

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

**RE:   XXXXXXXX XXXX  
      as Parent of Student  
      XXXX XXXX**

**PETITIONER**

**VS.   H-16-12**

**XXXXXXXXXX School District**

**RESPONDENT**

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

**Issues and Statement of the Case:**

The Petitioner alleges that the Respondent denied the Student with a free and appropriate public education (FAPE) during school years 2013-14, 2014-15 and the beginning of school year 2015-16 by violating the due process and benefit standards of the IDEA by:

1. Failing to develop and implement an appropriate Individual Education Plan (IEP);  
and
2. Failing to implement that plan in the least restrictive environment (LRE).

Relief sought by the Petitioner included:

1. Compensatory special education and related services (no amount specified);
2. Evaluation to the extent necessary for placement and programming purposes;
3. The development of an appropriate IEP to be implemented in the LRE, specifically to include therapies and teaching strategies to address all the Student’s disabilities and resulting deficits, and to provide opportunities for rehabilitation with and interaction with the Student’s non-disabled peers, with said IEP to include needed related services;
4. Reimbursement for costs associated with the Parent’s provision of FAPE (no amount specified);

5. Training for administrators, teachers, paraprofessionals, and staff;
6. Consultant approved by the Parent to assist the District with appropriate

programming

to include the development and implementation of an appropriate IEP to address all of the Student's disabilities and resulting deficits; and

7. The Parent to be declared to have exhausted his administrative remedies as to his Section 504 claims.

Issues raised by the Petitioner in her request for a due process hearing that were decided by the hearing officer as non-judicable under the IDEA included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973. These issues were dismissed by pre-hearing order issued on August 27, 2015. (See Hearing Officer Exhibit 2)

**Procedural History:**

On August 26, 2015, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from XXXXXXXX XXXXX (Petitioner) (hereinafter referred to as "Parent"), the parent and legal guardian of XXXXX XXXXX (hereinafter referred to as "Student"). The Parent requested the hearing because he believes that the XXXXXXXXXXXX School District (hereinafter referred to as "District") has 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 October 8, 2015, on which the hearing

would commence should the parties fail to resolve the complaint issues 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 August 27, 2015.

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 Parents were represented by Theresa L. Caldwell, attorney of Little Rock, Arkansas and the District was represented by Sharon Carden Streett, Attorney of Little Rock, Arkansas.

The District responded to the Petitioner's complaints as ordered on September 5, 2015. (See Hearing Officer Exhibit 3). The Respondent requested and was granted without opposition a continuance due to an out-of-state conflict for the Respondent's counsel. The hearing was set to begin on October 22, 2015; however, a family medical emergency resulted in the Respondent asking for yet a second continuance. The request was granted by order on October 16, 2015, for the hearing to begin on November 9, 2015. The hearing began as scheduled on November 9, 2015; however, the Petitioner requested on the record for a continuance in order for him to complete the presentation of his case. The request was granted with the dates of January 5, 6, and 7, 2016, being set for the continuance of the hearing. On January 4, 2016, the day before the hearing was scheduled to continue the Petitioner requested a continuance due to the non-availability of counsel. The request was granted without objection for the hearing to be continued on February 18 and 19, 2016, by order issued on January 5, 2016. On January 26, 2016, the Respondent notified the Hearing Officer of a court scheduled conflict and requested yet another continuance. The continuance was granted without objection by order on January

26, 2016, for the hearing to be heard on March 3, 2016. The second day of the hearing was heard on March 3, 2016, with the Petitioner once again requesting on the record for additional time to complete his case. The case was continued on the record to be heard for a third and fourth day on April 27 and 28, 2016. On April 20, 2016, counsel for the Respondent notified the Hearing Officer of a conflict with a previously scheduled CLE seminar with the Arkansas Bar Association scheduled for April 28, 2016. The third day of the hearing continued on April 27, 2016, with the Petitioner again requesting on the record for additional time to continue the presentation of his case. The fourth day of the hearing was conducted on June 2, 2016, with the Petitioner resting his case. The Respondent requested on the record for an additional day in order to present a defense of some of the issues presented in the course of the hearing. The request was granted on the record for the hearing to continue for a fifth and final day on August 18, 2016.

The Petitioner entered evidence in the course of hearing which has been labeled as Parent Binder and the District entered evidence in the course of the hearing which has been labeled as District Binder. The record as noted above also includes Hearing Officer Exhibits containing all previously issued orders and correspondence between parties relevant to the issues of the hearing. **Undisputed Issues:**

1. On the date the request for a due process hearing was received by the Department the Student was a nine-year-old fourth grade student enrolled in the District's elementary school.

2. The Student has been identified under the IDEA as a student with cerebral palsy and developmental delay entitling her to receive special education services and has

been eligible for such services since entering the District in her kindergarten year.

**Findings of Fact:**

**Did the District deny the Student with a free and appropriate public education (FAPE) during school years 2013-14, 2014-15 and the beginning of school year 2015-16 by violating the due process and benefit standards of the IDEA by:**

**A. Failing to develop and implement an appropriate Individual Education Plan?**

**(1). School year 2013-14:**

The Student's profile summary contained in the 2013-14 IEP reflected concomitant impairments having negative impacts on her educational achievement. She presented with an intellectual disability with a measured verbal IQ of 44 and a nonverbal IQ of 59. She also presented with an orthopedic impairment due to cerebral palsy which had an adverse affect on her educational performance due to poor muscle control.<sup>1</sup> The Student's diagnosis of cerebral palsy limited her in being independently mobile, requiring the use of a wheel chair as well as experiencing a significant speech/language impairment.

On May 15, 2013, an annual review conference was conducted by the Student's IEP team to prepare an Individualized Education Program (IEP) for her second grade school year (2013-14). Those in attendance included the Student's father, the District's designee, the physical therapy assistant, the occupational therapist, the art teacher, the special education teacher, the speech/language therapist, and a speech/language therapy aide.<sup>2</sup> The Student was scheduled to receive all of her functional academics and speech therapy in the special education classroom;

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<sup>1</sup> District Binder, Page B3

<sup>2</sup> Ibid, Page B22

with art, music, and physical education being in a regular education setting. She was scheduled to receive related services for speech therapy in the speech room four times weekly for thirty minutes each session; physical therapy in the physical therapy room twice weekly for thirty minutes each session; and occupational therapy in the occupational therapy room three times weekly for thirty minutes each session.<sup>3</sup>

It was noted at the IEP meeting that the Parent expressed concern with regard to the District obtaining a walker for the Student to use in lieu of her being in a wheel chair all day long. The District indicated on the IEP that a prescription request by the occupational and physical therapists for the walker would be mailed. Although the record does not reflect when the walker was obtained, since its use became a focus of examination during the hearing, the prescription and purchase was apparently obtained.

On January 27, 2014, an evaluation conference was held to discuss the results of the Student's three-year psychoeducational evaluation. Members present included the Student's father, the District's designee, the special education teacher, the librarian, and the speech/language pathologist. The school psychologist was unable to provide a report due to the Student's inability to perform the tasks in order to complete the testing. Nor was the speech/language pathologist able to complete testing for the same reason. An occupational therapy evaluation was completed in November 2013 which indicated that the Student continued to demonstrate significant developmental delays in all areas.<sup>4</sup> The same held true for the physical therapy evaluation also completed in November 2013 where the Student scored below

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<sup>3</sup> Ibid, Page B1

<sup>4</sup> Parent Binder, Page 266-268

the mean on the tests administered.<sup>5</sup> The special education teacher completed an adaptive behavior assessment with the results indicating the Student scored in the significantly below average range. The IEP team decided to continue to provide the Student with the special education services as indicated on her IEP with less than 40% of the school day in regular education classes with continuation of the same related services.<sup>6</sup>

The goals and objectives as outlined on the IEP for 2013-14 included (a) one functional hygiene goal with four objectives; (b) one personal behavior and/or self-esteem goal with four objectives; (c) a math goal with four objectives; (d) a receptive language goal with four objectives; (e) a reading skills goal with four objectives; (f) an understanding of spoken words, syllables, and sounds (phonemes) goal with four objectives; and (g) an occupational therapy plan with the stated goal of improving her fine motor skills with twenty-five stated objectives.<sup>7</sup> Her physical therapist testified that since the Student was unable to stand independently she was not able to obtain a score on a Medicaid-required test (BOT-2), so she completed a Pediatric Evaluation of Disability to measure the Student's functional skills. She stated that even though this test was not age-appropriate for the Student, that it provided her with good feedback as to how to provide her physical therapy activities.<sup>8</sup> The physical therapist recommended two sixty-minute sessions per week to address improving functional independence in mobility and

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<sup>5</sup> Ibid, Page 336-338

<sup>6</sup> District Binder, Page B4 and B23

<sup>7</sup> Ibid, Page B7-B17

<sup>8</sup> Transcript, Vol IV, Page 10-11

transfers.<sup>9</sup> The physical therapy plan developed in November stated that the annual goal of therapy was to improve the Student's gross motor skills to an age appropriate level in one year's time. The plan contained fourteen objectives towards the goal with her having met four of the objectives at 100%; one at 75%; one at 50%; one 39%; three at 20%; three at 10%; and two at 0%.<sup>10</sup>

The evidence and testimony indicate that the Student's IEP was appropriately developed in addressing the Student's unique education needs based on the evaluations determining the adverse affect of her physical and intellectual disabilities.

Were these special education and related services appropriately implemented is the second part of the Parent's complaint for school year 2013-14. In addition to having a specialist certification in special education the Student's classroom teacher is a licensed nurse practitioner. Given the Student's physical limitations as imposed by cerebral palsy, this would appear to be an advantage for the Student. Having taught special education for seventeen years and in the District for six years she has been the Student's special education teacher since kindergarten. Her testimony in how the Student was instructed in the functional academics included the use of a Smartboard and manipulatives such as blocks and flash cards for math problems and word recognition.<sup>11</sup> She also testified that she and the speech therapist used an iPad with a communication program on it to assist the Student in communicating, as well as the use of a Big

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<sup>9</sup> Parent Binder, Page 338

<sup>10</sup> Ibid, Page 348-349

<sup>11</sup> Transcript Vol IV, Page 19-22



Mack switch.<sup>12</sup>

As of May 2014 the Student had mastered her personal hygiene goal and objectives as well as her personal behavior goal and its four objectives. As of May 2014 she had not mastered any of the objectives of her receptive language goal. She did however master the objectives of her reading skills goal. She also mastered all four objectives of her math goal. Her physical therapist testified that the Student “met four of 14 goals” during school year 2013-14.<sup>13</sup> The physical therapy notes provided as evidence show that the Student was seen for a total of sixty sessions, for 1,965 minutes between August 20, 2013 and June 5, 2014.<sup>14</sup> The physical therapist testified that one of the reasons that extended year physical therapy services were not needed was because she was aware that the Student’s father would “make her get out and do.”

In testimony and as evidence presented the occupational therapist reported that the Student had made significant progress on four of the twenty-five goals she outlined for school year 2013-14.<sup>15</sup> It was difficult to ascertain from the documents as to how the Student was progressing in occupational therapy; however, the therapist explained that in completing the therapy notes that they didn’t “consider it (i.e., a goal) to meeting until they have actually met...so when it said – met it at least one time...so, really and truly, when you look at that, the interpretation of it should be that she has met four goals at least one time, and we haven’t closed

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<sup>12</sup> Ibid, Page 42

<sup>13</sup> Transcript, Vol IV, Page 37

<sup>14</sup> District Binder, Page J75-J105

<sup>15</sup> Parent Binder, Page 271

the goal out because it has to be met three times.”<sup>16</sup> The occupational therapy record showed that for school year 2013-14 the Student received a total of 3,255 minutes of therapy between August 19, 2013 and June 9, 2014.<sup>17</sup> The weekly average over this time frame met with the IEP expectation of 90.42 minutes per week of occupational therapy. The occupational therapist testified under direct examination that she was “absolutely” sure that all of the Student’s therapy sessions were met for school year 2013-14.<sup>18</sup>

The Student’s IEP, as noted above, established speech therapy in the speech room four times weekly for thirty minutes each session. Speech therapy notes presented as evidence for school year 2013-14 indicate that she received a total of 104 therapy sessions between August 26, 2013 through June 19, 2014.<sup>19</sup> As with the occupational therapy records provided as evidence the speech therapy notes also reflected a total of 3,255 minutes of therapy between August 19, 2013 and June 9, 2014. Again, the 90 minute per week requirement of the IEP appears to have been met. It should be noted that both the occupational and speech therapies were not recorded exactly as 90 minutes per week. Some sessions were thirty minutes and some sessions were one-hundred twenty minutes. As explained by the speech therapist if the Student was tardy, absent, or missed due to a snow day she consistently conducted a make-up session on the Student’s return.<sup>20</sup>

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<sup>16</sup> Transcript, Vol III, Page 146-147

<sup>17</sup> District Binder, Page J106-J143

<sup>18</sup> Transcript, Vol III, Page 158

<sup>19</sup> District Binder, Page J20-J74

<sup>20</sup> Transcript, Vol IV, Page 185

**(2). School year 2014-15:**

On May 13 and again on May 20, 2014, a notice of conference for the Student's annual review was sent to the Parent establishing the date of May 27, 2014, to meet and develop an IEP for the Student's third grade school year and to decide if the Student needed extended school year services (ESY).<sup>21</sup> The Parent was not in attendance. No testimony was presented as to why the Parent was absent. Those in attendance included the District's special education supervisor, the speech/language pathologist, the District's designee, the librarian, and the Student's special education teacher.<sup>22</sup>

On May 27, 2014, at the annual review conference the IEP team decided that based on retrospective data and the Student's lack of regression and the Student's recoument based on a two day interruption of programming that ESY was determined to not be necessary.<sup>23</sup> The annual review/notice of decision stated that with regard to educational progress that even though the Student had been absent fifteen days from school the 2014-15 year, she had made progress in the general curriculum and was progressing toward achieving her annual goals.<sup>24</sup> The occupational therapist conducted an OT annual review on April 1, 2014, stating that the Student was making progress toward - imitate horizontal strokes, independently propelling herself in the wheel chair, imitating circles and crosses, and picks between two and three items correctly when

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<sup>21</sup> District Binder, Page C29-C33

<sup>22</sup> District Binder, Page C42

<sup>23</sup> Ibid

<sup>24</sup> Ibid, Page C36

given choices.<sup>25</sup>

According to testimony by the District's special education supervisor the District changed as to when they conducted annual reviews for special education students from the spring of each year to the fall of each year that the students are scheduled to enter school.<sup>26</sup> Consequently, a notice for a second annual review conference for school year 2014-15 was sent to the Parent on September 16, 2014, establishing November 30, 2014, as the date on which the conference would be held.<sup>27</sup> Those in attendance including the Parent was the District's designee, the art teacher, and the Student's special education teacher.<sup>28</sup> Consistent with the previous year's IEP the Student was scheduled to receive all of her functional academics and speech therapy in the special education classroom and with art, music, and physical education being in a regular education setting. She was also scheduled to receive related services for speech therapy in the speech room four times weekly for thirty minutes each session; physical therapy in the physical therapy room twice weekly for forty-five minutes each session; and occupational therapy in the occupational therapy room three times weekly for thirty minutes each session. A related service of personal care was added as a related service for which she was to receive five times daily each week in the classroom.<sup>29</sup>

It was noted at the IEP meeting that the Parent participated in the development of the

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<sup>25</sup> Ibid, Page C45

<sup>26</sup> Transcript, Vol IV, Page 234

<sup>27</sup> District Binder, Page D1

<sup>28</sup> Ibid, Page D34

<sup>29</sup> Ibid, Page D12

IEP, but did not list any major parental concerns. Although the time frame is murky, in testimony however, the Parent expressed major concerns about the Student's safety in the classroom, with the Student not being fed, and general health risk concerns for her.<sup>30</sup> It would appear from his testimony in both direct and cross examination that these concerns were the primary reasons for requesting a due process hearing.

The IEP goals included: (a) the Student's use of her communicative device for reading material with three objectives; (b) enjoyment of books and stories and discussion by using the communicative device with three objectives; (c) a math goal with three objectives; (d) a measurement skills goal with two objectives; (e) a functional pragmatic goal using an augmentative communication system with three objectives; (f) a communication skills goal with three objectives; (g) an independent eating and drinking skills goal by using utensils with four objectives; (h) a functional language skill goal with four objectives; (i) an improved language skills goal with four objectives; (j) an understanding/usage of her AAC communication device to aid receptive and expressive language skills with three objectives; (k) a functional goal to increase her ability to eat and drink meals and snacks with four objectives; and (l) a goal of learning toileting skills with four objectives. According to the IEP she met the requirements for mastery of all objectives in (a), (b), (c), (d), (e), (f), (g), (k) and (l). She met the requirements for mastery on three of the objectives in (h); one of the objectives in (i); and none of the objectives in (j) however, only two of the three were implemented.<sup>31</sup>

As previously noted the occupational therapy annual review that was used by the IEP

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<sup>30</sup> Transcript, Vol I, Page 134-146

<sup>31</sup> District Binder, Page D15-D31

team was completed in April 2014. The OT treatment plan remained consistent with the twenty-five goals from the previous school year, but according to testimony with a higher degree of expectation. The therapist's treatment notes reflect a total of 63 sessions between August 22, 2014 and May 29, 2015. The notes also reflect that the Student was absent from school on twelve days when therapy was scheduled; that she was late for school or left school early two days; was on a field trip one day; was not available for therapy on twenty days due to school holidays and inclement weather; and two days were missed when the therapist was sick.<sup>32</sup> The therapist also conducted an annual review as required by Medicaid on April 1, 2015, in which she assessed the Student's progress for school year 2014-15. She reported that the Student had met two of the twenty-five short term objectives and was showing progress towards meeting four more short term objectives.<sup>33</sup>

The personal care assessment and service plan with instructions for a personal care assistant (PCA) was developed on November 9, 2014, which included the Parent's signature of approval. The dates of the service plan was from January 9, 2015, to June 5, 2015, or the end of the school year. The document acknowledges the Student's medical diagnoses of cerebral palsy, with spasticity/quad, severe motor and speech delay, constipation, and developmental delay; all of which required the need for restraint and supervision for personal safety. The assessment narrative includes a statement of the Student's mobility stating that she is mobile with her wheel chair most of the day, with the staff putting her in her gait trainer and assisting her in ambulation down the halls of the school. It further notes that the PCA will get the

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<sup>32</sup> District Binder, J259-J282

<sup>33</sup> Parent Binder, Page 272

Student out of the chair during the day and let her crawl around on the floor. It also notes that the PCA takes very good care of the Student while in school and that she is permanently disabled.<sup>34</sup>

The physical therapy notes for services provided for school year 2014-15 reflect a total of sixty-seven sessions between August 21, 2014 and June 9, 2015.<sup>35</sup> The physical therapy supervisor testified that by the end of the school year the Student had not mastered an entire goal, but that she was at the fifty percent or better level on two of the sixteen short-term goals and that she had made progress in strength ambulation, and functional skills.<sup>36</sup>

The speech therapy notes for school year 2014-15 entered as evidence show that the Student was provided with 115 therapy sessions between August 25, 2014 and May 26, 2015. The notes also indicate that the Student was absent on eighteen days when sessions were scheduled and that school was out on three days when sessions were scheduled.<sup>37</sup> The therapist who provided the services for school year 2014-15 was not available to testify.

The implementation of the IEP, as noted previously by the Student's special education teacher, continued to emphasize the importance of helping the Student develop a higher degree of independent functioning with regard to her academics. The physical therapist testified that the purpose of the Student's strength training and the use of the gait trainer was for her to

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<sup>34</sup> District Binder, K21-K29

<sup>35</sup> District Binder, Page J229-J259

<sup>36</sup> Transcript, Vol IV, Page 71

<sup>37</sup> District Binder, Page J161-J229

eventually stand independently without the trainer.<sup>38</sup> For the occupational therapist her testimony was that the ultimate goal of independence may not be mastered but that the purpose of treatment would continue to work towards that goal.<sup>39</sup>

**C. Failing to develop and implement an appropriate Individual Education Plan (IEP)?**

**(1). At the beginning of school year 2015-16:**

The Parent filed for a due process hearing prior to the District's conducting an IEP annual review meeting. Consequently, the stay put provision was put into effect with the Student's IEP for school year 2014-15 being the IEP that the District was required to follow. Therefore, no testimony or evidence presented was relevant with regard to this question.

**Did the District deny the Student with a free and appropriate public education (FAPE) during school years 2013-14, 2014-15 and the beginning of school year 2015-16 by violating the due process and benefit standards of the IDEA by not educating the Student in the least restrictive environment?**

Given that the Student has received all of her education services, in a regular education classroom for less than 40% of each school day since kindergarten both school years in question as well as the stay put provision for the current school year will be addressed together. The question of whether or not she was educated in the least restrictive environment has to be addressed on the assessment of her educational deficits and how the District programmed for them to be implemented. The IEPs for both years in question as well as the IEP for stay put in the current school year indicate that the Student has been receiving special education services in

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<sup>38</sup> Transcript, Vol IV, Page 76

<sup>39</sup> Ibid, Page 183



a self-contained special education classroom for more than sixty percent of the school day. Those services outside of the self-contained classroom have included physical education, art, music, and library. These classes were referred to as encore classes and each one was conducted once a week on a rotation basis with the fifth day of the week being a second class for each subject approximately once a month. None of her academics were provided in a regular education classroom. The District's special education supervisor testified that it would be very difficult for the Student to receive any component of her academic education in a regular classroom because: "she would be isolated in a regular classroom...what we are asked to teach based on these Common Core standards, it's very higher ordered, it has a lot of rigor it has a lot of rate issues...we go very fast."<sup>40</sup> She further testified that since the Student's language scores are so depressed that she would be "just sitting in the class with someone sitting beside her being very isolated... and there would not be any academic benefit."<sup>41</sup>

The Student's physical education teacher testified that the Student had always been in with the regular education class for physical education, including 2013. He stated that she came in her wheel chair and that it was necessary for him to use different safety measures.<sup>42</sup> He testified that he conducted his class in the lunchroom because he did not have a gym and that there were times that rather than conducting his class in the lunchroom he would go to the regular education classroom. Even though she was with her non-disabled peers it was still

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<sup>40</sup> Transcript, Vol V, Page 215

<sup>41</sup> Ibid

<sup>42</sup> Transcript, Vol V, Page 8-9

necessary for him to use different manipulatives to make sure safety regulations were followed.<sup>43</sup>

The Student's art teacher had retired but was one of the regular education teachers for both school years in question. She testified that the Student would be in her art class along with regular education students "unless I was doing a make-up class or it was raining."<sup>44</sup> Her regular education art class was located in a separate building from the Student's special education classroom. Neither the regular education librarian nor the regular education music teacher provided testimony.

Even though the Student received instruction from a regular education teacher she was not prepared and did not attend any academic class activities with her non-disabled peers. Based on her level of intellectual abilities, her speech/language deficits, and her physical limitations with regard to self-care, the IEP team's decision to provide her with her academics in the self-contained classroom appears warranted as being the least restrictive environment.

### **Conclusions of Law and Discussion**

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.<sup>45</sup> 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

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<sup>43</sup> Ibid, Page 9

<sup>44</sup> Ibid, Page 60

<sup>45</sup> 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

learning disabilities, and who by reason of their disability, need special education and related services.<sup>46</sup> The term “special education” means specially designed instruction.<sup>47</sup> “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.<sup>48</sup>

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as those exhibited by 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 jurisdiction of a hearing officer in IDEA due process hearings is confined to ruling on any matter that pertains to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Arkansas Code Annotated 6-41-202, et seq.<sup>49</sup>

The record shows that the Student has been the educational responsibility of the District since entering kindergarten. The Parent apparently had no complaints about the provision of the Student’s special education services until an incident occurred where her physical safety was questioned. The record shows that the Student’s mobility was extremely limited by the impact of cerebral palsy. This was compounded by her extremely limited speech/language and intellectual ability.

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<sup>46</sup> 20 U.S.C. § 1401(3)(A)

<sup>47</sup> 20 U.S.C. § 1402(29)

<sup>48</sup> 34 CFR § 300.26(b)(3)

<sup>49</sup> *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

Regardless of any actions and/or inactions on the part of the District, the Parent's complaints have to be addressed as a possible denial of FAPE. Hereto they need to be addressed with respect to the intent of the IDEA. 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 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?<sup>50</sup>

This definition of FAPE was recently challenged. At issue was whether the standard for a FAPE under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., has changed since *Board of Education v. Rowley*.<sup>51</sup> The court held that it has not and that, in evaluating whether a school provides a FAPE, the court still looks to whether the individualized education program (IEP) provides some education benefit to the student. Applying that standard to the case in question, the court concluded that the district court did not err in finding that the School Board met that requirement. Accordingly, the court affirmed the

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<sup>50</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982) (Also see: *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, No. 12-4301, F.3d , 2014 WL 1303156, at \*1 (2d Cir. Apr. 2, 2014) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982))

<sup>51</sup> *O.S. v. Fairfax Cnty. Sch. Bd.* (4th Circ., 2016)

judgment.

With regard to looking at a child's eligibility for special education services the courts have also consistently agreed that a free and appropriate public education (FAPE) must be based on the child's unique needs and not on the child's disability.<sup>52</sup> Did the District in this case deny the Student FAPE during school years 2013-14 and 2014-15 by not considering her unique disabilities and thus (a) failing to develop and implement appropriate IEPs; and (b) failing to provide her special education services in the least restrictive environment?

According to the undisputed facts the Student was diagnosed with extreme mobility problems associated with cerebral palsy, a major speech/language disability, and a profoundly low intellectual ability due to developmental delays. Accordingly all identified disabilities have had a negative impact on the Student's ability to learn in an educational setting without special education and related services. The adverse impact that these disabilities have had on her obtaining an education has resulted in her being eligible for special education services under the category of an intellectual disability. In addition to the intellectual difficulties the District recognized her need for occupational, physical, speech therapies and personal care assistance as related services. Thus, the question is not whether the Student needs special education services, but whether or not the individual education plans for the past two school years were reasonably calculated to enable her to receive an educational benefit and whether or not they were implemented in the least restrictive environment.

The Court of Appeals for the Eighth Circuit in *Fort Zumwalt v Clynes*<sup>53</sup> agreed with the

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<sup>52</sup> 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

<sup>53</sup> *Fort Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

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.<sup>54</sup> 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 in state or federal court. Id. § 1415(e)(2).”<sup>55</sup>

The evidence leaves little doubt that the Parent has executed his rights for a due process hearing; however, it would appear from the elicited testimony that he was and is more concerned about the physical safety of his daughter than the appropriateness of her IEPs.

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. The court further states that the statutory goal is to make sure that every affected student receives a publicly funded education that benefits

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<sup>54</sup> *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

<sup>55</sup> *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

the student.<sup>56</sup>

The Parent in this case has also challenged the District in the broader concept of having violated the Student's receipt of a free and appropriate education (FAPE). In 1988, the Supreme Court addressed FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.<sup>57</sup> In this case the extremely limited intellectual and physical abilities of the Student make it difficult to measure progress; however, not so with regard to whether or not the instructions and related services were developed in such a manner to allow her to meet her educational goals and objectives.

In this case those unique needs were manifest in the Student's limited intellectual capacity to learn as well as her physical difficulties with mobility, her communication disability, and her ability to manipulate objects in the educational environment. The identification and evaluation process began long before the Parent elected to challenge the last two years of the Student's IEP. Thus in considering the unique needs of the Student, the question is whether or not those IEPs were developed in such a manner that she was able to obtain an educational benefit.

In this case there is ample testimony and evidence that the District did focus on the Student's unique needs in developing her IEPs for both school years. Based on the evidence

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<sup>56</sup> *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8<sup>th</sup> Cir. 1997)

<sup>57</sup> *Honig v. Doe*, 484 U.S. 305 (1988)

and testimony even with her extremely limited intellectual ability and her physical disabilities the Student did appear to be making some progress toward the goals and objectives as outlined in the above findings of fact. Which brings up the Parent's challenge as to whether or not the IEPs were appropriately implemented.

Case law has assisted hearing officers with addressing this important challenge when the issue was considered by the Fifth Circuit. That case involved the provision of speech therapy where the parent challenged the school district when the student's speech therapy was not provided for several months. The court held in that case that even though there were lapses in the student's therapy services that it did not result in a denial of FAPE.<sup>58</sup> This standard was adopted by the Eighth Circuit in 2003.<sup>59</sup> In the current case the findings of fact indicate that the Student eventually received all of the related services specified in her IEPs. The evidence also reflected that even though the District's records did not indicate progress results on all of her educational goals and objectives such a procedural violation could not be said to rise to the level of a denial of FAPE for failure to implement her IEPs.

Also at issue was whether or not those IEPs were developed in such a manner to allow the Student to receive special education services in the least restrictive environment. The IDEA requires that to the maximum extent appropriate, a child with disabilities must be educated alongside his or her non-disabled peers. When it becomes necessary to remove a student from a regular education setting a district must do so only when the severity of his or her disability is such that the student's education cannot be achieved in regular education classes with the use of

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<sup>58</sup> *Houston Independent Sch Dist. V. Bobby R.*, 31 IDELR 185 (5<sup>th</sup> Cir. 2000)

<sup>59</sup> *Neosho R-V Dist. V. Clark*, 38 IDELR 61 (8<sup>th</sup> Cir. 2003)



supplementary aids and services.<sup>60</sup>

Case law from the Sixth Circuit regarding the provision of educating a student with disabilities in the least restrictive environment was adopted by the Eight Circuit.<sup>61</sup> That which is now considered as the least restrictive environment was previously addressed as educating students with disabilities in regular education classes by “main streaming.” Both circuits adopted the position that a student should be removed from regular education classes with same age peers only when the student’s education cannot be implemented satisfactorily in a regular education setting.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question as to whether or not the Student was denied FAPE by the District by not educating her alongside non-disabled peers must be addressed according to the Student’s unique needs.

In addressing this issue was the question as to whether or not the Parent showed through evidence and testimony that the District denied the Student FAPE by not providing her special education services in the least restrictive environment. The findings of fact show that the academics that she was provided were in a self-contained classroom with the assistance of instructional aides. The evidence that shows the Student is functioning at a kindergarten/first grade level academically, it would not be to her educational advantage to be in a regular education classroom with her same age peers where she would be exposed to teaching beyond her ability to comprehend. Whereas the non-academic subjects such as library, art, physical

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<sup>60</sup> 20 U.S.C. § 1412(a)(5)(A)

<sup>61</sup> *Ronker v. Walter*, 554 IDELR 381 (6<sup>th</sup> Cir. 1983) and *A.W. V. Northwest R-1 School District*, 558 IDELR 294 (8<sup>th</sup> Cir. 1987)

education, and music for which she received was provided in classes of non-disabled peers.

Therefore, in considering the Student's limited intellectual abilities as well as her communication and mobility deficits the evidence and testimony is consistent with the IEP team's decision for her to be educated for the majority of her academic day in a self-contained classroom.

**Order**

The Parent has not introduced sufficient evidence in the record to show that the District failed to address the unique needs of the Student and as such cannot be found to have been in a violation of FAPE for either the Student or Parent. Thus, the complaints as addressed in this hearing are hereby dismissed with prejudice.

**Finality of Order and Right to Appeal**

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the 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.

September 23, 2016

Date