

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

IN RE:

[REDACTED] Parent in behalf of
[REDACTED] Student

PETITIONER

VS.

CASE NO. H-13-15

Cabot School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

1. Were the individualized education programs (IEPs) and educational placements offered by Cabot School District (hereinafter referred to as "District" or "Respondent") from December 11, 2010 to December 11, 2012 reasonably calculated to provide [REDACTED] (hereinafter referred to as "Student") with a free, appropriate public education (hereinafter referred to as "FAPE")?
2. If not, is Student entitled to private placement or, alternatively, compensatory educational services as a result of the alleged failure of Respondent to offer special education and related services?

PROCEDURAL HISTORY:

On December 11, 2012, the Arkansas Department of Education (hereinafter referred to as "Department") received a request to initiate due process hearing procedures from [REDACTED] (hereinafter referred to as "Parent" or "Petitioner"), the parent and legal guardian of Student. Parent requested the hearing because she believed that the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended

(hereinafter referred to as "IDEA" or the "Act") and the regulations set forth by the Department by not providing the Student with appropriate special education services, as noted *supra* in the statement of issues. At the time that Parent filed a request for due processing hearing, Student was a ten-year-old, fifth grade, male enrolled in the District.

In response to the Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of January 28, 2013 was set as the date on which a hearing would commence should the Parent and District fail reach resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on December 17, 2012.

On January 18, 2013, counsel for Parent requested a continuance of the due process hearing to March 14, 2013. District did not object and an Order granting the requested continuance was entered on January 21, 2013. On February 27, 2013, counsel for Parent requested a second continuance regarding this matter, specifically requesting that the hearing be rescheduled for April 15, 16, and 17, 2013. As before, District did not object and an Order granting the requested continuance was entered on March 6, 2013.¹

A prehearing conference regarding this matter was conducted, via telephone, on April 11, 2013, and counsel for both parties participated. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address same. At that time it was also decided that the Parent had the burden of proof regarding the issues raised pursuant to this matter. Thereafter, the hearing began as scheduled on April 15, 2013. There were joint requests for continuances made on the record so that both Parent and District would have ample time to complete their presentation of testimony on

¹ See Hearing Officer Binder of Pleadings and Orders.

the issues in this case. All in all, testimony was heard on April 15, 2013, April 16, 2013, April 17, 2013, May 7, 2013, May 13, 2013, May 14, 2013, and June 7, 2013.² At the Parent's request, the hearing was open.³

The following witnesses testified in this matter:

[REDACTED]

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, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted an open impartial hearing. Parent was represented by attorney Pat Hays (Little Rock, Arkansas) and the District was represented by attorney Pamela Osment (Conway Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.⁴

FINDINGS OF FACT:

Background

Student is an eleven-year-old male that attends Cabot Public Schools (hereinafter referred to as "CPS").⁵ At the conclusion of the hearing in this matter, Student had completed the fifth grade at Cabot Middle School South.⁶ Parent testified that Student was intelligent, funny, and athletically

² See generally Transcript, Volumes 1 through 7.

³ Transcript, Volume 1, pp. 6-8

⁴ See Hearing Officer Binder of Pleadings and Orders.

⁵ Parent Binder, Grade 5 Tab, p. 33; District Binder, p. 167.

⁶ Transcript, Vol. IV, p. 171.

gifted.⁷ Student's fifth grade teachers, specifically Paula Vance (hereinafter referred to as "Vance") and Edward Meharg (hereinafter referred to as "Meharg") described Student as social, compassionate, considerate, and interactive during class.⁸

Parent testified that she knew by the time that Student was eighteen months old that Student was progressing differently than her previous children because there seemed to be a language or communication barrier.⁹ When Student was three years old, Parent contacted Wilbur Mills, which is a facility that focuses on early education and is part of the CPS System.¹⁰ At the conclusion of Student's tenure at Wilbur Mills, Student began Kindergarten at CPS, specifically Stagecoach Elementary.¹¹ Student, since the start of Kindergarten, has been identified as being eligible for special education services, pursuant to the IDEA, under the category of specific learning disability in the areas of reading, writing, and math.¹² Parent has, in general, been actively involved in Student's education at CPS.

On December 11, 2012, Parent filed a "Request for Due Process Hearing" with the Department. In her complaint, Parent alleged substantive violations of IDEA, specifically stating that Student had been denied FAPE in that he was in the fifth grade, but still reading on a first grade level.¹³ Parent requested that Student be removed from CPS and placed in a private school called All Children's Academy, which is located in Little Rock, Arkansas, for a period of two years at District's expense.¹⁴

⁷ *Id.* at 167.

⁸ Transcript, Volume 2, pp. 124, 245-46.

⁹ *Id.* at 167-68.

¹⁰ *Id.* at 168.

¹¹ *Id.* at 169-70.

¹² Parent Binder, Info-Cabot Schools Tab, p. 8.

¹³ See Hearing Officer Binder of Pleadings and Orders.

¹⁴ *Id.*

Third Grade, 2010-2011 School Year (Spring Semester)

Pursuant to an IEP developed on December 7, 2010 (duration of services to be December 7, 2010 through June 6, 2011), Student's Developmental Reading Assessment (hereinafter referred to as "DRA") level was four. Student had a total of twenty-four annual goals, of which he had achieved mastery in seven since the beginning of third grade four months earlier. Of those seven goals that Student had mastered, all were goals pertaining to math. Regarding reading and writing, it was noted that Student could blend sounds, recognize some sight words, and write a sentence with a complete thought. It was also noted that Student's "learning disability in reading, writing, and math" had caused him to "fall behind in the regular classroom."¹⁵ As a result, Student's IEP committee, which included Parent, agreed that Student should be moved from Stagecoach Elementary to Northside Elementary so that he could be placed in a self-contained classroom.¹⁶ Student was transitioned to Northside Elementary and remained in the new class until April 2011.¹⁷

On April 15, 2011, a new IEP was developed for duration of services from April 15, 2011 to June 6, 2011. Other than a notation that Student's DRA level had increased from level four to level six, the April 15, 2011 IEP, in terms of annual goals and notations, was nearly identical to the previous IEP dated December 7, 2010.¹⁸ The April 15, 2011 IEP was prompted by Parent's request that Student undergo a change of placement back to Stagecoach Elementary, as referenced on the "Separate Programming Conference Decision Form/Notice of Decision" dated April 15, 2011. Student's IEP committee concurred and Student was moved back to Stagecoach Elementary on April 18, 2011.¹⁹ Parent testified that she requested a change in placement at that time because she did not want Student to remain in the self-contained classroom at Northside Elementary due to the

¹⁵ Parent Binder, Grade 3 Tab, pp. 41-60; District Binder, pp. 74-84.

¹⁶ Transcript, Volume IV, p. 182; Transcript, Volume V, pp. 10, 220.

¹⁷ Transcript, Volume V, p. 10.

¹⁸ Parent Binder, Grade 3 Tab, pp. 1-12; District Binder, pp. 85-95.

¹⁹ Parent Binder, Grade 3 Tab, p. 21; District Binder, pp. 9-10.

“obvious differences” between Student and the other children in the classroom who appeared to have severe disabilities.²⁰

On May 31, 2011, Student’s IEP committee met to develop an IEP for the upcoming fourth grade school year, specifically for duration of services from August 15, 2011 to June 8, 2012.²¹ It was noted in the “Summary of Present Levels of Academic Achievement” that Student’s guided reading level was six. It was further noted that Student’s reading skills were “well below grade level.”²²

Valerie Stone (hereinafter referred to as “Stone”), Director of Special Programs for the District, testified that Student’s DRA level at the beginning of third grade was “less than four,” which equates to reading at beginning first grade level.²³ District documentation included in the record indicates that Student’s guided reading level at the end of third grade was between level four and six.²⁴ Developmental Spelling Analysis (hereinafter referred to as “DSA”) scores indicate that Student was at the letter naming level of reading at the beginning of third grade, and that he was starting the fourth grade at the same level.²⁵

During Student’s Annual Review Conference on May 31, 2011, it was determined by the IEP committee that Wyatt did not qualify for extended school year services.

Fourth Grade, 2011-2012 School Year

The IEP that was developed on May 31, 2011, with duration of services from August 15, 2011 through June 8, 2012, contained goals that were nearly identical to those of the IEPs that were developed during the second semester of third grade. The May 31, 2011 IEP also contained

²⁰ Transcript, Volume V, p. 9.

²¹ District Binder, pp. 96-106.

²² *Id.*

²³ Transcript, Volume VII, pp. 24-25.

²⁴ District Binder, p. 468.

²⁵ *Id.*

modifications that were identical to those of the previous year, including, but not limited to, the following: reduced assignments (certain subjects), opportunity to respond orally, emphasis on major points, preferential seating, short instructions, opportunity to have instructions repeated or explained, extra time for written response (certain subjects), immediate feedback, frequent reminders of rules, and opportunities to receive positive recognition in class.²⁶

At the beginning of fourth grade, Student's DRA level was less than four and his DSA level was LN, or letter naming. These DRA and DSA levels were exactly the same as those reported for Student at the beginning of his third grade year.²⁷ Stone testified that these identical scores indicate that Student did not make much progress during his third grade year, at least with regard to these assessments.²⁸ Stone stated, however, that there were additional factors and assessments that were considered in determining overall progress of Student.²⁹

On September 19, 2011, the IEP committee met at Parent's request to discuss Student's progress and the potential need for an assistive technology evaluation.³⁰ The "Separate Programming Conference Decision Form/Notice of Decision" dated November 19, 2011 stated that Parent was concerned about Student's lack of progress in the area of reading.³¹ The decision of the IEP committee at this conference was that new evaluations regarding IQ and achievement would be conducted, and that the District would assist Parent in expediting the already-scheduled audiological evaluation that Parent had scheduled for Student. In addition, it was decided by the IEP committee that Student would be administered other assessments, including the VADS and TAPS, as well as assessments to measure phonological awareness. The Notice of Decision stated

²⁶ District Binder, pp. 96 to 106.

²⁷ *Id.*

²⁸ Transcript, Volume 1, pp. 81-82.

²⁹ *Id.*

³⁰ District Binder, pp. 19-21.

³¹ *Id.*

that the IEP committee would reconvene to discuss evaluation results, as well as the need for an assistive technology evaluation, upon completion of the requested evaluations.³²

Thereafter, Maleah Bufford (hereinafter referred to as "Bufford"), who is employed by the District as a Psychological Examiner, School Psychology Specialist, prepared a report dated September 28, 2011 which outlined the evaluation results.³³ Bufford administered three assessments to Student, specifically the Wechsler Intelligence Scale for Children-IV (hereinafter referred to as "WISC-IV"), the Kaufman Test of Educational Achievement, Second Edition (reading portion only) (hereinafter referred to as "KTEA-II"), and the Visual Aural Digit Span (hereinafter referred to as "VADS").

The WISC is individually administered and measures a child's "learning potential, current level of functioning, cognitive strengths and weaknesses, and learning style."³⁴ Bufford reported that Student's WISC-IV full scale IQ could not be interpreted due to the fact that Student demonstrated "too much variability in his performance across the four indexes that make up his score," further explaining that Student's performance on the "Working Memory Index" was unusually lower than his highest index score.³⁵ Despite the fact that she could not calculate a full scale IQ score, Bufford was able to calculate Student's General Ability Index (hereinafter referred to as "GAI") to be 90, indicating Student's general level of intellectual ability to be average. Bufford stated the following in her report with regard to Student's working memory: "[Student's] ability to hold information in immediate awareness and manipulate or transform it in some way is of high

³² *Id.*

³³ Parent Binder, Psychological Evaluations, pp. 17-23; District Binder, pp. 216-22.

³⁴ Parent Binder, Psychological Evaluations, p. 20; District Binder, p. 218.

³⁵ Parent Binder, Psychological Evaluations, p. 21; District Binder, p. 219.

concern. [Student] may have difficulty holding information in short-term memory long enough to use it.”³⁶

Regarding the KTEA-II, Student was administered subtests to measure letter and word recognition, reading comprehension, phonological awareness, nonsense word decoding, word recognition fluency, and decoding fluency.³⁷ Bufford reported “normative weaknesses in many areas” with the exception of phonological awareness which tested at the lower limits of average.³⁸ Bufford stated in her report that Student does not read words with automaticity or text with fluency, further stating that these deficits “impact his skills in gaining meaning from what he reads.”³⁹ In her concluding remarks, Bufford stated that Student’s reading fluency and reading comprehension scores were “severely discrepant” from Student’s measured ability.⁴⁰

In addition to the evaluation conducted by Bufford, a speech-language evaluation that had been completed by Bonnie Brooks (hereinafter referred to as “Brooks”) was discussed by the IEP committee on November 9, 2011. Brooks tested Student on both September 29, 2011 and October 7, 2011 by administering both the Phonological Awareness Test-2 (hereinafter referred to as “PAT-2”) and the Test of Auditory Processing Skills-3 (hereinafter referred to as “TAPS-3”). On her report, Brooks reported below normal scores on the decoding portion of the PAT-2, however, Student’s scores on the phonological awareness portion of the same exam were normal. Regarding the TAPS-3, Student’s overall scores were within normal phonologic score; however, Student had low memory and cohesions scores which resulted in an overall low score on this test.⁴¹

³⁶ *Id.*

³⁷ Parent Binder, Psychological Evaluations Tab, pp. 20-21; District Binder, pp. 218-19.

³⁸ Parent Binder, Psychological Evaluations Tab, p. 21; District Binder, p. 219.

³⁹ Parent Binder, Psychological Evaluations Tab, p. 22; District Binder, p. 220.

⁴⁰ *Id.*

⁴¹ District Binder, pp. 223-26.

On November 9, 2011, the IEP committee, including Parent, reconvened to discuss the evaluations that had been completed. The decision of the IEP committee was that Student's placement at that time was appropriate.⁴²

On January 11, 2012, another evaluation/programming conference was held to discuss the results of Student's November 30, 2011 audiological evaluation. The decision of the IEP committee was that Student's placement at that time was appropriate.⁴³ At that time, the IEP committee developed a new IEP which noted that Student's guided reading level was ten.⁴⁴

On May 15, 2012, Student's IEP committee held its annual review conference for the purpose of program planning for Student's upcoming fifth grade school year. Pursuant to the "Annual Review/Notice of Decision" that was completed, Student had mastered one of three reading goals and none of his writing goals during the fourth grade.⁴⁵ In math, Student had mastered ten of his seventeen stated goals for the year. Regarding reading, the IEP committee stated: "[Student] continues to be significantly behind grade expectations in reading and writing. His severe deficits in basic reading and language may have attributed to his lack of progress."⁴⁶ The committee further reported that Student was reading at twenty-three words per minute on grade level text, an improvement over fourteen words per minutes as reported at the beginning of fourth grade. Student's guided reading level at the end of fourth grade was sixteen, indicating that Student was reading and comprehending material at the upper first grade level. Regarding spelling, Student continued spelling at the letter naming stage, struggling with vowel sounds, and struggling to correctly spell words with consonant blends. The IEP developed on May 15, 2012, for duration of

⁴² District Binder, p. 27.

⁴³ District Binder, p. 34-36.

⁴⁴ Parent Binder, Grade 4 Tab, pp. 1-10; District Binder pp. 107-17.

⁴⁵ District Binder, p. 40.

⁴⁶ *Id.*

services from August 20, 2012 through May 31, 2013 (Student's fifth grade year) included math, reading, and writing goals for Student.⁴⁷

Pursuant to the "Extended Year Evaluation Data Summary" dated May 15, 2012, the District recommended extended year services to prevent regression over the summer. The document stated, however, that extended year services were not appropriate because Parent had enrolled Student in summer camps and programs.⁴⁸ Parent testified during the hearing at this matter that she did not want Student to have extended year services during the summer of 2012 because she did not feel that the District was working on his specific issues.⁴⁹

Fifth Grade, 2012-2013 School Year

Prior to Student beginning fifth grade, Parent contacted the superintendent of CPS, Dr. Thurman, and requested a meeting with him to discuss her concerns about Student's progress. Dr. Thurman and Stone met with Parent and her attorney, Pat Hays. During the meeting with Dr. Thurman, Parent requested an assistive technology evaluation and discussed with Dr. Thurman and Stone the possibility of a reading intervention for Student.⁵⁰

As a result of this meeting, the District implemented a reading intervention for Student during Student's advisory period, which occurs in the morning.⁵¹ The intervention, which began on August 31, 2012, was provided by Diane Stockman (hereinafter referred to as "Stockman"), a special education teacher at CPS.⁵² Stockman testified that when she began working with Student, he knew his letters, but did not know letter sounds. She further stated that Student could not identify letters with fluency, meaning that Student had difficulty recognizing letters when presented

⁴⁷ District Binder, p 118-141.

⁴⁸ District Binder, p. 42; Transcript, Volume V, pp. 48-49.

⁴⁹ *Id.*

⁵⁰ Transcript, Volume V, pp. 50-52.

⁵¹ Transcript, Volume II, p. 87.

⁵² Transcript, Volume III, pp. 6-7.

to him quickly.⁵³ Stockman reported that by November 2012, Student started working on letter blends.⁵⁴ Stockman testified that she worked with Student every morning for approximately twenty minutes. At the time of the hearing in this matter, Student was still receiving reading intervention from Stockman and had progressed past the letter naming stage.⁵⁵

On August 30, 2012, Parent attended an IEP meeting that was scheduled to address parent's concerns about the need for an assistive technology evaluation. Pursuant to that meeting, it was determined that the District would make arrangements for an assistive technology evaluation, at which time Parent signed an informed consent regarding same.⁵⁶ On September 12, 2012, Easter Seals provided a report to Stone outlining recommendations for Student based on its evaluation.⁵⁷ Recommendations included, but were not limited to, implementing self-management strategies to improve Student attention, providing keyboarding or word processing as a daily activity, using a laptop or iPad to provide aid in writing, providing access to programs such as "Write Out Loud" and "Co-Writer", and using digital text sources such as "Bookshare."⁵⁸

On October 1, 2012, Parent attended an IEP committee meeting to discuss the results of the assistive technology evaluation.⁵⁹ In addition, the IEP committee discussed several questions and concerns raised by Parent. Specifically, Parent discussed with IEP committee members her plans to begin using a program that had previously been provided by the District ("Bookshare"). Parent also requested that Student not be required to write his spelling words five times each, in addition to writing a sentence for each word, explaining that she felt that this was too laborious for Student. Regarding the reading intervention that had been provided to Student since August 31, 2012,

⁵³ Transcript, Volume III pp. 16-17.

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 29-30.

⁵⁶ District Binder, pp. 47-50.

⁵⁷ District Binder, pp. 232-37.

⁵⁸ *Id.*

⁵⁹ District Binder, pp. 52-58.

Parent requested that the District replace the reading intervention with keyboarding skills. Ultimately, the IEP committee decided to continue with the reading intervention each morning, to add additional time after school to practice keyboarding skills, to make available an iPad with a wireless keyboard, as well as a student computer in Student's classroom, and to provide necessary training for Student's teachers regarding two writing programs addressed by Easter Seals in its evaluation.⁶⁰ Student's IEP was updated to include the assistive technology information.⁶¹

On November 5, 2012, an IEP conference was held for the purpose of discussing Student's progress with the reading intervention, his progress in keyboarding, positive behavioral supports, and a speech/language evaluation.⁶² At this conference, it was decided that Student would undergo a speech/language evaluation, that reading intervention would continue for an additional nine weeks, and that Student should continue with keyboarding practice after school.⁶³ Also discussed were concerns about Student being off task, as well as behavior strategies to address this behavior.⁶⁴ On this same date, Student's IEP was revised to reflect his progress in response to the reading intervention. The November 5, 2012 IEP states that, as a result of the interventions with Stockman, Student could recognize 156 of 250 second grade sight words, and that Student had increased his sight words by 55.⁶⁵

On November 28, 2012 and December 17, 2012, Terra Evans (hereinafter referred to as "Evans") conducted a speech language evaluation pertaining to Student.⁶⁶ Evans administered three tests during her evaluation, specifically the Test of Language Development-Intermediate 4 (hereinafter referred to as "TOLD-I:4"), the Comprehensive Test of Phonological Processing

⁶⁰ *Id.*

⁶¹ Parent Binder, Grade 5 Tab, pp. 1-26; District Binder, pp. 142-66.

⁶² District Binder, pp. 59-66.

⁶³ *Id.* at 64.

⁶⁴ *Id.* at 63.

⁶⁵ Parent Binder, Grade 5 Tab, p. 34; District Binder, p. 168.

⁶⁶ Parent Binder, Speech Therapy Tab, pp. 51-56; District Binder, pp. 249-254.

(hereinafter referred to as "CTOPP"), and the Clinical Evaluation of Language Fundamentals 4 (hereinafter referred to as "CELF-4").⁶⁷ Based on these assessments, Evans determined that Student's phonological processing skills were developing within normal limits, but that Student was exhibiting weaknesses with "rapid naming tasks." Evans also noted that Student had a "expressive/receptive language impairment"; however, she found that this impairment was commensurate with Student's IQ and achievement scores. Evans' recommended that Student's needs in the areas of language memory skills, organization skills, and grammar be addressed in the resource and/or special education setting.⁶⁸

On January 4, 2013, at Parent's request, Student was independently evaluated by Melissa Hannah (hereinafter referred to as "Hannah"), who is a speech language pathologist at All Children's Academy.⁶⁹ Hannah reviewed and summarized the test results of prior tests that had been administered to Student, as well as administered additional assessments. Hannah's reported impressions include, but are not limited to, the following: (1) Student exhibits moderate to severe language impairment; (2) Student exhibits low average to moderately impaired receptive language skills; (3) Student exhibits profound expressive language impairment; (4) Student exhibits average to mildly impaired semantic language skills; (5) Student exhibits moderate impairment of grammar; (6) Student exhibits a severe to profound impairment in working memory skills; (7) Student exhibits moderate to profound impairment in auditory processing skills; (8) Student exhibits severe to profound impairment in written language; (9) Student exhibits a severe impairment in reading comprehension; (10) Student's phonological awareness and processing skills are in the low average to mildly impaired range; and (11) Student exhibits a moderate to severe impairment in spelling

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Transcript, Volume 3, p. 173.

and word identification skills.⁷⁰ Hannah, therefore, recommended that Student receive speech and language therapy three times per week, sixty minute sessions, for a total of 180 minutes of speech therapy per week.⁷¹ Hannah further recommended, based on the deficits that she observed, that Student would benefit from intensive language instruction using the DuBard Association Method and the Lindamood Bell LiPS and Seeing Associations Method.⁷²

In addition to the independent speech-language evaluation, Parent had Student evaluated by Susan Jeter (hereinafter referred to as "Jeter"), a Licensed Psychological Examiner.⁷³ Like Hannah, Jeter reviewed Student's previous educational records, conducted a parent interview, and administered additional tests, specifically: Comprehensive Test of Nonverbal Intelligence (hereinafter referred to as "CTONI"), Woodcock-Johnson III Normative Update (NU) Tests of Achievement, Test of Word Reading Efficiency (hereinafter referred to as "TOWRE"), Gray Oral Reading Test - 4th Edition (hereinafter referred to as "GORT-4"), Comprehensive Test of Phonological Processing (hereinafter referred to as "CTOPP"), and Test of Orthographic Competence (hereinafter referred to as "TOC").⁷⁴

Regarding the CTONI, Jeter found Student to be in the average range on the nonverbal IQ and geometric nonverbal IQ, and in the upper average range on the pictorial nonverbal IQ. On the remaining tests administered, however, Jeter noted deficiencies. Specifically, on the Woodcock-Johnson, Student's performance indicated delays across reading, math calculation, math reasoning, and written expression skills, and severe delays in word reading, spelling, and handwriting skills. With regard to letter-word identification, reading fluency, word attack, writing samples, and spelling of sounds subtests, Student performed at a level commensurate to that of the second grade.

⁷⁰ Parent Binder, Speech Therapy Tab, pp. 1-50.

⁷¹ *Id.* at 19.

⁷² *Id.* at 45.

⁷³ Parent Binder, Psychological Evaluations Tab, pp. 1-16.

⁷⁴ *Id.*

With regard to the spelling subtest, Student performed at a level commensurate to that of first grade.⁷⁵ On the TOWRE, which assesses the ability to accurately and fluently pronounce printed words, as well as apply decoding knowledge and skills with nonsense words, Student scored in the “very poor” range.⁷⁶ Similarly, on the GORT-4, which measures general reading skills (text read aloud), Student once again scored in the “very poor” range, with rate and accuracy falling at the first percentile and fluency falling at less than the first percentile.⁷⁷ The CTOPP, which was also administered by Evans less than three months earlier, showed Student to have average phonological awareness and rapid naming skills, and poor phonological memory skills.⁷⁸

Based on her review of previous assessment, as well as those assessments that she administered, Jeter concluded that Student’s learning disorder profile is characteristic of a student with severe Developmental Dyslexia and Developmental Dysgraphia.⁷⁹ As such, Jeter made several recommendations regarding Student, including, but not limited to, the following: (1) work with an individual reading specialist to address current delays; (2) utilize Earobics software program to enhance phonological awareness, auditory memory, and literacy skill training; (3) utilize books on tape for school text and recreational reading (“Bookshare” or “Learning Ally”); (4) utilize assistive technology programs and devices (Kurzweil 3000, use of iPhone and iTouch Apple products; (5) practice and utilize keyboarding skills at home and school; and (6) academic accommodations, including, but not limited to, preferential seating, physical breaks and movement, frequent checks to determine if Student is on task, repeating oral and written instruction, extended time for assignments, group words by spelling rules, and electronic speller for class assignments.⁸⁰

⁷⁵ *Id.* at 4-5.

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 6.

⁷⁸ *Id.* at 7-8.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at 11-16.

In December 2012, Student's special education teacher, Vance, and the teacher providing Student's reading intervention, Stockman, attended a week-long training on the Orton-Gillingham methodology to teach reading and handwriting.⁸¹ Vance testified that she had used this methodology to teach Student since returning from the training. Prior to the training, she was not utilizing a formal reading program but, instead, was doing guided reading with Student.⁸² Vance teaches using the Orton-Gillingham method every day, teaching in a small group and pulling children out for individual attention when needed. Vance testified that the progress that she has seen in students since implementing the Orton Gillingham method has been "phenomenal."⁸³

The record contains documentary evidence, as well as testimony, regarding Student's performance on various assessments during the fifth grade year. Student's DRA level was sixteen in May 2012 (ending first grade), eighteen in November 2012 (beginning second grade), and thirty-four in April 2013 (third grade).⁸⁴ Student's DIBELS Oral Reading Fluency level was first grade, second month in November 2012 and second grade, third month in March 2013. Student's Brigance scores were as follows (some tests not mentioned): (1) listening comprehension - upper second grade in August 2012, fifth grade in April 2013; (2) word recognition - second grade in August 2012, third grade in April 2013; (3) oral reading - upper first grade in August 2012, upper third grade in April 2013; (4) reading vocab comprehension - first grade in in August 2012, third grade in April 2013; (5) comprehension of short passages - upper first grade in August 2012, lower third grade in April 2013; (6) comprehension of long passages - first grade in August 2012, third grade in April 2013; and (7) spelling grade placement - second grade in August 2012, third grade in April

⁸¹ Transcript, Volume 1, pp. 87-88.

⁸² Transcript, Volume 2, pp. 6-7.

⁸³ *Id.* at 7-10.

⁸⁴ District Binder, pp. 377-80.

2013.⁸⁵ In math, Student began the year in August 2012 having mastered goals on a third grade placement test, and by April 2013, Student was near mastery on the fifth grade placement test.⁸⁶ A review of Student's progress on his IEP reading and writing goals show significant gains in performance between the end of the second nine weeks (December 2012) and the end of the third nine weeks (March 2013).⁸⁷ When asked about the large jumps in percentage of mastery between the second and third nine weeks, Vance stated that she attributed the "great gains" to the Orton Gillingham method, which was implemented in January 2013, at the beginning of the third nine weeks.⁸⁸

All Children's Academy

Cindy Young (hereinafter referred to as "Young"), founder and CEO of All Children's Academy (day school), testified that that school that she founded was approximately two years old.⁸⁹ She testified that, in addition to operating the facility, she wrote curriculum, created materials, trained school staff, and trained parents.⁹⁰

Young testified that language foundation was the key to academics, explaining that children with speech and language delays could appear to have a learning disability even though they are within normal limits on IQ assessments.⁹¹ She stated that children are learning to read until the second grade, after which they are "reading to learn." Young explained that it is not possible for children that are unable to read to satisfactorily "do academics."⁹²

⁸⁵ *Id.* at 378-79.

⁸⁶ *Id.* at 379-80.

⁸⁷ Parent Binder, Grade 5 Tab, pp. 14-22.

⁸⁸ Transcript, Volume II, p. 59-61.

⁸⁹ Transcript, Volume IV, pp. 96-97.

⁹⁰ *Id.* at 97.

⁹¹ *Id.* at 98.

⁹² *Id.* at 98-99.

When asked about the philosophy of All Children's Academy, Young explained that the school provides a "therapeutically enhanced education," further explaining that the school views children as being made up of six domains, namely intellectual ability, social skills, spirituality, emotional well-being, environmental influences, and physical attributes.⁹³

All Children's Academy is not accredited, although Young testified that she was seeking accreditation through the International Multi-Sensory Structured Language Educational Council.⁹⁴ The school utilizes the DuBard Association method, which has Orton-Gillingham roots, to provide a multi-sensory way to teach children how to read and write.⁹⁵ Young stated that Orton-Gillingham is the "grandfather of everything," adding that "everything stems from Orton-Gillingham when you are talking about a learning disability."⁹⁶

Young testified that the school has one certified teacher (early childhood), a teacher's assistant who will finish her education in one year, three speech pathologists, three occupational therapists, and one physical therapist.⁹⁷ All Children's Academy has two, multi-level classrooms. The first classroom is for children that range in age from five to seven years, and the second classroom is for children ranging in age from seven to twelve years.⁹⁸ If Student were to attend All Children's Academy, he would be in Classroom Two, which is taught by Hannah, a speech-language pathologist, as well as one teaching assistant.⁹⁹ The maximum number of students that could be in the class is twelve, resulting in a 1:6 teacher/student ratio.¹⁰⁰ Student would be in a classroom with

⁹³ *Id.* at 99.

⁹⁴ *Id.* at 100-01.

⁹⁵ *Id.* at 102.

⁹⁶ *Id.* at 138.

⁹⁷ *Id.* at 104-05.

⁹⁸ *Id.* at 116-17.

⁹⁹ *Id.* at 107.

¹⁰⁰ *Id.* at 131-32.

children of all different ages and abilities.¹⁰¹ Young testified that she was expecting twenty-four children to enroll for the upcoming school year.¹⁰² She explained that, at this time, two of the children enrolled at the school are considered "borderline or below mental retardation"; however, she stated that All Children's Academy is no longer accepting children that are not within normal limits on an IQ assessment.¹⁰³ All of the children at All Children's Academy, with the exception of two, have a disability.¹⁰⁴

When asked specifically about Student, Young testified that she felt that Student needed to attend "daily, intensive academic."¹⁰⁵ She added that, per Hannah's recommendation, Student would also require 180 minutes of speech-language therapy per week.¹⁰⁶ Young stated that she did not know how long it would take for Student to close the gap, but she estimated that he needed two years of intensive education at this point after which Student could return to CPS.¹⁰⁷

The tuition to attend All Children's Academy is \$1000 per month, plus \$110 per hour for individual speech therapy. In addition, there is a \$400 per year supplemental fee and a \$25 application fee.¹⁰⁸

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.¹⁰⁹ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district

¹⁰¹ *Id.* at 132-33.

¹⁰² *Id.* at 105.

¹⁰³ *Id.* at 106.

¹⁰⁴ *Id.* at 137-38.

¹⁰⁵ *Id.* at 119-20.

¹⁰⁶ *Id.* at 120.

¹⁰⁷ *Id.* at 121.

¹⁰⁸ *Id.* at 124; Parent's Binder, All Children's Academy Tab, pp. 3-4.

¹⁰⁹ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

has failed to provide FAPE as required by federal law.¹¹⁰ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.¹¹¹

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for Parent, although she elicited occasional testimony regarding procedural issues at the hearing of this matter, did not raise any procedural violations of the IDEA in either the request for due process hearing or the brief in lieu of closing arguments. As a procedural safeguard, the party requesting a due process hearing is not permitted to raise issues at the due process hearing unless those issues were raised in the due process complaint. The only exception is where the opposing party agrees otherwise.¹¹² As such, this Hearing Officer hereby finds that the District did not deny a FAPE to Student on account of violation of any procedural issues.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student, *i.e.* whether the District failed to provide an IEP that was reasonably calculated to enable Student to receive educational benefits.¹¹³ Pursuant to *Rowley*, the goal of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."¹¹⁴ Essentially, an IEP is not required to be designed to "maximize a student's potential commensurate with the opportunity provided to other children," thus making the standard that the District must

¹¹⁰ 458 U.S. 176, 206-07 (1982).

¹¹¹ *Id.*

¹¹² 34 C.F.R. 300.511(d); 20 U.S.C. 1415(f)(3)(B).

¹¹³ *Rowley*, 458 U.S. at 206-07.

¹¹⁴ *Id.* at 192.

meet very minimal.¹¹⁵ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”¹¹⁶ In determining whether a disabled student’s IEP complies with the IDEA, an important factor can be academic progress of the student.¹¹⁷

In the present case, given the IDEA’s two-year statute of limitations, the consideration of whether Student was denied FAPE is specific to the time period between December 11, 2010 (middle of third grade) and December 11, 2012 (middle of fifth grade).

Based on the facts in this case, Student has been identified since Kindergarten as being eligible for special education services under the IDEA on account of a specific learning disability in the areas of reading, writing, and math. Although the speech-language pathologists and psychological examiners disagree about certain aspects of Student’s disability, it is undisputed that Student has severe deficits with regard to working memory, which greatly affect his ability to read and write. Despite these deficits, however, Student was found in the years 2011 and 2013 to fall within the average range when administered intelligence tests.

From middle of third grade to beginning of fourth grade, Student made no significant gains based on his DRA and guided reading levels. In December 2010, as well as in May 2011, Student’s IEP committee noted during conferences that Student was reading well below grade level, and Stone admitted that Student made little progress during third grade.

¹¹⁵ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), cert. denied, 540 U.S. 984 (2003).

¹¹⁶ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

¹¹⁷ *Rowley*, 458 U.S. at 203.

From beginning of fourth grade to beginning of fifth grade, once again, Student made miniscule progress. At the annual conference at the end of fourth grade, specifically the conference held on May 15, 2012, Student's IEP committee noted that Student had mastered only one of three reading goals and zero writing goals for the year. Yet, in math, Student had mastered ten of seventeen goals for the year, indicating that Student is capable of learning. During the fourth grade, in sum, Student barely increased the number of words per minute that he could read (14 to 23 over the year), and continued to be in the letter naming stage of reading according to his DSA scores. Also, Student's guided reading level showed that Student was continuing to read at the upper first grade level at the end of fourth grade. Once again, Student's IEP committee acknowledged on the May 15, 2012 IEP that Student was continuing to be significantly behind grade expectations in reading and writing, noting a lack of progress.

During the first semester of fifth grade, Student once again made little to no progress. At the beginning of the year, Student remained in the letter naming stage of reading, and, despite a newly implemented daily reading intervention, Student had only begun to work on letter blends by November 2012. During an IEP conference on November 5, 2012, it was noted that as a result of the reading intervention, Student could recognize 156 of 250 second grade sight words, representing an increase of only 55 new second grade sight words.

In a similar case, the Eighth Circuit Court of Appeals stated that "there may be instances in which an educational program that results in such slight progress is sufficient to comply with the statute in light of the student's disability." The Court, however, found that where the student in question had intellectual ability in the average range and, in addition, was socialized, well behaved

and willing to work, such progress was not sufficient to establish that the school district had provided educational programming reasonably calculated to provide some educational benefit.¹¹⁸

Similarly, in this case, Student possesses average intelligence, but his achievement is highly discrepant when compared to his intellectual ability. Although there are some references in the record to Student potentially having some attention deficit issues, for the most part, the record indicated that Student is compassionate, enjoys school and is willing to participate in class and other school activities. This does not appear to be a child that is unable to learn due to intellectual deficiencies. In fact, Student's performance on his math goals is further evidence of such. Instead, it appears that Student, between December 11, 2010 and December 11, 2012, was struggling to learn on account of the fact that his special education programming pertaining to reading and writing was not reasonably calculated to enable him to receive educational benefit in these areas.

This Hearing Officer has no doubt based on the testimony of the District's witnesses that the District genuinely wanted to assist Student in making progress on his reading and writing goals during the two-year period addressed above. Nonetheless, based on the evidence in the record, this Hearing Officer finds by a preponderance of the evidence that the District did not meet the minimal requirement of providing some educational benefit to Student between December 11, 2010 and December 11, 2012 in the areas of reading and writing and, thus, substantively denied Student a FAPE.

Having determined that the District denied a FAPE to Student from December 11, 2010 to December 11, 2012, this Hearing Officer must now determine whether Student should be placed at All Children's Academy, a private school in Little Rock, Arkansas, as requested by Parent. It should be noted that there is no requirement in the IDEA that a child be provided with the specific

¹¹⁸ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011).

educational placement that his or her parents prefer.¹¹⁹ Nor does the IDEA require that a school district maximize a student's potential or provide the best possible education at the expense of the public.¹²⁰ Pursuant to *Rowley*, a district's obligations under the IDEA are satisfied when a child receives a FAPE, i.e. "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."¹²¹ As addressed previously, a public school district has a responsibility under the IDEA to offer eligible children instruction and programming reasonably calculated to provide some educational benefits.¹²² In addition, the IDEA requires that disabled students be educated in the "least restrictive environment."¹²³ In this regard, the IDEA reflects a "strong preference" that children with disabilities attend regular classes with non-disabled children.¹²⁴

In the present case, this Hearing Officer has determined that FAPE was not provided to Student from December 11, 2010 to December 11, 2012. However, evidence in the record suggests that beginning in January 2013, CPS began providing programming designed to provide some educational benefit to Student. In December 2012, Vance and Stockman, both special education teachers that work directly with Student, attended a week-long training on the multi-sensory-based Orton-Gillingham methodology for teaching reading and handwriting. Vance testified that she began using this method at the beginning of year 2013, specifically the second semester of Student's fifth grade year. Vance indicated that she had seen phenomenal progress from Student since she began utilizing the Orton-Gillingham methodology. Student's performance on end of year progress assessments showed that significant progress had been made by Student since the implementation

¹¹⁹ *T.F. v. Special School Dist. St. Louis Co.*, 449 F.3d 816, 821 (8th Cir. 2006).

¹²⁰ *Fort Zumwalt Sch. Dist. V. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997).

¹²¹ *Rowley*, 458 U.S. at 203.

¹²² *Blackmon v. Springfield*, 358 F.3d 999 (8th Cir. 1998).

¹²³ 20 U.S.C. § 1412(a)(5)(A).

¹²⁴ *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996).

of the Orton-Gillingham methodology. In fact, most of the assessments administered to Student on or before April 2013 indicated that Student had progressed in reading and writing, on average, approximately two grade levels. As such, this Hearing Officer finds that, although CPS failed to provide FAPE between December 11, 2010 and December 11, 2012, evidence in the record establishes beyond a preponderance of the evidence that the programming provided to Student between December 11, 2012 and the end of Student's fifth grade year provided him with some educational benefit. Thus, private placement with All Children's Academy is not appropriate due to the fact that CPS has demonstrated that it is capable of providing FAPE to Student at this time.

It should be noted that this Hearing Officer is not suggesting that District should have implemented the Orton-Gillingham methodology as Student's program between December 11, 2010 and December 11, 2012. Certainly, it is not the place of a court or hearing officer to assume the expertise of an education professional and suggest one teaching method over another.¹²⁵ Instead, this Hearing Officer asserts that the use of Orton-Gillingham from December 2012 through the end of Student's fifth grade year served to illustrate that there were other programming options available for purposes of providing Student with some educational benefit, *i.e.* FAPE.

In addition to denying placement at All Children's Academy on the basis that CPS is now providing FAPE, this Hearing Officer also notes that placement at All Children's Academy would not result in Student being educated in the least restrictive environment. Based on the facts in the record, placing Student at All Children's Academy would result in his being in a classroom with children at different age (7yo to 12yo) and ability levels, who more than likely will all be disabled. Conversely, at CPS, student is with age-appropriate peers, with a mix of disabled and non-disabled,

¹²⁵ *Zumwalt*, 119 F.3d at 614.

indicating that CPS, in addition to being an appropriate placement from an educational benefit standpoint, also constitutes the least restrictive environment.

ORDER:

The results of the testimony and evidence warrant a finding for the Parent. Specifically, Parent has introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student a FAPE between December 11, 2010 through December 11, 2012 by failing to produce IEPs for Student that were reasonably calculated to provide some educational benefit to Student in the areas of reading and writing. Although the private placement requested by Parent is not appropriate at this time, compensatory education is warranted to compensate Student for the loss of programming and progress that occurred between the middle of third and the middle of fifth grade.

Therefore, this Hearing Officer hereby orders that District provide to Student 300 additional minutes per week of individualized reading and writing instruction for the duration of the 2013-2014 school year (sixth grade). It is further ordered that these minutes will be broken down throughout the week so that Student receives thirty minutes of individualized reading and writing instruction each school-day morning (advisory period), and an additional thirty minutes of instruction following the conclusion of each school day.

In addition, so as to rule out the possibility that attention issues are impacting Student educationally, it is hereby ordered that Student undergo a complete and appropriate evaluation, at District's expense.

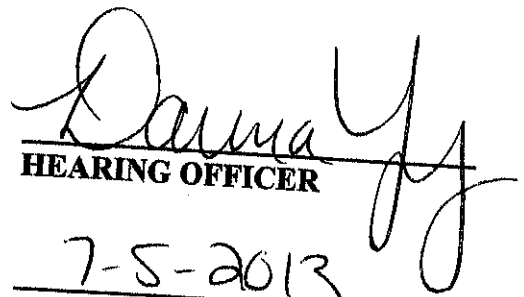
FINALITY OF ORDER AND RIGHT TO APPEAL:

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 Individual's 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.


HEARING OFFICER
7-5-2013
DATE