note on January 9, 2012, indicated that at 9:35 a.m., she was notified that the Student's G-J feeding tube had become dislodged during PT exercises. The note reflected that she called the Parent; covered the site with a 4X4; and filled the

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[12] District Exhibit, Page G2-3

[13] Ibid, Page G3

[14] Ibid, Page G4-5

[15] Ibid, Page G6-11

[16] Ibid, Page G17-18

[17] Transcript, Page 98-99 and Page 136

bulb to the first black mark on the tube. She also noted that the Parent would call the radiology department at Childrens Hospital to let them know.[18] When asked on cross examination about the incident the Parent testified that if the Student had a dedicated, full time, one-on-one aide assigned to her that at the time the feeding tube came dislodged during physical therapy that, "the aide could have been watching, because the therapist needed to know, if it came undone again" and that the Physical Therapist told her that she didn't know how the tube became dislodged.[19] There were no further references to the incident either in testimony or evidence. Therefore it is assumed that the Student suffered no ill effects from the incident.

On April 19, 2012, the Parent took the Student to Saline Memorial Hospital where diagnostic imaging was completed due to "leg pain after trauma."[20] The impression recorded by the physician was that "1. Acute anteriorly bowed fracture left distal femoral diametaphysis without displacement or evidence of soft tissue injury." and "2. Older healing fracture left proximal tibia" with the later being of "different ages."[21] The physician also noted that a "social history is being evaluated" and that "skeletal survey may be appropriate for this patient."

According the Parent Exhibit C2, a letter from two of the Student's physicians at Childrens Hospital submitted to the child abuse investigator stated that "a report of suspected child maltreatment was made to the child abuse hotline because while she did have some signs of bone thinning on X-ray (osteopenia), she did not have laboratory evidence of a metabolic bone disease (such as vitamin D deficiency)." They went on to note that the Student's sister had severe enough osteoporosis that fractures to her bones with trauma that could occur from routine care and providing physical therapy. With regard to the Student, they state that she had been scheduled for a bone density test and that "if it shows significant osteopenia as well, a conclusion that her fractures may have resulted from routine care and therapies would also be reasonable."[22]

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[18] Ibid, Page G29

[19] Transcript, Page 110

[20] Parent Exhibit, Page C1

[21] Ibid

[22] Ibid, C2

According to the testimony by the District's special education coordinator they conducted an internal investigation as to how the Student's leg could have been fractured, but that the local police department also conducted an investigation. With regard to the internal investigation she testified that "not one person had an inconsistent story...that the staff were well trained...they had not a clue how it happened."[23] The prosecuting attorney for the 22nd Judicial District informed the District that they had reviewed the investigative file prepared by the Benton Police Department and that the evidence was inconclusive as to how and when the injury occurred and that they did not identify a suspect who may have been responsible. Consequently, the prosecuting attorney found that the evidence was insufficient for criminal charges.[24]

Given the evidence and testimony it is not possible to conclude that the District failed to provide for the safety and well-being of the Student while at school. Given the extent of the Student's brittle health, the record shows that the District provided as much care and caution as could be reasonably expected to make sure that the Student would be exposed to as safe an environment as possible.

2. Did the District fail to provide the Parent fair access for grievance through a due process hearing?

As noted above the Parent's primary concern from the beginning to the end of her involvement in the development of the Student's IEP was for her to have a one-on-one aide specifically assigned to her and only her for the entire school day. The Parent believed that the Student's frail medical condition and issues warranted such a person to be with her child at all times. In testimony she recounted several incidents which were not disputed by the District that were examples of why, in her opinion, the Student needed such an aide. The District's special education coordinator also testified that the Parent was relentless in asking for such an aide in all of the conferences they conducted. A problem of misunderstanding, which became evident in the direct examination of the District's special education coordinator by the Parent's advocate, was how decisions were reached in the IEP conferences. This misunderstanding appears to have led to

[23] Transcript, Page 35-36

[24] District Exhibit, Page I148

the Parent's belief that not only was her request for a designated aide being ignored by the District, but that the District also failed to inform her of her rights to due process if she disagreed with the actions proposed by the District.

When challenged on direct examination by the Parent's advocate as how an IEP team reaches a decision on an issue such as the Parent's request for a dedicated one-on-one aid in the classroom, the District's director of special education replied "there was no majority or vote taken why my recollection of that conference was we went around the room and went to each therapist and teacher and asked them, 'Do you need the support,' and each one of them said, 'No, at this time we feel we have enough support and services'....they expressed to me they felt two additional people would be stepping over each other in the classroom." The "two additional people" she referred to was addressing the Parent's request for an aide for both of her children assigned to the same classroom. According to the classroom teacher "there are enough adults to meet all the needs of each individual student in the classroom."[25] However, it was the decision making process that the Parent challenged. She provided documentation from non-educational professionals including the Student's physician who stated that the Student "requires assistance with her G-tub and other personal daily activities."[26] The Student's physician at Childrens Hospital wrote a letter in March 2011 describing the Student's medical problems and noting that she will need assistance with her feeding tube and when, transferring from her wheel chair. She further noted that even though the Student was medically stable at that time, she required constant care and "would benefit from a classroom aid."[27] Thus what appeared to be the difference between the Parent's desire and the District's belief was whether or not the aides in the classroom were sufficient to meet the needs of the Student as requested by her medical providers.

The Parent was present in all of the conferences involving the Student according to the record as well as her testimony. In all of the conferences she made it clear according to the District's director of special education that she desired for the Student to have a dedicated aide, assigned to no one but her throughout the school day. The IEP team elected in call meetings to

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[25] Transcript, Page 168

[26] Parent Exhibit, C3

[27] Ibid, C6

continue with the ratio of students to aides, believing that they were sufficient to meet the needs of the Student. At each of the meetings the Parent was provided with and signed acknowledging receipt of copy of her rights under the IDEA.[28] When asked on cross examination if she had ever offered mediation to resolve the conflict, the District's director of special education answered "no, I don't believe I did....I believe I gave her her parental rights, told her that there were advocacy numbers, if she didn't agree with the decision of the committee, but no, I don't believe I did suggest mediation."[29] The Parent's exhibit A1 through A49 is a copy of Special Education, Your Rights Under the IDEA. The Parent was provided a copy of the document on five separate occasions. She may have elected to not read them; however, the evidence reflects the right to file for a due process hearing should she disagree with a committee's decision. How much of the document was read and how much was understood by the Parent was never addressed in her testimony.

The Parent was provided with a notice of each IEP conference held for the Student with each notice containing a statement as to a parent and child's protection under procedural safeguards of IDEA. The Parent signed the notice for all of the conferences acknowledging receipt of a copy of her rights. All of the notices provided by the District contained the address and telephone for two agencies available to her if she needed assistance in understanding her rights.[30] At the IEP conference on February 21, 2012, the Parent was provided assistance by two volunteer attorneys from the Walmart Pro Bono Medical-Legal Partnership.[31] In testimony the Parent did not deny having received notice and having attended the conferences. She testified that she was active in the discussion with specific concerns stated about the lack of supervision for the Student without a dedicated one-on-one aide. In responding to cross examination by the District as to how and aide being present during the Student's physical therapy would have made a difference when the Student's feeding tube became dislodged, the Parent stated "the aide could have been

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[28] District Exhibit, Page B9, B19, B26, B36, and B40

[29] Transcript, Page 50-51

[30] District Exhibit, Page B24, B29, B34, and B38

[31] District Exhibit, Page B32

watching, because the therapist needed to know, if it came undone again...maybe she wasn't paying attention to her, maybe she was texting."[32] This same allegation of inattention by texting was also drawn out on cross examination when the Student was admitted to Childrens Hospital and her IV came out.[33]

There was no evidence presented by the Parent to indicate that any of the above conferences did not take place and that she did not have the opportunity in each of them to participate. In each of these meetings she and the District's director of special education testified that she consistently asked for a one-on-one aide for the Student. She also did not deny that she was provided with all notices of conferences, nor that each notice contained information as to how she might address any disagreement through due process.

3. Did the District fail to allow the Parent to be involved and have a fair hearing?

It was unclear from the Parent's opening statement as to how this issue was to be addressed in testimony as well as evidence; however, the issue of fairness as well as the concept of a hearing did not appear to address that to which this case is being subjected. It would appear from the questions asked during examination that the Parent believes that she was not fair that she was not heard, nor agreed with in her assertion that her child needed a dedicated one-on-one aide. She acknowledged in testimony that she was a very protective mother.[34] The evidence showed, as demonstrated above in item number two, that the Parent was actively involved in all aspects of the Student's education; however, she was in total disagreement with the process of not being able to have what she deemed necessary for the safety and protection of the Student. However, the record does not show that she was denied a fair hearing by the District at any of the conferences she attended, in that both she and the District's director of special education testified that she made her wishes known on every occasion.

Another avenue of possible disagreement with the District as to fairness was introduced as how the District had obtained catastrophic funding for the Student which included the partial

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[32] Transcript, Page 109-110

[33] Ibid, Page 100

[34] Transcript, Page 101

salary for an aide in the classroom.[35] The funding as explained by the District's director of special education was to supplement the cost to the District for one of the aides in the classroom who splits her time between the Student and her twin sister. By looking at the document it would appear that the funding was being requested for a specific paraprofessional (aide) to provide services specifically for the Student. In explaining the document the District's director of special education testified that: "When we look at funding, the lowest ratio of funding required by the State Department is a one to six with one paraprofessional...we have four to eight in the classroom..when you..when you have kids who require a lot of supports and services, you've got to put in the supports that the teachers and the staff need to do their job, so the kids can make educational progress."[36] It is believed from the questions to the District personnel and the Parent's testimony that it was not fair that the District would use the Student's special needs to solicit funding for the salary of a paraprofessional who would not be spending all of their time taking care and looking out for the welfare of the Student.

Under the due process protections of the IDEA an overly protective parent's request may not always be an appropriate or necessary means of providing an educational opportunity for a student. Such appears to be so in the current case. The District has shown through evidence as well as testimony that they have indeed provided with Parent with a fair due process even though they have consistently disagreed with her preferences.

4. Did the District subject the Student to neglect and inadequate supervision while at school?

The Parent focused on the fact of the significant number of physical maladies and challenges that the Student presented with in an educational setting and asserting that given those challenges that, in her opinion, the District had been neglectful of the Student's well being by not providing for adequate supervision. Here again, as noted in addressing the issues as stated above, the Parent contended that the neglect and lack of supervision was the direct result of not assigning a dedicated one-on-one aide to be with the Student at all times.

The Parent questioned the District's director of special education as to the content of the

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[35] Parent Exhibit, Page G1-G4

[36] Transcript, Page 44-48

District's request to the Department for catastrophic funding to address the Student's behaviors which included biting herself "in the ears, nose, and face...arm guards have to be put on to prevent self-injury...she is very adapt at getting the arm guards off, and they have to be put back on up to fifty times a day...consistent redirection is needed to prevent self-injury.[37] For the Parent this funding request not only meant that the Student's medical needs, but also her self-injurious behavior constituted a need for a full time dedicated aide to watch after the Student.

The Parent also pointed to the incident, as addressed above, where the Student's feeding tube became dislodged during physical therapy, noting that in her opinion had there been a full time dedicated aide present that the aide may have seen it prior to it being seen by the therapist.

The Parent also pointed to the day, also addressed above, where the Student was found to have broken her leg. Even after the investigators found no one to be responsible for the incident, including any neglect on the part of the Parent, she still contended that the event itself may not have happened had a full time dedicated aide been assigned to the Student. At the conference following the broken leg incident the Parent testified that she not only wanted a full time dedicated aide, but that she also wanted "different aides, not the ones [the District] had."[38]

To the Parent these events might have been avoided had a dedicated aide been present at all times. However, no evidence or testimony was presented or elicited to substantiate or challenge the claim. No evidence was provided to substantiate the Parent's allegation that the District neglected the Student during the school day, nor that the teachers, aides, and therapist assigned to the Student did not appropriately supervise her during the school. As noted previously from the letter submitted as evidence by the Parent, the Student's physician noted that if the Student's bone density test showed significant osteopenia "her fractures may have resulted from routine care and therapies would also be reasonable."[39] When asked on cross examination the Parent testified that the Student was tested and that the results were positive for osteoporosis.[40] Given this, as well as

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[37] Transcript, Page 48

[38] Ibid, Page 90

[39] Parent Exhibit, C2

[40] Transcript, Page 101

the testimony by those assigned to the Student, there is insufficient evidence to show that the District failed to provide the Student with a FAPE by neglecting or inadequately supervising the Student during the school day.

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.[41] 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.[42] The term "special education" means specially designed instruction.[43] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[44] As noted in this case the Student presented as being a child eligible to receive special education services due to multiple medical conditions including cerebral palsy, developmental delay, nonverbal, seizure disorder, aphakia in the left eye, pseudoaphakia in the right eye, cataracts in both eyes, and osteoporosis. 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

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[41] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[42] 20 U.S.C. § 1401(3)(A)

[43] 20 U.S.C. § 1402(29)

[44] 34 CFR § 300.26(b)(3)

to understand in making a decision about her allegation 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
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> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[45]

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 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.[46] In this case the Parent has alleged that the District did not consider the Student's unique needs by virtue of her belief that the Student needed a full time, one-on-one aide, to be specifically assigned to her, and to be with her throughout the entire school day, to which the District disagreed. She further alleged the District's failure to provide such a dedicated aide constituted neglect and inadequate supervision of the Student during the school day.

Under the IDEA, an IEP team must "consider" the results of evaluations or suggestions by a parent when developing an IEP. [47] The evidence in this case indicates that the District did in fact consider the Parent's concern about the need for an additional aide. However, as noted in the findings of fact the Student's IEP team, which included the Parent at all meetings, were satisfied with the level of staff to student ratio in the Student's classroom. The record also showed that the District took the necessary steps to prepare for any health emergency the Student might present with during the school day as well as who would be responsible for responding to such emergencies. The testimony and evidence also reflected the fact that the District did incorporate

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

[46] *Honig v. Doe,* 484 U.S. 305 (1988)

[47] 20 U.S.C. § 1414(d)(3)(A)(iii)

strategies into the Student's IEP suggested by the Parent.[48] In so doing they were addressing the unique needs as presented by the Student's disabilities.

Congress established and the courts have consistently agreed that FAPE must be based on the child's unique needs and not simply on the child's disability.[49] 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 their specific or even unique disabilities. The evidence presented and the testimony reflected that the District correctly addressed the Student's medical and health difficulties associated with her eligibility criteria.

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 Health Care Plan (HCP) designed to address the Student's multiple health issues. The records presented as evidence by the District shows that the plan was appropriately and successfully implemented during the course of school year 2011-12. Contrary to the Parent's allegations there was insufficient evidence to show that the District failed to adequately prepare for and implement both the IEP and HCP to meet the unique needs of the Student. Despite the devastating manifestation of her health problems and the tragic events which triggered this due process hearing, the evidence also shows that in spite of her low level of intellectual functioning she made educational progress. Unfortunately, based on the educational science of learning her level of intellectual abilities will not progress to the degree of that wished for by either the Parent or the educators. However, this is not to suggest that either the Parent nor the District not continue to expect more and more from the Student with regard to developing her skills.

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 Parent, developed an IEP which concentrated on the unique needs of the Student and not the Parent's fears of what might happen in her absence and

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

[49] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

that the IEP team considered her unique needs in deciding on an appropriate educational placement, which included adequate supervision, in order to implement her 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 her health and behavior issues could best be implemented with the HCP developed by, trained by, and supervised by the school nurse. If the Parent had a more positive and trusting belief in the abilities of the Student's special education administrator, teacher, aides, and school nurse, the likelihood of the Student being able to progress under the IEP as developed, more and more progress would likely be possible. The IDEA does not require an educational agency or district to have foresight as to all the potential dangers to which a student with as many medical issues as does this Student have, and the dangers they might encounter; 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. In this case the District's conclusion that an additional aide in the classroom most likely would not have prevented the tragic events to which the Parent addressed in her complaint.

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.[50]

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

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

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. Even with the extensive disabling conditions that the Student presents with, there was no evidence presented by the Parent that indicated that the District failed to meet both the IDEA and Department standards in developing specialized instructions for the Student.

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. Thus, the question was addressed in this case as to whether or not the District denied the Student with a FAPE in not providing the Parent with adequate information with regard to how she might appeal any decision or recommendation that the District might propose or implement in the Student's IEP.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[51] 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.[52] There was ample evidence presented in the course of this hearing to show that the Parent was provided with sufficient information as well as assistance by pro bono attorneys to assist her in her efforts with the District.

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

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

[52] *Board of Education v. Rowley,* (458 U.S. 176-203, 1982)

review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)."[53]

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 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.[54] 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").[55] The Eighth Circuit has also found that a school district has met their IDEA obligations if a student's IEP "is reasonably calculated to enable the child to receive educational benefits."[56]

FAPE cannot be said to have been denied if, as noted above, the instruction and services comported with the Student's IEP. In this case the IEP that was developed and implemented by the District contained sufficient indications of specialized instruction in all of the Student's academic areas. Testimony by the District personnel was consistent in addressing how they responded to the unique needs and emergencies presented to them by the Student.

The issue of procedural violation addressed in this case was the allegation of the District's not having allowed the Parent adequate support in how she might appeal any of the decisions reached by the Student's IEP team. According to the Parent this failure on the part of the District was such an egregious violation of the procedural requirements of the Act that she believes the District denied the Student with FAPE.

It was the intent of the IDEA to encourage parental participation in the development of a disabled student's IEP and that as part of that participation they be provided with a copy of their

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

[54] *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

[55] Ibid, at 26 IDELR 172

[56] *M.M. v Special School Dist*, 512F.3d, 461 (2008) and *Neosho R-V School District v. Clark*, 315F.3d, 1026-27 (2003)

rights as well as the names and addresses of local non-profit agencies which might assist the parents in their pursuit of appealing a decision. The importance of parental participation and their understanding of how an IEP is developed has been consistently emphasized in the IDEA.[57] 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."[58] 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.'"[59] The Eight Circuit also found that an IEP must be found inappropriate and set aside only if "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation proses, or caused a deprivation of educational benefits."[60] Failure on the part of a district to not allow a parent to participate in the development of a student's IEP or hampering their understanding of due process would in and of itself be such an egregious violation.

In this case there is no doubt that the Parent participated in the development of the Student's IEP. There is also no doubt that the Parent was provided with adequate information about resources available to her in addressing any disputes she may have with the District's decisions about the Student's education. Additionally, there is a preponderance of evidence in the record showing that she was provided with sufficient notice and that even with limited school attendance with absences due to the untoward events which triggered this hearing, that the Student

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[57] 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

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

[59] *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)

[60] *Independent School District No. 283 v. S.D.*, 88 F.3d, 556-561 (1996)

made educational progress. Again, the degree of frustration the Parent experienced regarding her desire for a one-on-one aide being assigned just to the Student and other perceived neglect and inadequate supervision of the Student by the assigned staff most likely led to her request for a due process hearing. Her testimony of being an over-protective mother as well as the documents presented as evidence, reflect a history of active involvement on her part in the Student's health, welfare, and education. Such commitment and dedication can only be admired by those of us without such challenges that she meets 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."[61] 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 either her teacher or the Parent, was shown to be more than trivial or de minimis when measured against the extensive limitations placed on the Student by her multiple disabilities. 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 she may not have achieved academically to the degree believed possible by the District or the Parent.

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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[61] *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)

by the court when the alleged violation has been based solely on procedural violations.[62] 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."[63] The alleged violation of not following the IDEA's due process procedure by not providing the Parent with her request for a one-on-one aide or by not providing her with sufficient information as to how she might through due process address a disagreement was not shown by the evidence or testimony to warrant a judgement that the District failed to follow due process procedures in regard to the allegation. Thus in this case the Parent has failed to demonstrate that the decision of the District to not include her request for a one-on-one aide was not a denial of her right to participate in the development of the Student's IEP. Further, the Parent has failed to show that the Student was denied a FAPE because she was not adequately informed of her rights under the IDEA.

Order

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by the Parent. This case is hereby dismissed with prejudice.

The Parent is hereby encouraged to allow the District the continued opportunity to provide the Student with the educational opportunities for which she has been provided the right to receive under the IDEA as a child with multiple disabilities.

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[62] *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 Cou*nty, 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). See also: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson County 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).

[63] 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, Ph.D.
Hearing Officer

November 3, 2012
Date