

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXX and XXXXXXXXXXXX

Parents on behalf of **XXXXXXXXXX**, Student

PETITIONER

VS.

CASE NO. H-14-12

Bentonville School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Bentonville School District (hereinafter "District" or "Respondent") denied Student a free and appropriate public education (hereinafter "FAPE") during the 2013-2014 school year, in violation of the Individuals with Disabilities in Education Act (hereinafter "IDEA"), by failing to educate Student in the least restrictive environment, requiring student to take the "alternate assessment" as opposed to the "regular assessment" (standard benchmark exam), failing to afford Parents meaningful participation in individualized educational program (hereinafter "IEP") meetings and Student's education, and failing to maintain placement pursuant to the last agreed-upon IEP during the pendency of the due process proceedings in the above-captioned matter.

PROCEDURAL HISTORY:

On December 4, 2013, the Arkansas Department of Education received a request to initiate due process hearing procedures from XXXXXXXX XXXXXX and XXXXXX XXXXXXXX (hereinafter referred to as "Parents" or "Petitioner"), the parents and legal guardians of

Student. Parents requested a due process hearing because they 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 Arkansas Department of Education by failing to provide Student an education in the least restrictive environment, failing to allow Student an opportunity to be included in instruction with his non-disabled peers, failing to allow Student to participate in statewide testing with his non-disabled peers, and failing to provide Parents meaningful participation in Student’s education (including IEP meetings). At the time that Parents filed a request for due processing hearing, Student was a nine-year-old, fourth grade, male enrolled in the District.

In response to the Parents’ request for hearing, the Arkansas Department of Education assigned the case to an impartial hearing officer. Thereafter, the date of January 13, 2014 was set as the date on which a hearing would commence should Parents 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 5, 2013.

On January 6, 2014, an initial pre-hearing conference regarding this matter was conducted via telephone, with counsel for both parties participating. Counsel for Respondent requested a continuance of the scheduled due process hearing, and counsel for Petitioner stated that she had no objection. Thereafter, on January 8, 2014, counsel for Respondent filed an Agreed Motion for Continuance requesting that the due process

hearing in the above-captioned matter be continued until the week of January 27, 2014. An Order granting the requested continuance was entered on January 9, 2014.¹

A second prehearing conference regarding this matter was conducted, via telephone, on January 24, 2014. Once again, counsel for both parties participated in the hearing. 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 Parents had the burden of proof regarding the issues raised pursuant to this matter. Thereafter, the closed due process hearing began as scheduled on January 27, 2014. All in all, testimony was heard on January 27, 2014, January 28, 2014, January 29, 2014, and January 30, 2014.² The following witnesses testified in this matter: Kathy Herndon, Amy Simpson, Lisa St. John, Kenny Timbrel, Lissa Bisshop, Ansley Webb, Noel Dollard, Carrie Cousins, XXXXXXXXXX XXXXX, and Lauren Albey.

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 a closed impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and the District was represented by Marshall Ney (Rogers, Arkansas).

¹ See Hearing Officer Binder of Pleadings and Orders.

² See *generally* Transcript, Vols. 1-4.

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.³

FINDINGS OF FACT:

Student is a nine-year-old male that is currently enrolled in the fourth grade at Apple Glen Elementary School, a school within the Bentonville School District.⁴ Student's father testified that Student was officially diagnosed with autism at the age of five following an evaluation at the Dennis Developmental Center in Little Rock, Arkansas.⁵ As a result, Student has been receiving special education services at Apple Glen Elementary School under the disability category of autism since he began Kindergarten.⁶ Student's father testified that, since Kindergarten, the amount of time (weekly minutes) that Student has spent in the general education curriculum has gradually increased each year.⁷

On May 3, 2013, Student's IEP team met to discuss and develop Student's IEP for the 2013-2014 school year (duration of services from August 1, 2013 to August 1, 2014).⁸ Pursuant to the IEP, Student was to receive 1350 minutes of general education per week (literacy, math, art, music, library, physical education, lunch, recess, social studies), and 750 minutes of special education per week (literacy, math, speech therapy).⁹ According to the statement of academic needs, Student, as of the end of the 2012-2013 academic year (third

³ See Hearing Officer Binder of Pleadings and Orders.

⁴ Transcript, Vol. 1, p. 25.

⁵ Transcript, Vol. 4, p. 12.

⁶ *Id.* at p. 33.

⁷ *Id.* at pp. 33-34, 198-200.

⁸ Parent's Binder, pp. 43-61.

⁹ *Id.* at p. 43; Transcript Vol. 1, p. 27; District's Binder, p. 301.

grade), required a “para for all subjects in addition to receiving support through the autism classroom,” and attended only “specials, lunch/recess, and field trips independently.”¹⁰

With regard to achievement of annual goals, the May 3, 2013, IEP stated that Student had mastered 0/2 of his reading goals, 1/1 writing goals, and 1/1 math goals during the third grade, further explaining that Student read fluently at the second to third grade level, but lacked mastery of comprehension strategies necessary to demonstrate comprehension of the texts that he read.¹¹ It was also noted that Student’s “Composite Intelligence Index” based on the RIAS was 71, falling in the borderline range; that Student had delayed expressive, receptive, and pragmatic language; and that Student had below average social skills and extremely low communication skills.¹² These deficits were further addressed in the goals portion of the IEP. Specifically, regarding math, it was noted that Student’s language delays and intellectual abilities adversely affected his ability to reason and problem solve at a level commensurate to his peers.¹³ Regarding speech, reading, and writing, it was noted that Student’s communication impairment negatively impacted his ability to use language skills when reading, writing, and speaking, and that these deficits adversely affected Student’s ability to demonstrate reading comprehension.¹⁴ Student’s IEP included goals for the 2013-2014 school year to address these deficits.¹⁵

The May 3, 2013, IEP also included numerous academic modifications for Student, including (1) altering assignments by providing an opportunity to respond orally, reducing

¹⁰ Parent’s Binder, p. 44.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 49.

¹⁴ *Id.* at 49-53.

¹⁵ *Id.* at 47-53.

assignments, allowing extra time for assignment completion, and emphasizing major points; (2) adapting instruction by providing preferential seating, giving short instructions, encouraging classroom participation; and allowing visual aids; (3) adapting tests by providing small group testing, extending time, and reading aloud all allowable portions; and (4) managing behavior by providing para support for regular education classes.¹⁶

Parents participated in the May 3, 2013, IEP meeting and signed the signature page of the IEP that was developed.¹⁷ The May 3, 2013, IEP was implemented in August 2013 at the beginning of the 2013-2014 academic year.

On August 29, 2013, the District sent a Notice of Conference to Parents.¹⁸ Pursuant to the Notice, an IEP meeting was scheduled for September 12, 2013, and the purpose of the meeting was to review and revise Student's IEP.¹⁹ The District sought to modify Student's May 3, 2013, IEP by increasing special education minutes per week,²⁰ and by changing the format of Student's annual assessment test from the regular assessment (standard benchmark exam) to the alternate portfolio assessment.²¹

On September 12, 2013, Student's IEP team, including Parents, met to discuss these proposed modifications.²² Amy Simpson (hereinafter "Simpson"), assistant principal, testified that the IEP team explained to Parents during the meeting that it felt that a modification was necessary because Student was making minimal advances toward the

¹⁶ *Id.* at 57-58.

¹⁷ *Id.* at 61; Transcript, Vol. 1, p. 26; District's Binder, p. 301.

¹⁸ District's Binder, p. 307; Transcript, Vol. 2, p. 38.

¹⁹ District's Binder, p. 307.

²⁰ Parent's Binder, p. 1; District's Binder, p. 309.

²¹ Parent's Binder, p. 5; District's Binder, p. 313; Transcript, Vol. 1, pp. 175-76.

²² District's Binder p. 307.

goals and objectives on his IEP.²³ Simpson testified that she had reviewed “data” regarding Student prior to attending the September 12, 2013, clarifying that she did not review documents, but rather spoke to Student’s teachers and observed Student in the classroom.²⁴ Kenny Timbrel (hereinafter “Timbrel”), Student’s special education teacher, indicated that Student was having continued issues with reading comprehension, problem solving, abstract thinking, and social communication.²⁵ He further testified that it was necessary to work with Student on social skills development while Student was in the special education classroom on account of this being another of Student’s deficits.²⁶ Timbrel testified that, although Student had gradually progressed since his Kindergarten year from complete self-containment to spending more than half of each day in the general curriculum, the “rigor” of the fourth grade common core standards and curriculum was difficult for Student to handle.²⁷ Ansley Webb (hereinafter Webb”), Student’s regular education teacher, testified that she met with Parents prior to the September 12, 2013 IEP meeting and, during that meeting, showed Parents samples of Student’s work and talked with them about her concerns that Student was not being successful in her class.²⁸ Webb testified that, even with academic modifications, Student was struggling with reading comprehension and application of concepts.²⁹ Timbrel testified that he was also able to

²³ Transcript, Vol. 1, pp. 110-112.

²⁴ *Id.*

²⁵ Transcript, Vol. 2, p. 34.

²⁶ *Id.* at 147.

²⁷ *Id.* at 128-29.

²⁸ Transcript, Vol. 3, pp. 82-83.

²⁹ *Id.* at pp. 86-91.

work with Student on social skills while Student was in the special education classroom, social skills being another deficit that Student exhibited.³⁰

As a result of these deficits, the District proposed to modify Student's IEP such that Student's general education classroom minutes were decreased from 1350 to 1050 per week, and his special education classroom minutes were increased from 750 to 1050 per week.³¹

The District also proposed to change the format of Student's annual assessment test from the regular assessment (standard benchmark exam) to the alternate portfolio assessment.³² The alternate portfolio assessment is appropriate for students when three criteria are met, specifically:

- A. The student's demonstrated cognitive functioning and adaptive behavior in the home, school, and community environments are significantly below age expectations even with program modifications and adaptations.

AND

- B. The student's course of study is primarily functional and life-skills oriented.

AND

- C. The student requires extensive direct instruction and/or extensive supports in multiple settings to acquire, maintain, and generalize skills necessary for application in school, work, home, and community environments.³³

The Arkansas Department of Education has issued guidelines for local education agencies to use in determining students for whom the regular assessment (standard benchmark

³⁰ Transcript, Vol. 2, p. 147.

³¹ Transcript, Vol. 1, p. 175; Parent's Binder, p. 1; District's Binder, p. 309.

³² Parent's Binder, p. 5; District's Binder, p. 313; Transcript, Vol. 1, pp. 175-76.

³³ Parent's Binder, p 5; District's Binder, p. 313.

exam) is not appropriate. These guidelines provide examples of each of the three criteria set forth above (Criteria A through C).

Examples of Criteria A are as follows:

- “IQ is in or within close proximity to range for mental retardation and academic and adaptive behavior is commensurate with this score.”
- “IQ is below average (high 80’s and less) and academics and behavior are 4 years or more below grade level.”³⁴

Examples of Criteria B are as follows:

- “Reading is focused on functional words/community words. Student is still working on decoding and building sight word vocabulary or reading.”
- “Math is focused on skills needed for community. Heavy use of manipulatives (money, counters). Student is still learning base 10 skills for addition/subtraction.”
- “Social skills and adaptive behavior are taught directly.”³⁵

Examples of Criteria C include the following:

- “Student is in self-contained setting for majority of the day.”
- “Student requires support in other settings to carry over skills learned.”³⁶

The District, after reviewing the portfolio assessment criteria and related guidance, determined that Student met all three criteria. Therefore, the District explained to Parents

³⁴ Parent Binder, p. 440-43.

³⁵ *Id.* at 440.

³⁶ *Id.* at 440.

that it felt that the alternate portfolio assessment was a better measure of Student's academic abilities than the regular assessment (standard benchmark exam).³⁷ Until the 2012-2013 academic school year (third grade), Student had been administered the portfolio assessment.³⁸ Student participated in the regular assessment (standard benchmark exam) only during the 2012-2013 academic school year.³⁹ Student sat for one day of the regular assessment (standard benchmark exam) and, based on his results for that one day, scored in the one percentile.⁴⁰

Parents disagreed with the proposed modifications to Student's IEP and wanted to research possible additional accommodations that might be permissible so that Student could take the regular assessment (standard benchmark exam). No changes were made to Student's IEP at the September 12, 2013 meeting, allowing Parents an opportunity to consider the proposed modifications and research these issues further.⁴¹ Student's father testified that Parents did not want Student to take the alternate portfolio assessment because "the more higher expectations you have on him, the more he delivers."⁴²

On November 1, 2013, the District sent a Notice of Conference to Parents.⁴³ Pursuant to the Notice, an IEP meeting was scheduled for November 22, 2013, and the purpose of the meeting was to review and revise Student's IEP.⁴⁴ On November 22, 2013, Student's IEP team, including Parents, met to once again discuss District's proposed

³⁷ Transcript, Vol. 1, p. 113.

³⁸ Transcript, Vol. 4, pp. 214-219.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Transcript, Vol. 2, p. 22; Transcript, Vol. 4, pp. 70, 79-80.

⁴² Transcript, Vol. 4, p. 78.

⁴³ Parent's Binder, p. 174.

⁴⁴ *Id.*

modifications.⁴⁵ At Parents' request, Dr. Gary Jones, a counseling psychologist who had evaluated Student, attended the meeting as well.⁴⁶ Student's father testified that the IEP team, once again, reiterated that Student was not being successful in his general education classes and wanted to re-discuss District's preference that Student be placed on the alternate portfolio assessment.⁴⁷ Parents and Dr. Jones disagreed with District's proposed IEP modifications and requested additional accommodations so that Student would be able to take the regular assessment (standard benchmark exam).⁴⁸ Some of the accommodations requested by Parents were not permitted for the regular assessment (standard benchmark exam), and District notified Parents of same.⁴⁹ Parents refused to sign the IEP form.⁵⁰

At the conclusion of the November 22, 2013, IEP meeting, Parents were told that they had seven days in which to respond to District's proposed IEP modifications.⁵¹ They were also notified of their due process rights.⁵² The following week, November 25 through November 29, 2013, the school was closed for the Thanksgiving holiday.⁵³ On Monday, December 2, 2013, District implemented the modified IEP which is dated November 22, 2013.⁵⁴

On December 4, 2013, Parents filed a "Due Process Complaint" with the Arkansas Department of Education. In their complaint, Parents alleged substantive violations of

⁴⁵ Transcript, Vol. 4, p. 97.

⁴⁶ *Id.*

⁴⁷ *Id.* at 97-98.

⁴⁸ Transcript, Vol. 1, pp. 159, 217.

⁴⁹ *Id.* at p. 217.

⁵⁰ *Id.* at p. 72.

⁵¹ *Id.* at pp. 159, 217.

⁵² *Id.* at pp. 71-72.

⁵³ *Id.* at p. 90.

⁵⁴ *Id.* at pp. 90-92.

IDEA, specifically stating that District's proposed modifications to Student's May 3, 2013, IEP (increasing the number of special education minutes per week), failed to provide Student with an education in the least restrictive environment, and prevented student from being fully integrated with his non-disabled peers. Parents also alleged that District's decision to give Student the alternate portfolio assessment instead of the regular assessment (standard benchmark exam) constituted a violation of the IDEA. Finally, Parents alleged procedural violations of the IDEA, specifically pleading that District denied them the opportunity to participate in IEP meetings and Student's education. Parents requested that Student be given compensatory special education and related services for the denial of FAPE, that District be ordered to develop an appropriate IEP, that Parents be allowed meaningful participation in the IEP process and in Student's education, that District employees be ordered to undergo training requiring due process procedures, and that Parents be declared to have exhausted their administrative remedies.⁵⁵

Student remained on the November 22, 2013, IEP (modified IEP) until January 27, 2014, when this Hearing Officer ordered that Student's stay-put placement was to be the May 3, 2013, IEP throughout the pendency of these proceedings.⁵⁶

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.⁵⁷ 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

⁵⁵ See Hearing Officer Binder of Pleadings and Orders.

⁵⁶ Transcript, Vol. 1, pp. 96-97.

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

whether a school district has failed to provide FAPE as required by federal law.⁵⁸ 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.⁵⁹

Allegations of Procedural Violations of the IDEA

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District procedurally violated the IDEA by denying Parents the opportunity to meaningfully participate in the development of Student's IEPs and, in general, his education. Specifically, Parents contend that District failed to consider their suggestions at the IEP meetings on September 12, 2013 and November 22, 2013, and that District failed to consider the opinions of their hired expert (counseling psychologist) at the IEP meeting on November 22, 2013.

The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to participate.⁶⁰ Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents.⁶¹ Such predetermination could deprive parents of a meaningful opportunity to

⁵⁸ 458 U.S. 176, 206-07 (1982).

⁵⁹ *Id.*

⁶⁰ *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010).

⁶¹ *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

participate in the formulation process pertaining to the IEP.⁶² “The IDEA explicitly requires school district to include parents in the team that drafts the IEP to consider ‘the concerns of the parents for enhancing the education of their child’ and to address ‘information about the child provided to, or by, the parents.’”⁶³

Certainly, a school district’s obligation under the IDEA regarding parental participation in the development of a student’s IEP “should not be trivialized.”⁶⁴ In *Rowley*, the Court stated that “[i]t seems . . . no exaggeration to say that Congress placed every bit as much emphasis on 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.”⁶⁵ It should be noted, however, that by requiring parental participation, the IDEA in no way requires a school district to accede to parents’ demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent’s request.

In the present case, Parents were provided notice of both the September 12 and the November 22, 2013, IEP meetings. Parents attended both IEP meetings and shared their views regarding the IEP modifications proposed by District. At the September 12, 2013 meeting, District postponed action so as to allow Parents time consider the proposed modifications and to research alternate solutions and accommodations. At the November 22, 2013, meeting, Parent were permitted to bring a counseling psychologist along with them to render his opinion regarding the effect of the proposed IEP modifications on

⁶² *Gray*, 611 F.3d at 424 (citation omitted).

⁶³ *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)).

⁶⁴ *Rowley*, 458 U.S. at 205-06.

⁶⁵ *Id.*

Student. It is undisputed that Parents disagreed with the modifications that were proposed by District; however, the IDEA does not require that a parent's preference be determinative of educational decisions. There is no evidence in the record to suggest that District refused to consider suggestions from Parents or Parents' expert. Therefore, it is the conclusion of this Hearing Officer that Parents were given a meaningful opportunity to participate in the modification of Student's IEP in the fall of 2013 and, as such, Parents were not denied FAPE as a result of procedural violations of the IDEA.

Allegations of Substantive Violations of the IDEA

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether District substantively denied FAPE to Student. 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."⁶⁶ 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 District must meet very minimal.⁶⁷ 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.'"⁶⁸

⁶⁶ *Id.* at 192.

⁶⁷ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

⁶⁸ *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).

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”⁶⁹ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”⁷⁰ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”⁷¹ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”⁷² As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”⁷³

Parents asserted that District’s modification of Student’s May 3, 2013, IEP (adding additional special education minutes) resulted in a substantive violation of FAPE on account of the fact that Student, pursuant to the modified IEP, would no longer be educated in the least restrictive environment. Specifically, Parents argued that moving Student to a more restrictive educational setting was inappropriate given that (1) Student was not disruptive in his general education classes; (2) Student’s need for social interaction in the regular education curriculum was not considered prior to the modification; (3) the use of

⁶⁹ *CJN*, 323 F.3d at 641.

⁷⁰ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

⁷¹ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁷² *Pachl*, 453 F.3d at 1068.

⁷³ *Roncker*, 700 F.2d at 1063.

supplemental aids and services for Student was not considered prior to the modification; and (4) District's decision to modify Student's IEP and, as such, place Student in a more restrictive educational setting, was not based on measurable data.

In this case, the evidence does indeed suggest that Student has no behavioral problems in his classes. Also, in theory, student would receive more social interaction with his non-disabled peers if he spent more minutes each week in the general education classroom. However, these facts must be balanced against other considerations in determining whether a modification of Student's special education minutes is appropriate. Essentially, if the marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, then a non-segregated setting is the most appropriate placement.

Here, the reasons cited by District for increasing Student's special education minutes were that Student's deficits in reading comprehension, problem solving, abstract thinking, and communication skills were prohibiting him from successfully progressing academically in the general education classroom. Therefore, the question is whether the benefits of inclusion with non-disabled peers, such as modeling and socialization, outweigh the need to provide more intensive educational support. It is the opinion of this Hearing Officer that if Student remains on his May 3, 2013, IEP, with no change in education minutes, Student will have more time among his non-disabled peers, but he will not be learning with them. It is not likely that Student will receive meaningful education if he is continually bombarded with classroom work, projects, and instruction that he is not able to adequately comprehend and perform on account of his reading comprehension, problem-

solving, communication deficits. Instead, it is more likely that Student will benefit from additional minutes in the special education classroom, where he can receive more specialized assistance with these deficits in the hopes that he will progress to the point that he can have his general education minutes once again increased in the future. As such, it is the opinion of this Hearing Officer that the IEP modifications proposed by District on September 12 and November 22, 2013, which provide for 50% of Student's time to be spent in the special education classroom (1050 minutes per week) and 50% of his time to be spent in the general education classroom (1050 minutes per week), provides an appropriate balance so that Student will receive a meaningful education while also receiving the social interaction that he needs.

This Hearing Officer notes Parents' assertion that the use of supplemental aids and services for Student were not considered by District prior to the November 22, 2013 modification. In this case, however, a review of Student's May 3, 2013, IEP indicates that Student was receiving numerous modifications for the purposes of altering assignments, adapting instruction, adapting tests, and managing behavior. First, Student worked with a one-on-one para support specialist all day with the exception of special classes, lunch, recess, and field trips, meaning that he had a designated paraprofessional that accompanied and assisted him throughout all other aspects of his curriculum. Second, his assignments were modified so that Student was permitted to respond orally to questions and assignments, was given extra time to complete his work, and received emphasis with regard to major points. Third, his classroom instruction was adapted so that Student was given preferential seating, shorter instructions, encouragement for classroom participation,

and visual aids. Fourth, Student's tests were adapted by providing him with small group testing, extended time to complete tests, and someone to read aloud all allowable portions of his exams. Last, Student received behavior management support through his one-on-one paraprofessional. Despite these modifications, which were listed on the May 3, 2013 IEP, Student was still struggling academically in his general education classes on account of his reading comprehension, problem solving, abstract thinking, and communication deficits.

Also, Parents asserted that District's decision to modify Student's IEP was not based on measurable data. In this case, however, District's decision appears to be supported by the evidence, given that the educators with whom Student works on a daily basis, *i.e.* Timbrel, Webb, Bisshop, felt that Student's failure to progress was due to certain functional and academic deficits that could not be adequately addressed in the general education classroom. Given that Student's primary educators were in agreement regarding Student's deficits and the modifications that were proposed to Student's IEP, and giving due weight to the views of District on matters of educational policy, it is the opinion of this hearing officer that the November 22, 2013, modified IEP, which provided for 1050 minutes of general education classes and 1050 minutes of special education minutes each week, provides the least restrictive environment for Student's education within the meaning of the IDEA.

As it has been determined that the November 22, 2013, modified IEP provides the least restrictive environment for Student's education within the meaning of the IDEA, it is now necessary to determine whether Student should be administered the regular assessment (standard benchmark exam) each year, or whether he should be placed on the

alternate portfolio assessment. The alternate portfolio assessment is appropriate for students when three criteria are met, specifically:

- A. The student's demonstrated cognitive functioning and adaptive behavior in the home, school, and community environments are significantly below age expectations even with program modifications and adaptations.

AND

- B. The student's course of study is primarily functional and life-skills oriented.

AND

- C. The student requires extensive direct instruction and/or extensive supports in multiple settings to acquire, maintain, and generalize skills necessary for application in school, work, home, and community environments.⁷⁴

The Arkansas Department of Education has issued guidelines for local education agencies to use in determining students for whom standard benchmark assessment is not appropriate. These guidelines provide examples of each of the three criteria set forth above (Criteria A through C).

Examples of Criteria A are as follows:

- "IQ is in or within close proximity to range for mental retardation and academic and adaptive behavior is commensurate with this score."
- "IQ is below average (high 80's and less) and academics and behavior are 4 years or more below grade level."⁷⁵

⁷⁴ Parent's Binder, p 5; District's Binder, p. 313.

⁷⁵ Parent Binder, p. 440-43.

Examples of Criteria B are as follows:

- “Reading is focused on functional words/community words. Student is still working on decoding and building sight word vocabulary or reading.”
- “Math is focused on skills needed for community. Heavy use of manipulatives (money, counters). Student is still learning base 10 skills for addition/subtraction.”
- “Social skills and adaptive behavior are taught directly.”⁷⁶

Examples of Criteria C include the following:

- “Student is in self-contained setting for majority of the day.”
- “Student requires support in other settings to carry over skills learned.”⁷⁷

District, after reviewing the portfolio assessment criteria and related guidance, determined that Student met all three criteria. This Hearing Officer agrees. Here, testimony established that Student’s IQ level of 71 borders on mental retardation, as required by the above-stated criteria. In addition, Student’s IQ is commensurate with his academic and adaptive behavior, as evidenced by the testimony and documentary evidence regarding Student’s reading comprehension, problem solving, abstract thinking, and communication deficits, as well as the effects of these deficits on Student’s ability to demonstrate understanding of certain basic principles. In addition, Student’s course of study is devoted to the development of functional and life skills, as evidenced by the fact

⁷⁶ *Id.* at 440.

⁷⁷ *Id.* at 440.

that Student's teachers continually assist Student with the practical application of reading and math skills that are needed for success in his community, as well provide direct instruction to Student regarding social skills in the special education classroom. Finally, Student requires extensive direct instruction and/or extensive supports in multiple settings to acquire, maintain, and generalize skills necessary for application in school, work, home and community environments, as evidenced by the numerous modifications that Student is receiving, as well as the one-to-one direct instruction that Student receives in the majority of the educational settings in which Student participates.

Therefore, based on the evidence in the record, Student qualifies for administration of the alternate portfolio assessment and such assessment will be a more appropriate measure of Student's academic abilities than the regular assessment (standard benchmark exam).

Allegations of Stay-Put Violation

The IDEA includes a number of procedural safeguards, one of which is the "stay-put" provision.⁷⁸ Pursuant thereto, a Student shall "remain in the then current educational placement" during the pendency of mediation, a due process hearing, or judicial review, unless the parent and district agree to an interim or permanent change.⁷⁹

In the present case, an IEP meeting was held on November 22, 2013. During this meeting, District proposed modifications to Student's May 3, 2013, IEP, and the Parents objected to the proposed changes. Nonetheless, at the conclusion of the November 22,

⁷⁸ Please note that, although violations of the "stay-put" provisions of the IDEA constitute procedural violations, it seemed more logical to separately discuss this issue, in light of the LRE ruling, than to address it in the section above pertaining to procedural violations.

⁷⁹ 20 U.S.C. § 1415(j).

2013 meeting, Parents were told that they had seven days in which to respond to District's proposed IEP modifications. Parents refused to sign the IEP paperwork based on their disagreement with the proposed changes, and Parents were notified of their due process rights for further resolution of the disagreement. The following week, November 25 through November 29, 2013, the school was closed for the Thanksgiving holiday. On Monday, December 2, 2013, District implemented the modified IEP, which is dated November 22, 2013, and two days later, on December 4, 2013, Parents filed a "Due Process Complaint" with the Arkansas Department of Education alleging that District's proposed modifications of Student's May 3, 2013, IEP failed to provide Student with an education in the least restrictive environment.

Student remained on the November 22, 2013, IEP (modified IEP), which was implemented on December 2, 2013, until January 27, 2014, when this Hearing Officer ordered that Student's stay-put placement was to be the May 3, 2013, IEP throughout the pendency of these proceedings.

The issue, then, is whether these facts support Parents argument that District violated the procedural requirements of the IDEA by failing to move Student back to the May 3, 2013, IEP at the time that the due process hearing was commenced by Parents on December 4, 2013. It is the opinion of this Hearing Offer that, based on Parent's outspoken disagreement at the November 22, 2013, IEP meeting, their refusal to sign the IEP paperwork, and the fact that their disagreement prompted District to explain to Parents their due process rights, the school was on notice that Parents were likely to take further

action in this case. As such, Student's May 3, 2013, IEP should have been Student's "stay-put" placement during the pendency of these proceedings.

It should be noted that District argued that it provided the Parents with a reasonable timeframe, specifically seven calendar days, following the November 22, 2013, IEP meeting in which to object to the implementation of the modified IEP. However, there was testimony explaining that the school was closed the entire week following the November 22, 2013, IEP meeting for the Thanksgiving holiday. In addition, the record establishes that District implemented the modified IEP on December 2, 2013, when Student returned from the holiday break, and that Parents filed a due process complaint two days later. Given the fact that the school was closed for the entire week of November 25, 2013, through November 29, 2013, and that the Arkansas Department of Education was closed for part of that same week, it does not seem that Parents were afforded a reasonable time period in which to seek an attorney and file a due process complaint. Essentially, the November 22, 2013, modified IEP was implemented on the Monday following the holiday, and Parents filed their due process complaint a mere two days later, specifically on December 2, 2013. Given the close proximity in which these events occurred, it is the opinion of the Hearing Officer that the May 3, 2013, IEP was the last agreed-upon IEP and that Parents acted as quickly as possible under the circumstances to object to the implementation of the November 22, 2013 modified IEP.

As such, Student's May 3, 2013, IEP should have been the "stay-put" placement during the pendency of these proceedings. Nevertheless, as of January 27, 2014, Student's November 22, 2013 modified IEP was still in place; therefore, it is concluded that District

procedurally violated the IDEA's "stay-put" provisions. However, given this Hearing Officer's previous ruling that the November 22, 2013, modified IEP provided the least restrictive environment for Student's education within the meaning of the IDEA, it cannot be said that this procedural violation compromised the pupils right to an appropriate education.

Other Allegations

In Parents post-hearing brief, it is alleged that Student did not fully receive certain services, such as speech therapy, in accordance with the provisions of Student's May 3 and November 22, 2013, IEPs. This Hearing Officer notes that, although counsel for Parents elicited testimony regarding potential substantive violations of FAPE pertaining to Student's speech therapy minutes (addressing same in her post-hearing brief), she did not raise such violations of the IDEA in the request for due process hearing. 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.⁸⁰ Therefore, this Hearing Officer cannot address these alleged violations as part of these proceedings. Shall Parents wish to pursue this issue, they can file a separate due process complaint addressing these alleged violations.

ORDER:

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

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 Parents. This case is hereby dismissed with prejudice.

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.

/s/ Danna J. Young

HEARING OFFICER

03/13/2014

DATE