

Arkansas Department of Education
Special Education Unit

IN RE:	XXXXXXX XXXXXXX, As Parent of XXXXXXX XXXXXXX, Student		Petitioner
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VS. NO. H-15-12

XXXXXXXXXXXXX School District	Respondent
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HEARING OFFICER’S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioner alleges that the Respondent has denied the Student with a free and appropriate public education (FAPE) between November 15, 2013 and October 17, 2014 by failing to provide and implement an appropriate individualized education plan (IEP). In the request for a hearing the Petitioner claimed that the Respondent failed to:

1. Provide Parental participation in development of the Student’s IEP;
2. Develop an appropriate IEP;
3. Conduct a functional behavior assessment and develop a behavior support plan; and failed to
4. Implement the IEP that was previously developed by not;
 - A. Providing appropriate support services during instructional time;
 - B. Educating the Student in the least restrictive environment (LRE); and not
 - C. Educating the Student along with non-disabled peers.

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

Procedural History:

On October 20, 2014, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from

XXXXXXXX XXXXXXXX (Hereinafter referred to as "Parent"), the parent and legal guardian of XXXXXX XXXXXXXX (Petitioner) (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the XXXXXXXXXXXXXXXX School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of November 20, 2014, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims as noted above, was issued on October 22, 2014.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa L. Caldwell, attorney of Maumelle, Arkansas and the District was represented by Sharon Carden Streett, Attorney of Little Rock, Arkansas.

According to Counsel for the Respondent, a resolution conference was conducted as ordered; however, the conference ended without the parties resolving the issues contained in the Petitioner's complaint.

On November 10, 2014, Counsel for the Petitioner filed a motion for continuance stating she had a conflicting due process hearing in another case scheduled for the same date. The request was not objected to by the Respondent and an order continuing the case until January 12, 2015, was issued on November 11, 2014.

On January 6, 2015, a joint motion for continuance was requested and granted by order issued on January 7, 2015, setting the hearing to begin on February 18, 2015.

On February 2, 2015, the Petitioner entered a motion for access for evaluator to observe

the Student in her educational setting on February 7, 2014. An order granting the request was issued on February 3, 2015.

On February 10, 2015, Counsel for the Petitioner filed a notice of due process violation and a motion for an order to produce education records. The Petitioner alleged that the District failed to produce all of the Student's records in violation of the IDEA. Counsel for the District filed a response to the Petitioner's motion to compel stating that the District had complied with the IDEA and had made all records available to the Petitioner. No order was issued by the Hearing Officer in response to the Petitioner's request.

On February 17, 2015, the Respondent filed a motion to continue the hearing given that the schools in the District were closed due to inclement weather. On February 19, 2015, the Petitioner filed a response to the Respondent's request for continuance, further stating that should a continuance be granted that the parties be limited to the introduction of documentary evidence and the witnesses disclosed as contained in the pre-trial disclosures made on February 10, 2015. An order granting the request, without subsequent objection by the Petitioner, was issued on February 19, 2015 for the hearing to begin on March 9, 2015.

The hearing began as scheduled on March 9, 2015. The Petitioner requested and was granted a continuance on the record in order to complete her presentation. The dates of March 16 and March 19, 2015, were agreeable to both parties for the hearing to continue. The hearing was conducted as scheduled; however, on March 19, 2015, the Petitioner again requested a continuance on the record. The request was granted without objection for the hearing to be heard on April 27 and 28, 2015. The hearing continued as scheduled on those two dates; however, the Petitioner again requested a continuance on the record and without objection, May 14, 2015, was set for the continuance. On May 12, 2015, a joint request for a continuance was requested and granted for the hearing to be heard on June 15, 2015. On closing the hearing on June 15, 2015, the Petitioner requested another continuance in order to complete her case. The continuance was granted for June 29, 2015; however, on June 29, 2015, both parties requested that the hearing be continued due to scheduling conflicts. An order granting their request was issued on June 30, 2015, with the hearing being scheduled for July 16, 2015, with additional dates of August 13 and

14, 2015 to be set if needed.

The hearing proceeded as scheduled on August 13 and 14, 2015. The Petitioner requested and was granted permission to proffer testimony from a witness whose relationship to the issues in the case was determined to be non-essential and whose testimony was judged to be irrelevant to the issues. On August 13, 2015, the Petitioner also requested an order for the development of an IEP for the Student for school year 2015-16. That request was denied; however, both parties were granted time off the record to meet and develop an IEP for the Student. On the record the Respondent requested and was granted a continuance in order to present their case with the dates of September 22 and 23, 2015, being set as the final days for the hearing.

On September 23, 2015, the Hearing Officer received a letter from Counsel for the Respondent requesting that the subject matter of the hearing be limited to those issues specifically raised in the Petitioner's due process hearing request filed with the Department on October 17, 2014. As noted above the Department received the request on October 20, 2014. Also as noted above are the issues that will be decided in this case and that the decision reached will be based solely on what was known at the time of the request by both the Petitioner and the Respondent. The Petitioner entered two binders of evidence labeled Parent Binder 1 and 2. The Respondent entered seven binders of evidence labeled District Binder A, B, C, D, E, F, and G.

Both parties elected to forego making opening and closing statements on the record; however, both chose to provide post-hearing briefs. The briefs are included along with all other correspondence relative to the process of the case in a Hearing Officer's binder.

At the time the hearing was requested the Student was a ten-year-old, fourth grade, female enrolled in the District. She was identified as a child in need of special education services based initially on a disability of intellectual deficits and on entering school year 2014-15 was changed to autism.¹ According to the same document; however, her intellectual deficits continued to remain extremely low.

¹ District Binder A, Page 154

Findings of Fact:**1. Did the District fail to provide Parental participation in development of the Student's IEPs between November 2013 and October 2014?**

The Parent attended an IEP conference on March 20, 2014, for the purpose of developing an IEP for the Student. The District presented a thirty-three page draft of an IEP; however, the conference ended without having completed the IEP.² The District's special education LEA recorded that the meeting was tabled because "the conference became counter productive and off task."³ The Parent testified on cross examination that this particular IEP meeting lasted nine hours. In those nine hours she further stated that the content of the meeting did not include any of the things that she requested, because "the District came in with a draft and we walked out with the same thing after nine hours."⁴ The prior written notice of action following the conference stated that "an IEP was drafted, discussed, but not agreed upon by all members of the committee" noting that the proposed action was tabled until another conference date. The basis for the action was noted as "stay put, ABLLS-R, BRIDGE, parent/teacher/therapist/specialist input."⁵

The Parent attended the next IEP conference on April 4, 2014, at which time the decision reached by the committee was to implement the agreed on accommodations and to add them to the IEP drafted on March 20, 2014.⁶ The Parent testified that at this meeting she "asked for some supervision and help with behavior, some supervision with the aide in non-instructional times...for accommodations on her IEP to be followed...for her teachers to have a copy of that and to follow some of the recommendations that the behavior consultant had put in place...(for) them to provide progress monitoring, that the progress monitoring went along with her IEP goals,

² District Binder A, Page 191

³ District Binder A, Page 188

⁴ Transcript, Vol II, Page 19-20

⁵ District Binder A, Page 186

⁶ District Binder A, Page 176

and to explain that to me and show me where – you know, how they were getting that progress monitoring....(and for them) to do joint grading.”⁷

The next IEP conference where the Parent was present was conducted on April 24, 2014. The notice of conference stated that the committee would be reviewing an independent evaluation conducted by a neuro-psychologist and revise the Student’s behavior plan.⁸ The District made effort to have the psychologist who performed the evaluation available to explain the results, but to no avail.⁹ The Parent provided the District with a revised (shorter) copy of the neuro- psychological evaluation which had been conducted almost a year earlier (June 6, 2013). The psychologist concluded in the non-revised (longer) report that the test results indicated diagnostic impressions of “epilepsy - by history, generalized neurocognitive dysfunction, intellectual disability, and autism spectrum disorder with associated sensory processing disorder and features of attention-deficit/hyperactivity disorder - combined presentation.”¹⁰

At the April 24, 2014, IEP conference the Student’s primary handicapping condition for educational purposes was changed to autism. The record reflects that the Parent was not only present at this conference but at all IEP conferences prior to September 2015. The Parent believed that conferences were held in her absence, but there was no evidence or testimony that supported this claim. Additionally, and according to testimony by both the Parent and District personnel, everyone participated in several lengthy conferences including the current one.¹¹ The evidence in the record includes documents presented at the IEP conferences by the Parent which contained her ideas as to what she believed the Student needed as well as requests for services as

⁷ Transcript, Vol II, Page 23-24

⁸ District Binder A, Page 166

⁹ District Binder A, Page 162 and Transcript Vol

¹⁰ Parent Binder 1, Page 289

¹¹ Transcript, Vol II, Page 7, Page 152; Vol VI, Page 171

noted above.¹² The results she would like to have seen were never met. According to her testimony on direct examination she stated:

“I’ve already provided specific concerns in person, via e-mail and writing, by phone and through my attorney since 2011. I’ve missed a considerable amount of work to sit in multiple meetings – some lasting over nine hours, only to have the IEP team refuse to make decision when I didn’t agree to their pre-determined agenda and ultimately make fun of my efforts and mock me after I left. I have filed due process twice and stated I intend to file again for due process on September 5, in light of the District’s actions in continuing to violate my rights and unilaterally scheduling IEP meetings with a District paid facilitator. It is indeed amazed that you continue to totally frustrate my ability as a parent to actually be a active and meaningful participant at IEP meetings without any consequences. Only after requesting due process a third time have you sent this current e-mail pretending to solicit my input but at the same time expecting me to start over with issues that have been decided or pending for three years now. My requests have been reworded, they’re e-mailed back to me, and they’re forwarded to administration.”¹³

Although the District has not agreed with nor met all of the Parent’s requests regarding the education of her child, there is no evidence or testimony that would indicate that the District hampered her active participation in developing the IEPs for her child. The District’s compilation of over several hundred pages of emails and the Parent’s multiple pages of transcriptions of various IEP meetings is evidence enough to deny the Parent’s claim that she was not provided opportunity to participate in the development of the Student’s IEPs. What is evident in both the documents presented as evidence and the testimony by the Parent is that the District did not, could not, or would not program for or include in the Student’s IEPs all of what

¹² Parent Binder 1, Page 468-469

¹³ Transcript, Vol I, Page 269

the Parent wanted and expected. Those issues are addressed below.

2. Did the District fail to develop appropriate IEPs for the Student between November 2013 and October 2014?

The District did provide IEPs; however, the question really is whether or not they were appropriately designed to provide the Student with the opportunity to receive an educational benefit. One measure of appropriateness would be whether or not the Student was provided the opportunity to obtain educational benefit. Despite the appropriateness of an IEP, however, a student progress as expected by either a parent or a teacher. For an IEP to be appropriate it must be designed to meet the specific needs of the child. Therefore considering the disabilities that this Student brought to the District for programming between November 2013 and November 2014 we find:

A. The Student's speech language testing completed in March 2013 revealed a severe language delay, with her receptive and expressive vocabulary function being relative strengths even though they were measured to be only in the borderline average range. She demonstrated on the testing significant difficulties in the use and understanding of semantics, syntax, and sentence structure, as well as the understanding of paragraph comprehension. Her greatest speech language difficulties were in the pragmatic and social use of language.¹⁴ According to the ABLLS-R Progress Marking Assessment of August 9, 2013, she struggled with building CVC words.¹⁵ The same assessment also reflected difficulty with copying straight lines, curve lines, and numbers and letters.¹⁶ The Student's overall intellectual deficits were listed on the IEP as being "extremely low" and at the equivalent of "a low performing 6 year old."¹⁷

From the Parent's complaints and her testimony the District had not assessed the Student

¹⁴ District Binder A, Page 266 and Binder C, Page 263

¹⁵ District Binder A, Page 270

¹⁶ Ibid, Page 272

¹⁷ District Binder A, Page 260

for progress and had never shared with her any evidence of progress.¹⁸ She disagreed with the reading program that was being used in teaching the Student to read. On direct examination when asked about whether or not she thought the Student had made progress she responded:

“Academically, I actually found out that when they were doing the Bridge test, the Bridge test showed like a whole lot of progress, but if you’ll look closely at that, they used – they keep starting over with kindergarten, you know, if they start over with all of her kindergarten skills, it appeared like she was doing well...but she’s not doing well if she’s still doing the same kindergarten skills in fourth grade...in third grade she mastered those kindergarten skills...in fourth grade, math they started over again at like a 40 percent when she had already been like a 80 – I would have to look at it, at a real high, they started back over and then re-reached that again and said that she had done well...then literacy and reading, the IEP annual review, they explained that she regressed in her reading at the annual review in third grade...and then, in fourth grade, the IEP goals that I received they actually tested her, you know, she had mastered the kindergarten goals, so they tested her with the first grade Bridge the first time....then when they come back to show progress, they tested her with the kindergarten Bridge, but they didn’t write that on there...it just shows she went from 17 percent to like 50 to 60 percent...and they said she rocked it out, she rocked it out, she was making progress.”¹⁹

The District’s behavior consultant who testified disagreed with the Parent’s assessment of the very same documents stating that they had measured for progress and that the documents provided indicated that the Student had made progress for school year 2013-14. The District’s behavior consultant who had knowledge of the Student since she was in kindergarten testified that as a non-reader the Student needed “less words and more pictures” in the process of teaching her and that the “manner in which you typically teach the child to read is not going to be as

¹⁸ Transcript Vol I, Page 194-195

¹⁹ Ibid, Page 291-292

effective when you have a child that your are working on, a pretty visual memory component of having to show it visually instead of looking at the auditory process to this, look at any who is reading, they are not going to have that same capability component.”²⁰

As previously noted the Student had been diagnosed with a severe language disorder and to that the behavior consultant testified that “it’s necessary to do things differently in order to teach that same approach.”²¹

Further when asked about the Student’s progress she testified that she was not surprised at the Student’s progress stating:

“I think that she has made gains on those things that we were able to teach through direct instruction....I think that the program methods that are currently in place are good for [her]...she has made progress on that...I think the way she feels about reading is different, which is important to me...that was not something that she wanted to participate in or do before...and now, when you look at the books, and she is going through it, pointing at the picture and talking about those things and work, she is sitting for those times, she is doing the SRA ‘Treasures Book’ that we had looked at before, we are also doing quite a few components of discrete trial within that, not as much civil response, we are doing more.”²²

B. Although outside the time frame to the issues being heard, in order to adequately address the Parent’s complaints in this hearing a background into the development of the IEP in place within the time frame is important to consider. An IEP developed in June 2013, at the annual review conference to address the Student’s educational deficits and related services was modified shortly after school year 2013-14 began in September 2013. The notice of conference contained in the record and provided to the Parent, indicated that the purpose of the September 2013 conference was to review/revise the IEP; to consider/conduct a Functional Behavior

²⁰ Transcript Vol IV, Page 193

²¹ Ibid

²² Ibid, Page 193-194

Assessment; and to review independent evaluations.²³

The results according to the documents presented were that the Student “is a student of specialized services under the PHC of Intellectually Disabled” and to “benefit from academic instruction [she] must receive instruction in a small group setting with individual instructions” and that she would begin to receive WIN [What I Need] minutes of 60 minutes a week for social skills” and that she would “only go to one 20 minute session of regular education a day, equaling 100 minutes per week (or as determined by educational staff).”²⁴

The same document also records that the Parent did not agree with the PHC of intellectual disability and that she wanted both subjects [science and social studies] to be in the regular education class. The record also indicated that the Parent refused to allow the entire IEP team to review the neuro-psychological evaluation she had obtained earlier in the year.²⁵ At this time she also presented her concerns to the IEP team not only about the curriculum, but also the Student’s behavior. The maladaptive behaviors exhibited by the Student as discussed in the psychological evaluation that she refused to share with the entire committee included:

“Children with similar scores on the inhibit scale typically have marked difficulty resisting impulses and difficulty considering consequences before acting. They are often perceived as (a) less in control of themselves than their peers, (b) having difficulty staying in place in line or in the classroom, (c) interrupting others or ‘calling out’ in class frequently, and (d) requiring higher levels of adult supervision.

“ Often, care givers and teachers are particularly concerned about the verbal and social intrusiveness and the lack of personal safety observed in children who do not inhibit impulses well. Such children may display high levels of physical activity, inappropriate physical responses to others, a tendency to

²³ Parent Binder 1, Page 179

²⁴ Parent Binder 1, Page 187

²⁵ Ibid, Page 188

interrupt and disrupt group activities, and a general failure to ‘look before leaping.’ In the classroom settings, children with inhibitory control difficulties often require a higher degree of external structure to limit their impulsive responding. They may start an activity or task before listening to instructions, before developing a plan, or before grasping the organization or gist of the situation.”²⁶

The Parent acknowledged in testimony that she questioned as to whether or not the Student’s behaviors exhibited at school as well as at home were or were not related to a diagnosis of autism.²⁷ The District did not at that time have access to the psychological evaluation that concluded she exhibited “mild to moderate” autism. They eventually received a modified version of the report in April 2014. It was at this time when the Parent shared the shortened version of the report with the entire IEP team.²⁸ The confusion is understandable for both the Parent and the District in that the psychologist’s diagnostic impressions in the longer version of the evaluation not only included autism, but also included a generalized cognitive dysfunction, intellectual disability (IQ in the mild to moderate range of mental retardation with global deficiencies in academics, and with autism being associated with a sensory processing disorder and features of attention-deficit hyperactive disorder – combined presentation.²⁹

The same psychologist provided a somewhat different report which the Parent subsequently released to the District. The diagnostic impressions in that report, with one exception, remained the same. The longer report (17 pages) appears to be a comprehensive neuropsychological evaluation and contained the generalized neurocognitive dysfunction disorder; whereas the shorter modified report (9 pages) released to the District appears to be a

²⁶ Parent Binder 1, Page 285

²⁷ Transcript, Vol I, Page 48

²⁸ Parent Binder 1, Page 289

²⁹ Ibid

psychoeducational report.³⁰ The psychologist, without having observed the Student in a classroom setting, but having had access to previous evaluations, provided recommendations for the District. Of particular interest with regard to this hearing was the psychologist's comments regarding her opinion of the District's previous evaluators. She stated "excellent recommendations appear in [the Student's] past evaluation records, particularly within the recommendations by the occupational therapist, SLP and behavioral therapist."³¹ The psychologist provided four major recommendations in both reports with the fourth containing thirteen subparagraph recommendations. The longer neuropsychological report contained seven additional recommendations with each having subparagraphs, being more specific as to how to address the Student's multiple disabilities. Both reports recommended that the Student's current IEP be continued, with speech-language and occupational therapies being provided as adjuncts to her resource education.³²

The behavioral therapist referred to in the report was also the person who suggested that the Parent use that psychologist for the evaluation. As noted above the District's behavioral consultant provided testimony as having known the Student since kindergarten and was responsible to the District for conducting some of the IEP conferences. At the IEP meeting on September 27, 2013, as referred to above, the behavioral consultant testified that the Parent refused to allow the team to review the psychological evaluation because she apparently did not approve of the person present that would be explaining the results.³³ When that individual arrived to explain the report at the IEP meeting, the behavioral consultant testified that: "there was some arguing, there was lots of tension in the room...at that particular point in time, I paused the meeting, and [the Parent] and I had a sidebar, which we do on occasions when we have issues within the meeting...when we get to an impasse, we can't go any further, then we sidebar and I

³⁰ District Binder C, Page 229-237

³¹ Parent Binder 1, Page 290

³² Ibid and District Binder C, Page 235

³³ Transcript, Vol IV, Page 181

try to mediate what our situation is and get a fall back in the room...we had everybody leave....and [when the individual available to explain the report arrived we] went over the [short version of the] report [with the Parent].”³⁴

The behavioral consultant, who is a BCBA certified therapist, meets all of the recommended qualifications of the psychologist who completed the evaluation as well as the recommendations of the Parent’s expert witness, was the person responsible for obtaining the services of the speech/language evaluator referred to in the psychologist’s report. The speech/language therapist’s conclusions were that the Student continued to qualify for speech-language services “given her severe language ratings.”³⁵

The Parent’s expert testified to the need for a functional behavioral assessment. The behavioral consultant testified that a functional analysis of the Student’s behavior, as believed necessary by the Parent as well as her expert witness, was not needed because the functions for which the maladaptive behaviors exhibited by the Student was obvious. She stated that:

“It’s not difficult to determine the function of behavior looking at her across case, even when she was very young, and I spent time with [her mother], ahead of even looking at [the Student] for the first time...and I spent about ten and a half hours I think with her, is what we looked at on the very first observation, determining what the functional behavior was...because when we looked at that in multiple settings, across different teachers, across different days, [the mother] and I worked hard the first time that we did that to make sure it wasn’t on a day after visitation, it wasn’t on a time when she was staying with Grandma and [the mother] was out of town for fair, in the fall, trying to come up with times that would be typical for her..and so, we actually did the looking at that behavior across different school days, different people interviewing [the Student], people that had been involved outside duty teachers, people that had been involved in her case....and [the Student] is not –

³⁴ Transcript, Vol IV, Page 181-182

³⁵ District Binder C, Page 264

[she's] not a difficult child in terms of her behavior...her language is difficult, but in terms of her behavior, she gets pretty good indicators as to what she is doing and why she is doing it."³⁶

She also testified as to how the Student's disabilities manifested in her academic endeavors which had to be programmed for:

“[The Student] can express her wants and her needs when she isn't escalated and her anxiety isn't high, her sensory system is modulated. She can, in fact, tell you what her wants and needs are. As far as – as far as learning, it's very difficult. You know, we keep looking at the regression back, and [the Parent] and I talked about this, we started with a kindergarten level skill of what we are learning and what we are looking at. That's pretty difficulty for [the Student] to process the elements of language that are required for that, for those reading skills and higher order reading, which is why we pick word families and different components of the phonics-based in that. Other than – other than the verbalization of her wants and needs, her reading strengths are that she does – she does comprehend short-term conversation in terms of reciprocity. Like, it's easy to have a two to three exchange with [her]. You know, 'How is your dog?' 'Oh he is great.' 'That's awesome.' But you are not going to get more than about three exchanges, and you are not going to be able to keep her on topic with her language in terms of that, because of the level of language, all of the pragmatic aspects of it are not there at that particular point in time. And so, that's her largest area. The biggest barrier, if you are looking at autism, you are talking about a social language disorder. .and her language is the biggest barrier to what her issues currently are.”³⁷

The results of that IEP conference concluded that the Student be provided 990 minutes per week of educational instruction in the regular education environment and 1160 minutes per

³⁶ Transcript, Vol IV, Page 170-175

³⁷ Ibid, Page 187-188

week of instruction in the special education environment. Her related services were to include 120 minutes weekly of speech/language therapy; 120 minutes weekly of occupational therapy; with special transportation daily when school is in session; and for her to have a personal one-on-one aide during the school day. Goals and objectives were developed for each of the academic areas. A support plan for behavior interfering with learning of students and peers was developed in January 2013 and was included with the IEP at the end of the previous year to be implemented in the 2013-14 school year.³⁸

C. The Parent's disagreement with the IEP team decision led to the District setting up another IEP conference to be held on October 21, 2013; however, the Parent refused to attend stating that: "I will not attend the evaluation conference until the appropriate personal/evaluators are invited and in attendance, either in person or by telephone conference." Her unhappiness and disagreement with the District led to her filing a due process complaint in October 2013.³⁹ The due process hearing was dismissed after the parties reached a settlement agreement and developed a memorandum of understanding on November 15, 2013.⁴⁰

D. A parent/teacher conference was held on February 20, 2014, for the Parent to meet the Student's new teacher and to change the IEP minutes of instruction to 1250 minutes per week in the regular education environment and 900 minutes per week in the special education environment.⁴¹ A week later on February 27, 2014, the Parent signed an informed consent for the District to conduct a reevaluation with the use of the Reynolds Intellectual Assessment Scale (RIAS). However, the document indicates that the District did not receive the consent until March 17, 2014.⁴²

E. On March 20, 2014, a separate programming conference was conducted with the

³⁸ District Binder A, Page 319

³⁹ Parent Binder 1, Page 240

⁴⁰ Parent Binder 1, Page 247-251

⁴¹ District Binder A, Page 256-258

⁴² District Binder A, Page 260 and Page 192

Parent present for the stated purpose of developing the Student's IEP; however, the IEP proposal was tabled until all parties could review the document as drafted by the District. The Parent submitted a Statement of Parental Participation and Concerns that was also developed on March 20, 2014.⁴³ The statement included her suggestions for how the IEP conference should be held.

F. On April 4, 2014, a separate programming conference was conducted for the purpose of agreeing on classroom accommodations for the Student as drafted on March 20, 2014. The Parent was present even though the notice of the conference was given to her on the same date.⁴⁴

G. On April 9, 2014, the District notified the Parent of an IEP conference to be held on April 25, 2014. The purpose of the meeting was stated as reviewing the results of the psychological evaluation conducted in June 2013. The District attempted to have the psychologist available either in person or by phone to review the results of her evaluation.⁴⁵ As previously noted, even though the Parent had obtained the evaluation results prior to school year 2013-14, she did not permit the District to have access to the report. Also as previously noted the results the District received reflected a psychoeducational evaluation, whereas the Parent had obtained a neuropsychological evaluation in the process.⁴⁶

At the conference held on April 25, 2014, the Student's primary handicapping condition was changed to autism, noting that the autism had a greater adverse affect on the Student's receiving academic benefit than the Student's intellectual deficits.⁴⁷

H. On April 16, 2014, the Parent received a notice of conference to be conducted on May 2, 2014, for the purpose of reviewing/revising the Student's IEP. On April 29, 2014, the Parent notified the District that she would not be able to attend the conference on that date and the

⁴³ Parent Binder 1, Page 265-267

⁴⁴ District Binder A, Page 176

⁴⁵ District Binder A, Page 162

⁴⁶ Parent Binder 1, Page 269

⁴⁷ District Binder A, Page 153

conference was rescheduled for May 29, 2014, and for the conference to be the annual review.⁴⁸

The Student's progress, including grades was brought before the committee along with the use of the agreed on classroom accommodations. It was noted that due to the Student's limited intellectual skills that the curriculum had to be extensively modified in order for her to participate in the regular classroom setting. The meeting concluded "abruptly" without a final decision on the Student's IEP for the following school year and was rescheduled to be continued at a later time.⁴⁹

I. On June 3, 2014, the Parent was notified that a conference would be held on June 20, 2014, for the purpose of discussing the need for extended year services (ESY) and to discuss the Student's behavior plan. The District's behavior consultant who, as previously noted, had known the Student since kindergarten would be present and be responsible for conducting the meeting.

An IEP for the Student's next school year (2014-15) was developed, but not without major concerns being expressed and documented by the Parent.⁵⁰ The IEP team determined that the Student needed ESY for fifteen units of service with each unit lasting an hour and a half. Five of the units were to be completed by the District and the remaining ten by the behavior consultant. For the Student's next school year the IEP indicated that she would receive 100 minutes per week in the general education environment and 1050 minutes in the special education environment. She would be receiving 150 minutes weekly of speech/language therapy; 120 minutes per week of occupational therapy; special transportation to and from school; and a personal one-on-one aide during every school day.

The prior written notice of action as a result of the IEP conference indicated that the Parent "asked that incorrect statements be removed from [the Student's] records." To which, according to the Parent, "was told by the resource teacher that she does not and will not ever go back and make changes in paperwork." According to the Parent she "asked to reconvene/wait to

⁴⁸ District Binder A, Page 135

⁴⁹ District Binder A, Page 133

⁵⁰ District Binder A, Page 83-122

sign [and] was told no and signature was not needed [and that she] signed w/critical concerns listed.”⁵¹

The evidence is clear that the District attempted, over the objections of the Parent, to develop an IEP that would meet both the behavioral difficulties expressed by the Student as a consequence of her autism as well as her limited intellectual skills. The impression left by the Parent in testimony was that she believed that the Student was capable of greater academic achievements than indicated by the assessments. The District on the other hand believed that they had and were continuing to provide special education services appropriate to the Student’s disabilities. The testimony supports both assumptions; however, the IDEA expects a school district to develop an IEP that contains special education and related services that have been designed to provide a student with an opportunity to obtain academic benefit. The evidence presented supports the actions taken by the District.

It is not possible to decide on whether or not the Student would have made progress for school year 2014-15 in that the Parent instigated the stay put provision of the IDEA by asking for a due process hearing based on the complaints as noted above. However, the evidence and testimony reveals that:

(a). Between August 18, 2014 and August 21, 2014, all of the teachers involved in providing educational instruction to the Student signed a document acknowledging that they had received a copy of the Student’s classroom accommodations and that they understood that they were bound by federal law to comply with the accommodations as determined by the Student’s IEP team.⁵²

(b). On August 25, 2014, the District notified the Parent of the need for an IEP conference on September 5, 2014, to review and revise the Student’s IEP to include co-teaching in the regular education classroom.⁵³ Included in the notice for those to be in attendance was an

⁵¹ District Binder A, Page 75-76

⁵² District Binder A, Page 74

⁵³ District Binder A, Page 67

outside consultant who would be conducting a facilitated IEP meeting. The Parent elected to not attend the meeting and informed the District that she would be filing for a due process hearing. The IEP team decided to reconvene the meeting the following Monday (September 8, 2014) and made an attempt to have the Parent participate as well as informing her that the meeting could be held without the consultant facilitator if she desired and that the topics for discussion would not be limited to those stated in the notice of conference.⁵⁴

(c). The Parent attended the scheduled conference on September 8, 2014, being led by the outside facilitator. Her account of involvement is contained in an email she provided the District on September 11, 2014:

The facilitator “arrived on Thursday and met with staff. She and [the special education supervisor] then spent the day on Friday with [the Student’s file] preparing for the meeting. [The facilitator] was well spoken with her words, but clearly not neutral. The meeting lasted about 10 minutes before I left.”⁵⁵

(d). The September 5, 2014, IEP meeting ended without any action being taken by the committee. A notice was provided the same day for the IEP team to reconvene on September 8, 2014, without the facilitator conducting the meeting. The Parent did not attend that meeting and another date was set for September 15, 2014.⁵⁶ The prior written notice of action for the September 15, 2014, meeting indicated that the team would discuss the co-teaching service provision and the frequency codes for the Student’s accommodations. The notice also included statements regarding the need to alter the Student’s education schedule “due to continuing behavior issues and disruptions during the content of the instruction.”

The record reflects that the Student’s IEP team, without the Parent present, discussed the results of classroom observation reports, teacher reports, the accommodations and the frequency

⁵⁴ District Binder A, Page 70-73

⁵⁵ District Binder A, Page 57

⁵⁶ District Binder A, Page 18

codes, behavior evaluation data collected by the behavior consultant as well as her independent evaluation report, the previous psychological and speech/language reports, and status of the co-teaching service provision. The IEP team decided that the regular education class in science was inappropriate for the Student due to her severe language delays which prohibit her from being able to do the prerequisites for what was being asked of her. The team decided that the co-teaching service provision for science would provide the Student with more support. The team decided to reconvene should conditions change regarding the Student's progress and/or behavior.⁵⁷

(e). In October 2014, the behavior consultant provided the District with a behavior intervention/safety plan.⁵⁸ On October 13, 2014, the District obtained a report of classroom observations conducted by North Central Arkansas Education Service COOP reading recovery teacher leader/literacy personnel. The observations were conducted on October 1 and 6, 2014, during the Student's reading group.

(f). On October 13, 2014, the Parent was provided with a notice of conference to be held on October 24, 2014, for the purpose of developing a behavior plan and to review the report from the reading consultant.

On October 17, 2014, the District was notified that the Parent had filed the current request for a due process hearing, thus the October 24, 2014, IEP team meeting was not held.

In summary, from reviewing all of the documents as outlined above as well as the testimony provided by the District personnel assigned with the responsibility of providing special education services to the Student, it is evident that the IEPs as developed did and do provide the Student with an opportunity to obtain an educational benefit. The Student's maladaptive behaviors in the educational setting do and will more likely than not continue to need behavioral interventions with the targeted behaviors being modified as she continues to advance in the educational settings she will be attending. Neither the Parent's nor the District's great

⁵⁷ District Binder A, Page 16

⁵⁸ District Binder A, Page 6-8

expectations of the Student's progress may or may not be reached given her limited intellectual abilities.

3. Did the District fail to conduct a functional behavior assessment and develop a behavior support plan for the Student between November 2013 and October 2014?

The Parent's expert witness testified as to the definition of a functional behavior assessment by stating that "a functional behavior assessment is a method of developing essentially an informed guess about what the student's behavior – or what the purpose of the student's behavior is."⁵⁹ He further stated with regards to the importance of a functional behavior assessment, that "it's important, because it informs the development of the positive behavior interventions and supports plan."⁶⁰

The District's behavioral consultant testified that the first functional behavior assessment that she conducted with regard to the Student's behaviors was when the Student was in the second grade.⁶¹ As noted above she testified that she had known the Student since she entered kindergarten. When asked if she had conducted a functional behavior assessment since the initial one, she responded that "we have not done one since because the function of the behavior has not changed...we have updated what we did with regards to behavior...we have not completed a full assessment."⁶² When challenged as to why such an assessment had not been conducted since the initial one, she responded that "we did not change placement or complete a manifestation determination for change of placement where an FBA or a manifestation is required, and therefore, that is the case."⁶³

The District's Binder G contains records of the behavior consultant's classroom

⁵⁹ Transcript, Vol III, Page 20

⁶⁰ Ibid, Page 24

⁶¹ Transcript, Vol II, Page 143

⁶² Ibid, Page 150-151

⁶³ Ibid, Page 235

observations conducted in a report dated October 21, 2013 and another observation report dated September 12, 2014; an ABLLS-R goal Sheet dated August 26, 2014; and her behavior intervention summary/recommendations provided following the prior settlement agreement as previously noted. Her recommendations included:

“1. It is clear that [the Student] lacks sensory input during her school day following lunch. I recommend the sensory /OT room be used periodically to give [her] an opportunity to de-escalate prior to entering in the general education setting and on a structured schedule throughout the afternoon.

“2. Having a time set that [she] could interact with one or two of her peers for social interaction would be appropriate. While she is participating in the general education classroom, there is no social interaction during instruction. Therefore, while she is acquiring skills on how to sit appropriately, her conversation skills and ability to interact [can] be strengthened.

“3. The regular education setting is not productive for [her] at the current time. While the team is aware that she is not in this setting for academic reasons the time frames and requirements need to be adjusted.

“a. [She] needs modified work that does not require altering the curriculum.

“b. The team should consider moving [her] to a different classroom.

“c. While [she] has been going to the regular education classroom for extended periods of time, it would maximize her engagement to go more often for shorter sessions.

“d. While [her] present levels of performance do not allow her to complete grade level work, all assignments from the regular room (in Science and Social Studies) can be sent home so that [her mother] is aware [of] the expectations in the classroom. Those will not be sent back [from the Parent] as grades will be taken on work specific to [her] ability.

“4. [She] would benefit from a visual schedule to reduce frustration, anxiety and aid transition.”⁶⁴

The District’s behavior consultant developed a behavior support plan that had been in place for the Student since January 11, 2013, as well as an instructional plan for each of the teachers which summarized the process to be followed in the behavior support plan.⁶⁵ When challenged as to the purpose of the later she testified that “this is a note to my teachers to remind them that when they are – when she engages in this behavior, and what I want for them to do...and I give them some scenarios there....we have changed teams, and its good for them to have in laymen’s terms what to do when, for a particular child, not just a blanket ‘every kid with autism do this,’ but for this particular child what I want them to do.”⁶⁶

As noted above in the procedural history, on February 2, 2015, the Petitioner entered a motion for access for evaluator to observe the Student in her educational setting. An order granting the request was issued on February 3, 2015. The Parent’s expert witness testified that he observed the Student throughout one day, accompanied by the District’s behavior consultant. Following his observation with the Student he met with the school personnel at the school and then spent about an hour with the Parent and examined all of the documents provided to the Parent by the District.⁶⁷

He subsequently compiled a forty-five page report of his findings. After his one day of observing the Student, spending time the same day with school personnel, reading the documents provided him by the Parent, and spending an hour with the Parent, he concluded that: “There exists clear and unequivocal evidence indicating the denial of process and benefit standards of FAPE. [The Student] failed to receive meaningful benefit due to poorly constructed IEPs, repeated delays in conduction of FBAs, poorly designed and ineffective behavior plans,

⁶⁴ District Binder G, Page 26-27

⁶⁵ Ibid, Page 18-21a

⁶⁶ Transcript, Vol II, Page 237-238

⁶⁷ Transcript, Vol III, Page 12-13

failure to use evidence-based practices, and failure to collect appropriate data to evaluate intervention effectiveness.”⁶⁸

When challenged about the use of “evidence-based practices” as a requirement under the IDEA, the Parent’s expert witness was asked to read from a copy of the IDEA stating that: “A *statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child.*”⁶⁹ After a lengthy bantering with the District’s counsel on cross examination he admitted that the IDEA does not require the use of evidence-based practices.⁷⁰

The documents provided as evidence by the District refute his opinion regarding the lack of behavior data; however, in his opinion the data that was collected was “inappropriate” as noted above. He did not testify to his meaning of the “repeated delays” in conduction of the FBAs; however, here to the data collected was not consistent with how he would have preferred, even though as the District’s behavior consultant testified, as noted above, that the function of the Student’s behavior had not changed and that the behavior support plan in place adequately addressed the Student’s maladaptive behaviors.

- 4. Did the District fail to implement the IEP that was previously developed by not;**
- A. Providing appropriate support services during instructional time;**
 - B. Educating the Student in the least restrictive environment (LRE); and not**
 - C. Educating the Student along with non-disabled peers.**

The IEP developed for the Student that was in place prior to November 2013, was

⁶⁸ Parent Binder 2, Page 43

⁶⁹ Transcript Vol III, Page 150

⁷⁰ Ibid, Page 153

developed on September 27, 2013.⁷¹ The Parent was present at the IEP conference and expressed her disagreement with the IEP by including her concerns that the Student receive science and social studies classes, as well as asking for support in class before the Student is removed.⁷² On February 20, 2014, the record reflects that the Parent met with District personnel to allow the Parent to meet the Student's new classroom teacher and to change "the cover of the IEP...to reflect the minutes outlined on the MOU."⁷³ The MOU (Memorandum of Understanding) was the result of a settlement agreement dated November 13, 2013, dismissing a previous due process complaint filed by the Parent with the Department.⁷⁴

Therefore the question addressed here is whether or not the IEP developed in February 2014 provided appropriate support services for the Student during instructional time; whether or not she was educated in the least restrictive environment and whether or not she was educated along with her non-disabled peers.

The IEP reflects that the Student would be receiving 1,250 minutes weekly in the general education setting where she would receive instruction in science, social studies, specials, and WIN; that she would receive 900 minutes weekly in the special education setting receiving specialized instruction in literacy and math.⁷⁵ The IEP indicated that the Student needed positive behavioral interventions, and supports, and other strategies to address any maladaptive behavior that would impede her learning or that of others. For which, a behavior plan was deemed as needed. It also determined that she would not be following the regular discipline policies of the school because of her communication deficit. Because of her disabilities she would be receiving one-on-one assistance for testing as well as extended time and for allowable portions of testing to

⁷¹ Parent Binder 1, Page 189-210 and District Binder A, Page 261-280

⁷² District Binder A, Page 280

⁷³ District Binder A, Page 256

⁷⁴ Parent Binder 1, Page 247-251

⁷⁵ District Binder A, Page 257

be read to her.⁷⁶ These special considerations were not altered in the IEP developed in April 2014; however, additional accommodations were added and put into place.⁷⁷ It was at this time also when the primary handicapping condition was changed to autism. The accommodations provided for the Student in the IEP included:

1. Extra time for completing assignments/appropriate activities;
2. Opportunity to respond orally;
3. Emphasis on major points;
4. Special projects in lieu of assignments;
5. Differential project rubric;
6. Frequent reminders of rules (verbal and/or nonverbal prompts and cues);
7. Visual aides for behavioral support;
8. Sensory support;
9. Copy of completed study guide;
10. Encouragement for classroom/appropriate participation;
11. Altered format of materials;
12. Spelling will not count against her unless it is the objective being taught;
13. Emphasis on detail for mastery;
14. Adapt simplify assignments;
15. Word bank;
16. Reduction of multiple choice options;
17. One on One Oral Testing/Read allowable portions; and
18. Adapt tests / Extended time.⁷⁸

As previously noted, all of the school personnel involved in providing education to the

⁷⁶ District Binder A, Page 253

⁷⁷ District Binder A, Page 176

⁷⁸ Parent Binder 1, Page 405-406

Student signed the Documentation of Receipt of Classroom Accommodations.⁷⁹ This document is contrary to what the Parent believed. She testified that “the teachers did not have the IEP or the accommodations” and that the Student “did not have any of the accommodations that she needed.”⁸⁰ How she was aware of this was never disclosed in evidence or testimony. The only accommodations that she testified to that was not being followed was that the Student was “counted off for her spelling...and that she was suppose to have oral testing.”⁸¹ This according to the Parent was reflected in that the Student received an “F” in science due to her spelling. The Student’s Grade Report dated June 3, 2014, reflected grades in science for the first semester to be a 63 or “D” and for the second semester to be a 52 or “F” according to the grading scale.⁸² No reasons in evidence or testimony was presented to attest to how or why the Student achieved the grades she did in the science class. Therefore, it cannot be said with any degree of confidence that the failing grade was the result of poor spelling or a failure to acquire the necessary knowledge required in the science class.

With regard to the Parent’s complaint that the Student was not educated in the least restrictive environment the IEP in question provided for the majority of the Student’s educational activity time to be in the general education setting rather than in the special education setting. No evidence or testimony was provided to attest to this allegation other than the Parent’s complaint that the Student was removed from the classroom for extended periods of time. Thus constituting in her mind that she was not in the LRE. The general education classes to which the Student was assigned also reflected that she was educated along with her same-aged non-disabled peers for the majority of each school day. It would appear from the Parent’s testimony that her complaint of not being educated with non-disabled regular education peers was related to the amount of speech therapy that the Student was receiving outside of the classroom setting. On cross examination she

⁷⁹ District Binder A, Page 172

⁸⁰ Transcript, Vol IV, Page 54

⁸¹ Ibid, Page 55

⁸² District Binder D, Page 15

testified when asked what was more important to her, science and social studies in the regular education classroom or the speech therapy for which she was receiving 150 minutes weekly, she stated that:

“Appropriate speech would be a priority...I don’t want her to – when she regresses, and she has regressed in speech, when she regresses in speech after receiving compensatory education, and after receiving speech at 150 minutes a week, then I know that that is a big red flag...and I would rather her be with her science and social studies in with the regular ed peers versus regress, if that is going to happen with that much speech therapy.”⁸³

The Parent further testified that she:

“Would like the speech therapist to be able to incorporate the curriculum and visit the speech – ideally, I believe that if the speech therapist, if she is having one on one speech, and if she is doing great in science and social studies, and they are doing a lab, I think that that would be awesome for the speech therapist to come in to science and social studies and help her, because it’s one on one speech, and it is still special ed time, regardless of where she is at, or all the trouble that she has had on the recess, on the playground, and all the trouble that she has had during lunch, if the speech therapist was around, I thought that would be great.”⁸⁴

The Parent, without direct knowledge, believed that the Student was being removed from the regular education classroom for extended periods of time during her third grade year due to the Student exhibiting maladaptive behaviors in the classroom. This, as noted above, would appear to be associated with her complaint that the Student was not being educated in the least restrictive environment as well as not being educated along with her regular education peers. On direct examination she acknowledged that the Student had never been suspended, but was subjected to

⁸³ Transcript, Vol IV, Page 23-24

⁸⁴ Ibid, Page 25-26

“taking walks or – they said, they call them sensory breaks.”⁸⁵ She further stated that she believed that:

“a sensory break was not meant to be like with the one-on-one aide, you know, sitting in all these places, like to go visit the office personnel or to sit in the nurse’s office or to go to all these rooms or to go get massages and to have their hair done, and you know, it turned into pretty elaborate – I’ve got three pages of nurses’ notes that are not even something that you would take somebody to a nurse for....and that was only part of them, they won’t give me the rest...I couldn’t get them to give me the rest, you know, in time for this meeting – they have taken her, you know, what few special ed – what few regular ed minutes that she gets...I have now found out that instead of – you know they count lunch as her regular ed time – instead of going to lunch, she’s with this new aide and she’s like – they’re doing like the body rubs or they’re doing – I think they’re going to the physical therapy room and they just – they play in there – she plays with this adult aide instead of being with her peers...and I haven’t checked with you on that...I don’t even know if they would consider that reg ed, special ed, or what that counts.”⁸⁶

How the Parent had access to the information was never revealed, but she testified that:

“during her third grade year, she was taken out of her regular class in the morning, and rushed down the hall into the resource room..and when she arrived at the resource room, they told her to go talk to Snoopy, which is a stuffed animal in the corner of the room...and then for ten or 15 minutes, she was just over there in the corner of the room with a stuffed animal while the aide and the teachers visited...and I really thought that that was not a good use of time...and at the end of the day [she] was dismissed from school ten minutes earlier than the other children

⁸⁵ Transcript, Vol I, Page 286

⁸⁶ Ibid, Page 287-288

were.”⁸⁷

The Student’s assistant principal testified that she, as well as the Student’s teachers and aides, were able to address the Parent’s complaint of when and why the Student was removed from the classroom. She stated that she did not have a sufficient memory to give the amount or number of times she talked with the Student for disciplinary reasons; however, she stated “it certainly [was] not once a day, because [the Student] had several good days.”⁸⁸ She further testified that during the Student’s third grade year that one behavior that resulted in being removed from the classroom was blurting out. “She was only removed from the classroom for a sensory break if the redirection did not work...and the goal 100 percent of the time is to bring her back into the classroom...so, it may just be to step out into the hall and get a drink and then come back in.”⁸⁹ The frequency of the removals and other disciplinary measures are contained in District’s Exhibit Binders G and F. Binder G contains 122 pages and Binder F contains 1,980 pages. All of the documents in these binders do not pertain to the adjudicated time frame in question and not all of those within the time frame were brought out in testimony.

The District’s behavior consultant provided the more informative information with regard to the purpose or function of the Student’s maladaptive behaviors which resulted in the removals; however, the amount of time away from same age peers is impossible to judge based on either testimony or evidence. More difficult in terms of judging the complaint is whether or not the removals resulted in a denial of FAPE. Other than these two complaints there was no other testimony or evidence presented to address the complaint of the Student not being educated along with non-disabled, same-aged peers between October 2013 and November 2014.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide

⁸⁷ Transcript, Vol IV, Page 51

⁸⁸ Transcript, Vol VI, Page 97-98

⁸⁹ Ibid, Page 130

a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.⁹⁰ The IDEA establishes that the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.⁹¹ The term “special education” means specially designed instruction.⁹² “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.⁹³ As noted in this case the Student presented as being a child eligible to receive special education services based on the identified disabilities of autism and intellectual deficits. She had been identified and was receiving special education services since entering the District as a kindergarten student.

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in its regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008. The Parent comes challenging the District as to whether or not they have complied with the IDEA and the Department’s regulations in providing the Student with a free and appropriate public education.

In 1982, the Supreme Court was asked, and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." Given that this is the crux of the Parent’s contention in this case it is critical to understand in making a decision about the Parent’s allegations of the District’s failure to provide FAPE. The Court noted that the following twofold analysis must be made by a court

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

⁹¹ 20 U.S.C. § 1401(3)(A)

⁹² 20 U.S.C. § 1402(29)

⁹³ 34 CFR § 300.26(b)(3)

or hearing officer:

- (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
- (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?⁹⁴

Six years later the Supreme Court addressed FAPE again by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.⁹⁵

Congress established and the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability.⁹⁶ Too often this hearing officer has found that parents, school administrators and attorneys representing them, agree on the basis but do not make this distinction in their arguments on the complaints or the differences they've encountered. The charge to education professionals is to concentrate on the unique needs of the child rather than the title of the disability or disabilities which makes them eligible for special education services. Such as in this case, the Student's exhaustive behavior difficulties were not only being associated with her autism, but also with her extremely limited intellectual abilities.

In reviewing the elicited testimony and the evidence in this case it is clear that the District attempted to focus on what they believed to be the unique needs of the Student even prior to changing the primary handicapping condition from intellectual deficits to autism. The record has been made difficult to some degree with the current due process hearing complaint filed by the Parent being the third complaint in the first four years of the Student's education. The complaint

⁹⁴ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

⁹⁵ *Honig v. Doe*, 484 U.S. 305 (1988)

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

is additionally complicated by the fact that the period of time during which the alleged violations took place are confined to the Student's second semester of her third grade year and the first two months of her fourth grade year.

It is necessary, therefore for this hearing officer to look at the facts in this case as to whether or not the District responded to the unique needs as expressed by the Student following a hearing being dismissed and the development of a subsequent memorandum of understanding having been developed as the result of a settlement agreement. The evidence and testimony indicates that the Parent believed that she was not permitted to participate as fully as she desired; whereas the District personnel responsible to the Student believed that they accommodated not only the Parent but appropriately did so for the Student during this time frame. The testimony by District personnel elicited in the course of the hearing suggest that they truly believed that the unique needs of the Student were being met by the IEPs developed within the time frame of November 2013 and October 2014. The relationship between District personnel and the Parent, even though she is an employee of the District, apparently began deteriorating when the Student was first associated with the District as a kindergarten student. The Parent's testimony as illustrated above in the finding of facts, gives evidence to her lack of trust, and her distrusting that the District has her child's educational welfare in mind. The fact that this hearing had to take eleven days and over eleven months to complete is evident that the Parent was given ample consideration to present evidence and testimony to support her complaints. The nine binders of evidence is also evident of having giving both sides ample opportunity to present their cases.

The documents entered as evidence and testimony are replete with how the District recognized and responded to the Student's unique needs for special education consideration during the period in question. The Parent's testimony is also evident that she has an expectation for her child which may be greater than the child or any educational institution will be able to help her attain. The Parent's challenge that FAPE was denied during the time period in question cannot be justified by the evidence. The evidence and testimony show that the District, recognized and accepted the additional challenge of addressing the maladaptive behaviors the Student exhibited as a consequence, more likely than not of her autism, as well as her intellectual deficits and the challenges that she presented to the educators in providing her with a free and

appropriate public education.

In more specifically defining what is meant by FAPE, the Court held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

- (1). They are provided at public expense and under public supervision and without charge;
- (2). They meet the State's educational standards;
- (3). They approximate the grade levels used in the State's regular education; and
- (4). They comport with the student's IEP.⁹⁷

The definition of children covered under IDEA; however, is seen as being doubly circular in that a child with disabilities must be so disabled as to require special education and related services. Again, as noted above, special education and related services are those that meet the unique needs of a child with disabilities. Moreover, related services are those that assist a child to benefit from special education, which can only be received by a child with disabilities. This child presents her Parent and the District with challenges consequent of both autism and her extremely low intellectual skills. The records presented show that the District made appropriate efforts to provide an educational program that would permit her the opportunity to receive an educational benefit.

The Parent is acutely aware of how the Student's autism disability has impacted her ability to adjust to the social demands of the school environment; however, her testimony reflects a belief that the Student should be able to acquire academic knowledge equivalent to her non-disabled peers in a regular educational setting. The District's position is in agreement with the Parent in that she might be able to benefit from making social skills gains in a regular classroom setting; however, they do not see her being able to gain any educational benefit in the same setting due to her extremely limited intellectual and communication skills.

The Parent has alleged in this case that the District has denied the Student FAPE because

⁹⁷ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

of an inadequate IEP rather than not having evaluated for the additional disabilities associated with autism. Even without the diagnosis of autism being an initial part of the record for the period in question, the District's behavior support plan, in place at the time, addressed the very same maladaptive behaviors as identified by the psychologist who provided the autism diagnosis.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. The question as to whether or not the Student was denied FAPE by the District for failure to develop and implement an appropriate IEP requires: (1) looking at each individual issue raised by the Parent to determine whether or not the District has been in compliance with the definition of FAPE under the IDEA, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*⁹⁸ agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.⁹⁹ Further, *Rowley* recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

"Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action

⁹⁸ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

⁹⁹ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

in state or federal court. Id. § 1415(e)(2).”¹⁰⁰

The Eighth Circuit Court of Appeals has addressed the issue of the appropriateness of an education in meeting the standards established in IDEA in order to provide FAPE. In *Fort Zumwalt School District v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible education or superior results as the Parent in this case would desire. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student.¹⁰¹

A major question with regard to the current case and whether or not FAPE was denied is whether or not the District between November 2013 and October 2014 failed to provide the Student with an IEP that appropriately addressed all of her educational needs including her maladaptive behaviors. She believes that by the District failing to conduct a functional behavior assessment within the adjudicated time frame that the Student was denied FAPE. The IDEA requires a district to determine the function of a student’s maladaptive behaviors by conducting an FBA when the student does not have a behavior intervention plan and has been removed from his or her educational placement for more than ten days for behaviors that are determined to be a manifestation of his or her disabilities.¹⁰² In the current case an FBA had been conducted prior to the time frame in question and the District was implementing a behavior intervention plan, although it was not in writing as suggested as a requirement by the Parent. (See *M.W., by his parents, S.W. and E.W., Plaintiffs-Appellants, v. New York City Department of Education, Defendant-Appellee*, 725 F.3d 131, 12-2720-cv, 7/29/13.)

It was the intent of the IDEA to encourage parental participation in the development of a disabled student’s IEP. The value of parental participation in the development of an IEP has

¹⁰⁰ *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

¹⁰¹ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

¹⁰² 20 U.S.C. §1415(k)(1)(F)(I) and 34 C.F.R. §300.530(f)(I)

been consistently emphasized in the IDEA.¹⁰³ As the Supreme Court stated in the previously cited Rowley case “It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.”¹⁰⁴ In this case there is no doubt, regardless of the complaint as filed, that the Parent participated in the process by being an active participant in the development of the Student’s multiple IEPs. At the same time, the evidence is replete with her allegations that she was not allowed to participate in a meaningful way. She actively participated, however, the testimony and evidence suggest simply that her expectations and recommendations were not agreed to by the other members of the Student’s IEP team. Although she did not agree with all of the decisions reached by the IEP team, her testimony reflected a history of active involvement in the Student’s health, welfare, and education which can only be admired by those of us without such challenges as those that she meets daily.

Also, as noted earlier, the courts have agreed that an IEP must be designed to provide the possibility for a student to obtain an educational benefit from the proposed instruction. What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. Again, going back to the Rowley standard, progress according to the courts should be measured in terms of educational needs of the disabled child and should be more than “trivial” or “de minimis.”¹⁰⁵

Some circuit courts have adopted a “meaningful benefit” standard of FAPE, whereas other circuits have not altered the longstanding position that the IDEA only requires an IEP to provide nontrivial educational benefits. Successful academic results or “progress” as suggested by the

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

¹⁰⁴ *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189, 205 (1982)

¹⁰⁵ *Polk v. Central Susquehanna Intermed. Unit 16*, 853 F.2d 171 (3rd Cir. 1988); *Ridgewood B. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); and *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)

Parent was never a construct associated with receipt of or the failure to receive FAPE under the IDEA. (See for example, *O.S. by Michael S. And Amy S. V. Fairfax County School Board*, 4th Cir., 2015, 14-1994, 10/19/15; see also *Independent School District No. 283 v. S.D. by J.D.*, 88F.3d, 8th Cir. 1996; and *Schuldt v. Mankato School District No. 77*, 937 F.2d 1357, 8th Cir 1991.)

In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a child's potential and educational needs. In this case the Student's extremely low level of intellectual ability and the maladaptive behaviors associated with her autism were appropriately addressed and illustrated in her IEPs as noted by the evidence. It is not a mandate of the IDEA that a parent, anymore than a district, be able to forecast with ultimate certainty of the adequacy of a particular IEP. From the documents entered as evidence and the testimony of the educational professionals this would appear to be the case for this Student when she initially became the educational responsibility of the District up to and including the time in question. The evidence and testimony support the District in having complied with the IDEA requirement in developing an IEP for the time period in question which provided the Student with the opportunity to obtain an educational benefit.

The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the court when the alleged violation has been based solely on procedural violations.¹⁰⁶ The alleged violation of not following the IDEA's due process procedure such as not conducting a functional behavior assessment or using "evidence based practices" do not meet that level of a violation of FAPE.

¹⁰⁶ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). See also *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996). More recently see: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson Country Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *School Board of Collier County v. K.C.*, 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79*, 35 IDELR 159 (8th Cir. 2001).

Order

The Parent has failed to provide testimony or evidence to suggest that the District has denied the Student with a free and appropriate public education between November 2013 and October 2014. The Parent is to be commended in her diligence in seeking out the best educational opportunities for her child; however, as noted above, the IDEA does not require a school district to provide the best education for a student with disabilities, only one that provides the student with an opportunity to gain educational benefits.

Finality of Order and Right to Appeal

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individuals with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer’s Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so ordered.



Robert B. Doyle, Ph.D.
Hearing Officer

October 29, 2015
Date