

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

Parents on behalf of [REDACTED], Student

**PETITIONER**

**VS.**

**CASE NO. H-15-26**

**Sloan-Hendrix School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Sloan-Hendrix School District (hereinafter "District" or "Respondent") denied [REDACTED] (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") during the 2013-2014 and 2014-2015 school years, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) failing to provide Student with an individualized educational program (hereinafter "IEP") that was reasonably calculated to provide educational benefit; (2) failing to provide special education in conformity with Student's IEP; (3) failing to provide related services in conformity with Student's IEP; and (4) failing to educate Student in the least restrictive environment.

**PROCEDURAL HISTORY:**

On April 22, 2015, the Arkansas Department of Education (hereinafter referred to as "Department") received a written request from Parents to initiate due process hearing

procedures on behalf of Student. Parents requested a due process hearing because they believed that the District failed to comply with the IDEA, as well as the regulations set forth by the Department, by failing to provide Student with an IEP reasonably calculated to provide educational benefit, failing to provide Student with special education and related services in conformity with his IEP, and failing to educate Student in the least restrictive environment.<sup>1</sup>

At the time that Parents filed their request for a due process hearing, Student (male) was fifteen years old and attending school in another school district. Student has not been enrolled in the District since completing the 2014-2015 school year. Because of the two-year statute of limitations, this case pertains only to issues going back to April 22, 2013; therefore, the issues raised by Parents fell within the 2013-2014 and 2014-2015 school years, when Student was in the eighth and ninth grades.

In response to the Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of May 26, 2015 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time. Ultimately, following two continuances, the hearing of this matter was scheduled to begin on September 16, 2015.<sup>2</sup>

On September 14, 2015, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the

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<sup>1</sup> See Hearing Officer Binder of Pleadings and Orders.

<sup>2</sup> *Id.*

prehearing conference, the parties discussed unresolved issues to be litigated at the hearing of this matter, as well as the witnesses and evidence necessary to address same.

On September 16, 2015, the closed hearing of this matter commenced. Testimony was heard on September 16, 2015, September 17, 2015, and September 18, 2015.<sup>3</sup> Testimony on September 16, 2015 and September 17, 2015 was heard at the administrative offices of the District. Testimony on September 18, 2015 was heard via skype, with some parties in Little Rock, Arkansas and others at the location of the District, specifically in Imboden, Arkansas. The hearing concluded on September 18, 2015.

The following witnesses testified in this matter: [REDACTED] (hereinafter referred to as "[REDACTED]"), [REDACTED], [REDACTED], [REDACTED], [REDACTED] (hereinafter referred to as "[REDACTED]"), [REDACTED] (hereinafter referred to as "[REDACTED]"), [REDACTED] (hereinafter referred to as "[REDACTED]"), and both Parents.<sup>4</sup> Parents had the burden of proof regarding the issues raised in this case.

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, [REDACTED], [REDACTED], Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parent was represented by [REDACTED] (Little Rock, Arkansas) and the District was represented by [REDACTED] (Jonesboro, Arkansas).

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<sup>3</sup> See Hearing Transcripts, Volumes I-III.

<sup>4</sup> *Id.*

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>5</sup>

**FINDINGS OF FACT:**

Student is a sixteen-year-old male and is no longer attending school in the Sloan-Hendrix School District. Student completed the 2013-2014 and 2014-2015 school years at the District.

Parent (father) testified that Student was born premature and, as a result, spent three months at Arkansas Children's Hospital before being discharged.<sup>6</sup> While in the hospital, Student suffered from a grade three bleed in his brain, which caused significant damage to Student in many regards.<sup>7</sup>

Student has significant balance issues, and has been diagnosed with spastic cerebral palsy.<sup>8</sup> He has difficulties walking and falls often when he is mobile.<sup>9</sup> Student must always be directly supervised while ambulating, and he often requires someone to hold his hand or otherwise support him when he is mobile.<sup>10</sup> In addition, Student has numerous cognitive impairments, such as communication and reading deficits. Student often makes noises with his mouth, such as popping or clicking sounds, and these noises increase in frequency with changes in environment or schedule. He commonly mimics people or animals as well.<sup>11</sup>

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<sup>5</sup> See Hearing Officer Binder of Pleadings and Orders.

<sup>6</sup> Transcript, Volume III, pp. 7-8.

<sup>7</sup> *Id.*

<sup>8</sup> Transcript, Volume III, pp. 13-14, 24.

<sup>9</sup> *Id.*

<sup>10</sup> Transcript, Volume III, pp. 23-24.

<sup>11</sup> Transcript, Volume III, p. 18.

Student struggles with fine motor skills, such as handwriting. Parent (mother) testified that it takes Student approximately two hours to write the numbers one through twenty-five.<sup>12</sup> Finally, Student is visually disabled, requiring direct light and magnification in order to see written documents.<sup>13</sup>

During the 2013-2014 academic year, Student was in the eighth grade.<sup>14</sup> Student received special education and related services during the academic year pursuant to an IEP developed on May 16, 2013 (duration of services to be through May 23, 2014).<sup>15</sup> Pursuant to the IEP, Student was scheduled to receive 800 minutes of general education per week (study hall, lunch, computer class, and music/art/P.E.) and 1350 minutes of special education per week (writing, reading, math, science, and social studies).<sup>16</sup> In addition, Student was scheduled to receive occupational therapy one time per week for duration of 60 minutes, and physical therapy one time per week for duration of 60 minutes.<sup>17</sup> Per the IEP, Student was also to receive the following: (1) extra time on assignments; (2) preferential seating; (3) adaptation of materials to increase font size; (4) daily contact; (5) adaptation of tests to be read aloud and the font on tests to be enlarged; (6) frequent reminders of class rules; and (7) accompaniment by paraprofessional during unstructured times.<sup>18</sup>

The IEP contained statements in the "Student Profile Summary" indicating Student's present academic and functional levels at the time that the IEP was developed.<sup>19</sup> Student's

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<sup>12</sup> Transcript, Volume III, p. 141.

<sup>13</sup> Transcript, Volume III, pp. 15.

<sup>14</sup> Parent Binder, p. 48; District Binder, p. 51.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Parent Binder, pp. 51-52; District Binder, pp. 54-55.

<sup>19</sup> Parent Binder, p. 49; District Binder, p. 52.

listening vocabulary comprehension was at the second grade level, and his reading, math, and writing levels were at the kindergarten level.<sup>20</sup> The IEP further noted that Student's strengths were "one-to-one counting and counting money" and that Student could read forty-eight out of fifty-seven second grade Dolch words.<sup>21</sup> Student's weaknesses were listed as sentence construction, spelling, similarities/differences, subtraction, and using charts and graphs.<sup>22</sup>

Student's May 16, 2013 IEP contained eight annual goals: one social studies goal, one science goal, two math goals, two English language goals, and two functional goals.<sup>23</sup> At the end of Student's eighth grade year, he had mastered four of eight annual goals.<sup>24</sup>

During the 2014-2015 academic year, when Student was in the ninth grade, he continued to receive special education and related services pursuant to an IEP developed on May 19, 2014 (duration of services to be through May 22, 2015).<sup>25</sup> As in the prior year, Student was scheduled to receive 800 minutes of general education per week (study hall, lunch, P.E./Health) and 1350 minutes of special education per week (writing, reading, math, science, social studies, language arts).<sup>26</sup> In addition, Student was scheduled to receive occupational therapy one time per week for duration of 60 minutes, and physical therapy one time per week for duration of 60 minutes.<sup>27</sup> Per the IEP, Student was also to receive the following: (1) extra time on assignments; (2) adaptation of materials to increase font size;

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Parent Binder, pp. 53-64; District Binder, pp. 56-67.

<sup>24</sup> *Id.*

<sup>25</sup> Parent Binder, p. 1; District Binder, p. 27.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

(3) adaptation of tests to be read aloud and the font on tests to be enlarged; (4) direct light; and (5) accompaniment by paraprofessional during unstructured times.<sup>28</sup> In addition, the IEP stated that Student would have a “choice of working at school or doing homework” to address behavior issues.<sup>29</sup>

The “Student Profile Summary” indicated that Student had mastered math subtraction of two-digit numbers with 80% mastery and that he was reading first grade passages with 80% accuracy.<sup>30</sup> In addition, it was noted that Student’s strengths were listening comprehension, specifically stating that Brigance assessments indicated Student to be at the fifth grade level on this skill, and recognition of third grade Dolch words with mastery.<sup>31</sup> Student’s weaknesses were listed as reading, reading comprehension, math calculation, problem-solving, occupational therapy, and physical therapy, noting specifically that Student has difficulty with “fine and gross motor skills, writing complete sentence answers independently, sequencing, calculating 3-digit numbers, task completion, and age-appropriate behavior.”<sup>32</sup>

Student’s May 19, 2014 IEP contained seven annual goals: one social studies goal, one science goal, one math goal, two English language goals, and two functional goals.<sup>33</sup> By the end of the third quarter of Student’s ninth grade year, he had mastered four of seven annual goals.<sup>34</sup>

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<sup>28</sup> Parent Binder, pp. 4-6; District Binder, pp. 31-32.

<sup>29</sup> *Id.*

<sup>30</sup> Parent Binder, p. 2; District Binder 28.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Parent Binder, pp. 7-16; District Binder, pp. 33-42.

<sup>34</sup> *Id.*

At the annual review conference held on May 19, 2015, it was noted that Student's listening comprehension was at the seventh grade level. Word recognition, however, showed that Student was recognizing words in isolation at the first grade level. Further, Student was able to orally read passages at the upper second grade level, and reading to comprehend short passages at the upper first grade level. In math, Student was functioning at a first grade level, showing strengths in basic addition and subtraction.<sup>35</sup>

Student's occupational therapist, [REDACTED], did not attend any IEP meetings for Student, and was not asked to attend any.<sup>36</sup> She provided reports to Student's special education teacher, [REDACTED], and spoke with [REDACTED] on a regular basis.<sup>37</sup>

Student's occupational therapy annual report dated April 25, 2014 states that Student received "up to 60 minutes per week" of occupational therapy services during the 2013-2014 school year. The report further states that Student demonstrated excellent participation in occupational therapy treatment and that he improved in all areas of fine motor and upper-limb coordination. Finally, the report states that the same treatment plan used in the 2013-2014 school year would be applied to the Student's 2014-2015 school year.<sup>38</sup> A report dated April 24, 2013, addressing the 2012-2013 school year, addressed the same points.<sup>39</sup>

Student was evaluated for occupational therapy purposes in the year 2012, and a report dated August 29, 2012 is in the record.<sup>40</sup> Student was performing at or below his actual age in the areas of visual motor integration, fine manual control, and coordination at

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<sup>35</sup> District Binder, p. 132.

<sup>36</sup> Transcript, Volume II, p. 8.

<sup>37</sup> *Id.*

<sup>38</sup> Parent Binder, p. 174.

<sup>39</sup> District Binder, p. 417.

<sup>40</sup> District Binder, p. 227.



the time that the report was prepared.<sup>41</sup> The report recommends long and short term goals for Student specific to activities of daily living, visual motor integration, visual perception, coordination, handwriting, and attention.<sup>42</sup> [REDACTED] testified that Student's goals with regarding to occupational therapy remained the same during the 2013-2014 and 2014-2015 school years.<sup>43</sup> [REDACTED] did not update progress on specific goals in her annual reports but, instead, addressed deficits that she was continuing to address with Student.<sup>44</sup> [REDACTED] testified that Student had made progress during the 2013-2014 and 2014-2015 school years, noting overall improvement in coordination, handwriting, and strength.<sup>45</sup>

[REDACTED] maintained occupational therapy logs for Student during the 2013-2014 and 2014-2015 school years.<sup>46</sup> During the 2013-2014 school year, Student attended twenty-two sessions of occupational therapy, with approximately fourteen sessions missed.<sup>47</sup> There were no records to suggest the reasons for the missed sessions. During the 2014-2015 school year, Student attended twenty-two occupational therapy sessions. [REDACTED] acknowledged that approximately thirteen occupational therapy sessions were missed, explaining that although some sessions were missed due to Student absence and school closures (snow days), others were missed because she was "low on therapy staff" and did not have a therapist to cover the session.<sup>48</sup> She also testified that some of the absences were due to her being out of town at conferences or on vacation.<sup>49</sup> [REDACTED] acknowledged that

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<sup>41</sup> District Binder, p. 230.

<sup>42</sup> District Binder, p. 230-231.

<sup>43</sup> Transcript, Volume II, p. 26.

<sup>44</sup> Transcript, Volume II, p. 28.

<sup>45</sup> Transcript, Volume II, p. 63-64.

<sup>46</sup> Parent Binder, pp. 195-205; District Binder pp. 418-426.

<sup>47</sup> Transcript, Volume II, pp. 48-49.

<sup>48</sup> Transcript, Volume II, pp. 33-35.

<sup>49</sup> Transcript, Volume II, pp. 39-40.

Student missed approximately a third of his physical therapy sessions each year and that this was significant.<sup>50</sup>

Student's physical therapist, [REDACTED], did not attend any IEP meetings for Student.<sup>51</sup> She provided annual reports to Student's special education teacher, [REDACTED], and spoke with [REDACTED] on a regular basis. Student's physical therapy annual report dated April 25, 2014 states that Student received 60 minutes of physical therapy services per week during the 2013-2014 school year. The report further states that Student had improved functional mobility skills so as to increase speed of ambulation, increased his standing balance, and improved overall coordination.<sup>52</sup>

Student was evaluated for physical therapy purposes in the year 2012, and a report dated September 11, 2012 is in the record.<sup>53</sup> Student had deficits regarding balance, strength, and coordination, as well as range of motion in his lower extremities, at the time that the report was prepared.<sup>54</sup> Specifically, Student scored two standard deviations below average on strength and agility, and almost two standard deviations below average on body coordination, placing him in the "well below average" category in these areas.<sup>55</sup> Deficits of this nature cause Student to have difficulties with activities such as running, jumping jacks, kneeling to standing without upper body assistance, standing on one leg, walking on a line with one foot in front of the other, jumping over obstacles, and maintaining an upright

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<sup>50</sup> Transcript, Volume II, pp. 50-51.

<sup>51</sup> Transcript, Volume II, p. 90.

<sup>52</sup> Parent Binder, p. 162.

<sup>53</sup> Parent Binder, pp. 163-167.

<sup>54</sup> *Id.*

<sup>55</sup> Transcript, Volume II, p. 79.

position without touching or using hands.<sup>56</sup> Specifically, in the school setting, Student has difficulty maneuvering around campus, walking between buildings, and participating in physical education.<sup>57</sup>

The September 11, 2012 physical therapy report provided short term goals for Student to address these deficits.<sup>58</sup> In addition, [REDACTED] provided goals, and updated goals, for Student for the 2013-2014 and 2014-2015 school years based on Student's progress.<sup>59</sup> Progress on these goals was noted on the physical therapy progress reports completed each day that Student had therapy, as well as on the annual report prepared by [REDACTED] for District.<sup>60</sup> [REDACTED] stated, however, that she did not report on each specific goal on an annual basis.<sup>61</sup>

[REDACTED] maintained occupational therapy logs for Student during the 2013-2014 and 2014-2015 school years, and she provided these logs to the owner of the clinic for which she worked.<sup>62</sup> Although the record in this case is somewhat unclear regarding the issue of whether Student missed any physical therapy sessions, [REDACTED] stated that Student would have missed some sessions on account of his being absent from school or due to school closures. In addition, there were times when [REDACTED] was unable to provide therapy on account of illness.<sup>63</sup>

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<sup>56</sup> Transcript, Volume II, p. 80.

<sup>57</sup> Transcript, Volume II, p. 81.

<sup>58</sup> Parent Binder, pp. 163-167.

<sup>59</sup> Transcript, Volume II, p. 84; District Binder, pp. 427-28, 441-42.

<sup>60</sup> Transcript, Volume II, p. 86.

<sup>61</sup> Transcript, Volume II, p. 90.

<sup>62</sup> Transcript, Volume II, p. 135.

<sup>63</sup> Transcript, Volume II, pp. 136-37.

The record in this case contains documentation of the dates that Student received occupational and physical therapy.<sup>64</sup> These dates correspond with the number of missed occupation and physical therapy sessions acknowledged by [REDACTED] (fourteen per academic year) and [REDACTED] (six per academic year).<sup>65</sup>

[REDACTED], Student's special education teacher, testified that she taught Student the entire time that he attended school in the District.<sup>66</sup> [REDACTED] classroom is a combination resource room, with some students, including Student, being classified as self-contained.<sup>67</sup> All of the students in [REDACTED] classroom during the 2013-2014 and 2014-2015 school years were special education students.<sup>68</sup> [REDACTED] testified that there would be no reason for a student to be in her classroom if not receiving special education services.<sup>69</sup> An aide, [REDACTED], was also in the classroom to assist Student during unstructured situations, such as when Student was walking to lunch, walking from the school bus to breakfast or class, and walking in the hallways.<sup>70</sup> [REDACTED] also assisted with instruction for Student, as well as other students as needed.<sup>71</sup>

During both the 2013-2014 and 2014-2015 school years, Student was scheduled to receive 800 general education minutes per week, or 160 minutes per day.<sup>72</sup> During both school years, Student's IEP specified that he would have study hall in the general education,

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<sup>64</sup> District Binder, pp. 389-90.

<sup>65</sup> *Id.*

<sup>66</sup> Transcript, Volume II, p. 153.

<sup>67</sup> Transcript, Volume II, pp. 155-56.

<sup>68</sup> Transcript, Volume II, p. 171.

<sup>69</sup> Transcript, Volume II, p. 172.

<sup>70</sup> Transcript, Volume II, p. 159.

<sup>71</sup> Transcript, Volume II, p. 160.

<sup>72</sup> Transcript, Volume II, p. 166.

which compromised forty-five minutes per day.<sup>73</sup> Student also had lunch in the general education, comprising approximately thirty minutes per day.<sup>74</sup> In both academic years, Student was schedule to attend one or two other classes each day in the general education (i.e. Music/Art/P.E. for 2013-2014 and P.E./Health for 2014-2015), compromising forty-five to ninety minutes per day.<sup>75</sup> [REDACTED] testified that the remaining time constituted class transitions.<sup>76</sup>

During the 2013-2014 and 2014-2015 school years, until May 11, 2015, Student attended study hall in [REDACTED] class. [REDACTED] explained that it was agreed upon by Parents that he would have study hall in her classroom during both school years. [REDACTED] acknowledged that this was not reflected on the IEP.<sup>77</sup> When asked specifically about Student's schedule for the 2014-2015 year, [REDACTED] explained that Student received special education services first hour for math, second hour for reading, third hour for science, fourth hour for re-teaching, sixth hour for social studies, seventh hour for language arts, and eighth hour for study hall.<sup>78</sup>

In January 2015, Student's IEP was amended at Parents' request. Parent (mother) had requested that the conference meet to discuss how to address an earlier incident (December 2014) in which Student was sexually abused by another student in the school

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<sup>73</sup> Parent Binder, pp. 1, 48.

<sup>74</sup> Transcript, Volume II, p. 166.

<sup>75</sup> Parent Binder, pp. 1, 48.

<sup>76</sup> Transcript, Volume II, p. 167.

<sup>77</sup> Transcript, Volume II, pp. 163-66.

<sup>78</sup> Transcript, Volume II, pp. 169-70.

bathroom.<sup>79</sup> The IEP committee decided that Student would be permitted for the remainder of the 2014-2015 school year to use the restroom in the teacher's lounge.<sup>80</sup>

██████ testified that, when Student had behavior problems in class, he was given a homework consequence. Student would sometimes make noises and mimic others in the class in a very loud manner. As a consequence for these negative behaviors, ██████ would assign homework to him for that evening. Parents agreed to this consequence and worked with ██████ to enforce the consequence by making Student complete whatever was assigned.<sup>81</sup> During the 2013-2014 school year, Student's negative behaviors escalated and District made a CIRCUIT referral. The Arkansas Department of Education sent a behavior specialist to observe Student, and the specialist notified District that what ██████ and Parents were doing with regard to addressing behavior was working and no other intervention was necessary.<sup>82</sup> No IEP meeting was held prior to the CIRCUIT referral.<sup>83</sup> Student's behaviors were improved until the third quarter of the 2014-2015 school year. ██████ testified that she did not need to institute a behavior plan at that time because Student's behaviors corrected very quickly without additional intervention.<sup>84</sup>

Both ██████ and the classroom aide, ██████, instructed Student with regard to substantive subjects.<sup>85</sup> ██████ testified that she would tell ██████ about Student's goals and what Student needed to work on, and ██████ assisted with instruction.<sup>86</sup> ██████ worked

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<sup>79</sup> Transcript, Volume II, pp. 174-75. Please note that, whether Student was or was not sexually abused while in attendance at the District is not an issue that this Hearing Officer has jurisdiction to consider or decide.

<sup>80</sup> Transcript, Volume II, p. 175; Parent Binder, p. 20.

<sup>81</sup> Transcript, Volume II, pp. 205-06.

<sup>82</sup> Transcript, Volume II, p. 214.

<sup>83</sup> Transcript, Volume II, pp. 217-18.

<sup>84</sup> Transcript, Volume II, pp. 226-27.

<sup>85</sup> Transcript, Volume II, p. 228.

<sup>86</sup> *Id.*

with Students one-on-one at some point every day.<sup>87</sup> Student was taught half of the time by [REDACTED] and the other half by [REDACTED].<sup>88</sup>

[REDACTED] testified that she was Student's paraprofessional for the 2013-2014 and 2014-2015 school years.<sup>89</sup> She testified that she accompanied Student when he walked around campus, and this included the bathroom. Regarding the bathroom, she testified that sometimes she walked Student all the way to the bathroom and, other times, she would walk him part of the way down the hall or watch him from the classroom door.<sup>90</sup> [REDACTED] testified that, in addition to being a paraprofessional in [REDACTED] room, she filled in for others at the school from time to time.<sup>91</sup> [REDACTED] sometimes worked in the school office answering telephones, and she would take Student with her during these times.<sup>92</sup> She testified that Student liked to go with her to the office, and that she and Student would read "on DRA levels" while they were there.<sup>93</sup> [REDACTED] also instructed Student in the subjects of math, science, and social studies.<sup>94</sup> [REDACTED] was given worksheets or materials by [REDACTED] and she would work with Student on these materials.<sup>95</sup> When the worksheets or materials were turned in, [REDACTED] would grade them and give them to [REDACTED] to record the grade.<sup>96</sup>

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<sup>87</sup> Transcript, Volume II, p. 232.

<sup>88</sup> *Id.*

<sup>89</sup> Transcript, Volume I, p. 14.

<sup>90</sup> Transcript, Volume 1, p. 22.

<sup>91</sup> Transcript, Volume 1, p. 24.

<sup>92</sup> Transcript, Volume 1, p. 25.

<sup>93</sup> Transcript, Volume 1, p. 26.

<sup>94</sup> Transcript, Volume 1, pp. 34, 37.

<sup>95</sup> Transcript, Volume 1, p. 73.

<sup>96</sup> Transcript, Volume 1, p. 75.

██████ accompanied Student to P.E. each day.<sup>97</sup> In P.E., Student walked and would play catch with ██████ or other students.<sup>98</sup> Student did not always engage in the same activities as other students in P.E., sometimes because he was unable to physically do the activity, and other times because he did not want to participate.<sup>99</sup> P.E. and the lunch period were the only times that Student was outside of ██████ classroom and around non-disabled peers.<sup>100</sup>

### **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.<sup>101</sup> In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.<sup>102</sup> 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.<sup>103</sup>

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<sup>97</sup> Transcript, Volume 1, p. 46.

<sup>98</sup> Transcript, Volume 1, p. 47.

<sup>99</sup> Transcript, Volume 1, pp. 48-49.

<sup>100</sup> Transcript, Volume 1, pp. 51, 65.

<sup>101</sup> 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

<sup>102</sup> 458 U.S. 176, 206-07 (1982).

<sup>103</sup> *Id.*



It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts no procedural violations; therefore, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of procedural violations of the IDEA.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the 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.”<sup>104</sup> 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.<sup>105</sup> 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.’”<sup>106</sup>

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.”<sup>107</sup> However, the IDEA

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<sup>104</sup> *Id.* at 192

<sup>105</sup> *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

<sup>106</sup> *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).

<sup>107</sup> *CJN*, 323 F.3d at 641.

“significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”<sup>108</sup> 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.”<sup>109</sup> The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”<sup>110</sup> 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.”<sup>111</sup>

In the present case, Parents asserted that the District failed to provide FAPE when it: (1) failed to develop and implement an appropriate IEP for Student that was reasonably calculated to provide educational benefit; (2) failed to provide special education in conformity with Student’s IEP; (3) failed to provide related services in conformity with Student’s IEP; and (4) failed to educate Student in the least restrictive environment.

**Appropriate IEP.** Parents asserted that the District failed to develop and implement an appropriate IEP for both the 2013-2014 and 2014-2015 school years that was reasonably calculated to provide educational benefit to Student. For children who are Student’s age, the IDEA requires that IEPs include the following: “(1) a statement of the student’s present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related

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<sup>108</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

<sup>109</sup> *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

<sup>110</sup> *Pachl*, 453 F.3d at 1068.

<sup>111</sup> *Roncker*, 700 F.2d at 1063.

services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence.<sup>112</sup>

In the present case, the record shows that Student's IEP was reasonably calculated to enable Student to receive educational benefit while at Sloan-Hendrix School District. The District prepared an IEP for Student prior to the 2013-2014 and 2014-2015 academic years that included specific goals for math, English language arts, behavior, science and social studies.

In addition to the stated goals on the 2013-2014 and 2014-2015 IEPs, Student's IEPs included a statement of the student's present levels of academic performance, progress indications, a statement of educational and related services being provided to Student, an explanation of the extent to which Student would be in special education classes versus the general education, a statement of accommodations necessary to measure Student's achievement, and the date on which services outlined in the IEP would commence. The IEP also outlined Student's progress toward his goals, in that each goal included a percentage per quarter which represented Student's level of mastery. █████ explained in the record how she calculated progress on each of the goals. A review of all goals indicated that Student mastered some of the stated goals for both his eighth and ninth grade years, and that he made progress toward mastery on all remaining goals. It is noted that, in some areas, Student's progress has been slow; however, it is the opinion of this Hearing Officer that this lack of

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<sup>112</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

progress is related more to District's failure to adhere to Student's IEPs, rather than to District's failure to develop appropriate IEPs.

Also, Parents noted that Student's behavior was not addressed via a behavior intervention plan, and that Student was failing to make progress. It is the opinion of this Hearing Officer, however, that the District's method of addressing Student's behavior, i.e. assigning additional nighttime homework, was agreed to by Parents and was effective for Student. While it might have been unorthodox, there is nothing that indicates that is was inappropriate. In addition, regarding progress, Student was making progress from year to year. While that progress may have been slower than Parents would have preferred, there is nothing to indicate that Student was not progressing adequately.

In sum, Parents have failed to meet their burden in regards to establishing that Student's IEPs were not reasonably calculated to enable Student to receive educational benefit.

**Adherence to IEP.** Parents asserted that District failed to comply with the requirements of Student's IEP with regard to special education minutes and related services by failing to provide general education minutes, as well as occupational and physical therapy services, required by Students' 2013-2014 and 2014-2015 IEPs. In the present case, there is sufficient evidence based on the facts presented to conclude that District failed to properly implement Student's IEPs for the 2013-2014 and 2014-2015 school years.

First, it is undisputed that District failed to provide Student the weekly general education minutes specified in his IEPs for eighth and ninth grade. Both of Student's IEPs, specifically those for the 2013-2014 and 2014-2015 school years, specified that Student

should receive 800 minutes of general education per week, which equates to 160 minutes of general education per school day.

During the 2013-2014 school year, Student was scheduled to have one study hall and two substantive classes in the general education, as well as lunch and transition between classes. Considering that study hall and class periods were forty-five minutes, and lunch was approximately thirty minutes, Student's schedule, had it been properly followed, more than covered the general education minutes specified in his IEP. During the 2014-2015 school year, Student's general education minutes remained the same. A review of Student's schedule, however, showed that he had one substantive class, one study hall, lunch, and class transitions in the general education. This constituted one less substantive class than in the prior school year. Even if District had properly followed Student's schedule for the 2014-2015 school year, it is questionable, without additional information in the record, whether one forty-five minute substantive class, one forty-five minute study hall, a thirty-minute lunch and class transitions would add up to 160 minutes per day.

Here, however, the facts leave no question as to whether Student was deprived general education minutes specified in his IEP. [REDACTED] testified that Student, despite the fact that his IEP indicated that he would attend study hall in the general education, attended study hall in her classroom for both academic years in question. When questioned about the reason for this action, [REDACTED] explained that she and Parents had jointly decided that Student should attend study hall in her classroom. Parental agreement, however, does not overcome the requirement that the District adhere to Student's IEP. Had [REDACTED] felt that Student needed to attend study hall in the resource room, and Parents had agreed to such

recommendation, [REDACTED] should have indicated this on the IEP before implementing this change. As such, Student's stated general education minutes were reduced by 45 minutes per day, which equates to 225 minutes per week, for the duration of two school years, or 69<sup>113</sup> weeks. All total, Student did not receive 15,525 minutes of general education over the course of the 2013-2014 and 2014-2015 school years.

Parents also asserted that Student was not allowed to eat lunch in the general population and, instead, was forced to sit at a table near teachers without non-disabled peers. Parents, however, failed to present sufficient information to prove this claim. While it appears that Student may not have had choice of table for lunch, there is nothing to indicate that Student was isolated from non-disabled peers simply because he was seated at a table near the teachers. Without more evidence on this issue, Parents have failed to meet their burden with regard to establishing that Student was not allowed to eat lunch in the general population.

Regarding occupational and physical therapy, it is undisputed that Student was not provided each of these related services as specified in his 2013-2014 and 2014-2015 IEPs. Records indicated that student missed approximately 30% of occupational therapy sessions during his eighth and ninth grade school years. He further missed approximately 15% of physical therapy sessions. Certainly, many of these missed sessions could be attributed to student absences and school closures (snow days). However, both [REDACTED] and [REDACTED], Student's occupational and physical therapists, indicated that they had missed sessions for various other reasons, i.e. conferences, vacations, illnesses, and that these sessions had not

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<sup>113</sup> The record indicates that Student began attending study hall with the general student population in early May, 2015.

been covered by other therapists. The evidence in this case did not allow for Student's attendance to be matched day for day with occupational and physical therapy logs; however, based on the testimony of [REDACTED] and [REDACTED], it is the conclusion of this Hearing Officer that approximately one third of all missed sessions were attributable to therapist absences, as opposed to Student absences and school closures. This would compute to five missed sessions of occupational therapy per school year (approximately one third of approximately fourteen total missed sessions), and two missed sessions of physical therapy per school year (one third of approximately 6 missed sessions).

In conclusion, Student was denied FAPE as a result of District failing to adhere to his stated IEPs for the 2013-2014 and 2014-2015 school years regarding general education minutes, occupational therapy, and physical therapy.

**Least Restrictive Environment.** Parents alleged that the District failed to educate Student in the least restrictive environment. As stated *supra*, the IDEA 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."<sup>114</sup> However, the IDEA "significantly qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate.'"<sup>115</sup> Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be "feasibly

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<sup>114</sup> *CIN*, 323 F.3d at 641.

<sup>115</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

provided in a non-segregated setting.”<sup>116</sup> The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”<sup>117</sup> 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.”<sup>118</sup>

In the present case, it was determined by Student’s IEP team that he should receive 800 minutes of general education each school week for the duration of his eighth and ninth grade years. As concluded above, despite the requirements stated on the IEP, District did not provide student with study hall in the general education during his the 2013-2014 and 2014-2015 school years. Student should not have been separated from his peers during study hall because the services that necessitated separation could not have been provided in a non-segregated setting. Based on the facts in this case, there is nothing to indicate that Student could not have been adequately provided study hall in a non-segregated setting. Student had a paraprofessional that was assigned to him; therefore, he could have continued to have one-on-one assistance, as needed, in a general education study hall. In addition, evidence indicated that Student often had free time to play educational games on an iPad during study hall, an activity that certainly could have been done with other, non-disabled peers in the same classroom.

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<sup>116</sup> *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

<sup>117</sup> *Pachl*, 453 F.3d at 1068.

<sup>118</sup> *Roncker*, 700 F.2d at 1063.



In addition, the benefits that Student would have gained educationally by being exposed to his non-disabled peers cannot be classified as marginal. In Student's case, he had some cognitive and physical limitations, but he was more than capable of socializing with other peers and benefitted educationally from doing so. By being removed from general education study hall and given an individual study hall in the resource room, Student was isolated from others and did not receive the opportunity to interact and learn social behaviors from same-aged, non-disabled peers.

As such, District's failure to adhere to Student's 2013-2014 and 2014-2015 IEPs regarding general education minutes, specifically resulting in a total loss of 16,200 general education minutes over the course of two school years, also resulted in District failure to education Student in the least restrictive environment.

**Conclusion.** Having considered Parents allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was denied FAPE as a result of substantive violations of the IDEA.

**ORDER:**

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents have introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between August 2013 and May 2015 (two academic years) by failing to provide services, in accordance with the 2013-2014 and 2014-2015 IEPs on file for Student.

Student was deprived of 15,525 minutes of general education minutes on account of Student being denied study hall in the general education with nondisabled peers for a period of nearly two academic years. Although Student did receive instruction during study hall, he was deprived of FAPE because he did not receive social exposure to same-aged, non-disabled peers. Compensatory education is warranted to compensate Student for this deprivation. Therefore, this Hearing Officer hereby orders that Student be permitted to engage in any age-appropriate, extracurricular activity of his choice<sup>119</sup> for up to 70 hours, at a cost of no more than ten dollars (\$10.00) per hour, at District's expense. This remedy serves to compensate approximately one hour/week of lost social experiences on account of District's denial of FAPE.<sup>120</sup>

Student was deprived of approximately ten one-hour occupational therapy sessions during the 2013-2014 and 2014-2015 school years<sup>121</sup> on account of his therapist being absent, which constituted a denial of FAPE. Therefore, this Hearing Officer hereby orders that Student be permitted to attend ten one-hour occupational therapy sessions, at District's expense. These ten sessions must be scheduled and attended by Student prior to June 1, 2016.

Student was deprived of approximately four one-hour physical therapy sessions during the 2013-2014 and 2014-2015 school years<sup>122</sup> on account of his therapist being

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<sup>119</sup> Student is no longer attending school in the District; therefore, it is not possible to impose a remedy that can be served in the District.

<sup>120</sup> It is unlikely that the entire duration of each study hall session was social in nature. As such, this remedy is based on an estimate of the percentage of time that Student might have interacted with same-aged, non-disabled peers while in study hall over the course of the 2013-2014 and 2014-2015 academic years.

<sup>121</sup> There were approximately five one-hour occupational therapy sessions per academic year that were missed on account of the occupational therapist being absent.

<sup>122</sup> There were approximately two one-hour physical therapy sessions per academic year that were missed on account of the physical therapist being absent.

absent, which constituted a denial of FAPE. Therefore, this Hearing Officer hereby orders that Student be permitted to attend four one-hour physical therapy sessions, at District's expense. These four sessions must be scheduled and attended by Student prior to June 1, 2016.

**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

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**HEARING OFFICER**

10/29/2015

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**DATE**