

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SECTION**

[]
AS PARENT OF
[]

PETITIONER

VS.

NO. H-16-33

[]

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Parent maintained and pursued the following issues:

- (a) failing to provide the Student with a Free Appropriate Public Education (FAPE) by providing the Student indirect special education services when evaluations showed the need for direct special education services for deficits in Reading and Written Expression;
- (b) failing to instruct the Student on his Individualized Education Program (IEP) goals and objectives;
- (c) failing to provide a highly qualified teacher;
- (d) failing to provide the opportunity for meaningful participation in the IEP process.

Procedural History:

On February 22, 2016, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department" from [] (hereinafter referred to as "Parent", the Parent and legal guardian of [] (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the Kipp Delta School District (hereinafter referred to as "District") failed to comply with the Individuals with

Disabilities Education Act (20 United States Code Sections 1400-1485, as amended) (IDEA) (also referred to as the “Act” and Public Law 108-446) and the regulations set forth by the Department in providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Parent’s request by designating April 7 and 8, 2016, as the dates on which the hearing would be held and by assigning the case to an impartial hearing officer. The hearing officer issued an order setting preliminary timelines on February 23, 2016, which included the District convening a resolution session with the Parents on or before March 8, 2016.

The Parents also alleged violations by the District of Section 504 of the Rehabilitation Act of 1973. The hearing officer determined that these issues were not within his jurisdiction while conducting a hearing under the IDEA.

The burden of proof was assigned to the Parents. The Parents filed a motion to continue on March 3, 2016. The District did not object to a continuance. On March 8, 2016, the District filed a Challenge to Sufficiency of Due Process Complaint. Also on March 8, 2016, the hearing officer issued a pre-hearing order. On March 12, 2016, the hearing officer issued an order to continue setting the hearing dates for May 4-6, 2016. On March 13, 2016, the hearing officer ruled that the Due Process Complaint Notice was sufficient.

The hearing began on May 4, 2016. The hearing ended on May 5, 2016, after which time the

record was closed and closing statements were waived in lieu of submitting Post Hearing Briefs, which were submitted on May 31, 2016.

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, Garry J. Corrothers, Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parents were represented by Theresa L. Caldwell, Attorney at Law of Little Rock, Arkansas, and the District was represented by Donn Mixon, Attorney at Law of Jonesboro, Arkansas.

FINDINGS OF FACT

1. The Student is currently an eleventh grade student at Kipp Delta College Preparatory School within the Kipp Delta School District.
2. The Student is a student with a disability as such is defined in 20 United States Code (USC), Section 1401(3) and has diagnoses of Attention Deficit Hyperactivity Disorder, (“ADHD”), Reading Disorder, Written Expression Disorder, Dyseidetic Dyslexia, Mood Disorder, and Visual-Spatial Impairment.
3. Dr. Rebecca West, a psychologist, conducted a comprehensive evaluation of the Student on September 9, 2015. [P. Exh. P. 146] Dr. West’s report contained, among other things, the following diagnoses: Reading Disorder, by history; Disorder of Written Expression - Dyseidetic Dyslexia. [P. Exh. P. 158-161]
4. Dr. West diagnosed the Student with a Specific Learning Disability in Reading and Written Expression. [P. Exh. P. 158-161]
5. Sara Guilliam, Special Education Teacher, testified that she provides special

education services. This is done through a co-taught Algebra II class and a co-taught physics class, along with the content area teacher. She also teaches a class called pre-teach, which lasts for a period each day. She goes over lessons and assignments for all of the Student's classes ahead of time. In addition, there is an accountability hour at the end of the day of tutoring. [TR V1, P. 26-27]

6. Guillian has taught special education for four years. She is not licensed or certified in special education. She is currently working towards licensure. [TR V1, P. 25]

7. Guillian testified that she does not recall going over any goals and objectives for special education services in physics and Algebra II. She testified that goals and objectives would be aligned to his reading and writing goals. The goals are implemented by her and his English teacher. She keeps data and has it at school. (TR V1, P. 31-32)

8. The Student's English Teacher for the first semester was Jaclyn Dean. She did not know or recall the Student's reading level or his specific disability. [TR V2 P. 5, 8, 12] Regarding implementing IEP goals and objectives, she testified that she tutored the Student during the accountability hour. The data that she kept came from the work he did. [TR V2, P. 21-22] A lot of the work is stored electronically. [TR V2, P. 25] The Student made a 70% in her class. She testified that he was performing 11th grade work [TR V2, P. 27] and that she was not amazed that he could do 11th grade work because he was very bright. [TR V2, P. 29-30]. She implemented the modifications on the Student's IEP. [TR V2, P. 32-36]

9. The District's Director of Special Education is Traci Davis. [TR V2, P. 186] She testified that the Student's disability category is a Specific Learning Disability in reading. [TR V2, P. 193] Davis testified that she could not disagree with a September 9, 2015, Psycho-Educational Evaluation done by Easter Seals of Arkansas. She said she could not disagree with

the examiner's opinion. [TR V2, P. 196]

10. Davis testified that at the annual review conference you have to document progress towards goals and objectives. The IEP [P. Exh. P. 10A] has performance levels. It does not have a percentage, it has a "c", which means that he is continuing to work on the objective. It does not show his progress toward's reaching the 70% target. [TR V2, P. 207-209] The Student's grades and work samples would indicate whether he is benefitting from his IEP [TR V2, P. 215] Guillian was supposed to be working with the Student in reading [V2, P. 216, 217]

11. Davis testified that the Student was classified as both a direct student and an indirect student and they neglected provide the documentation for indirect services. [TR V2, P. 218]

12. Davis testified that the May 18, 2015, Annual Review [P. Exh. P. 131] indicated that the Student was making adequate progress in all areas and that he was doing especially well in reading. The only indication that the Student was making adequate progress would be his grades. This was during the same time period that the Student had several failing grades. By the time of the Annual Review he did not have failing grades. [TR V2, P. 225-226]

13. Davis said that she could not answer why Algebra II and physics were co-taught. She testified that physics is heavy on reading.

14. Davis testified that prior to her tenure, the Student received direct and indirect special education services at the same time. She learned that you cannot do both. [TR V2, P. 248-249]

15. The records reflect that the Student was referred for a psychological evaluation. He was evaluated by West Psychological Services (Dr. Rebecca West, Ph.D.) on April 30, 2015. P. Exh. P. 146 is a Confidential Psychological Evaluation which diagnosed the Student with,

among other things, Reading Disorder, Disorder of Written Expression, and Dyseidetic Dyslexia. Subsequent to this evaluation, a Confidential Psycho-Educational Evaluation was completed on September 9, 2015, by Easter Seals. This re-evaluation referred to and essentially confirmed the evaluation done by Dr. West. Lory Greer, M.S., Licensed Psychological Examiner opined that, “[the Student’s] difficulty with areas of achievement, as demonstrated by his achievement scores administered for this evaluation, and his classroom performance, are consistent with his diagnoses of ADHD, Dyslexia and Visual Spacial Disorder”.

16. The record also contains a Psychological Evaluation done by Germantown Psychological Associates, P.C. in on February 17, 2011. [P. Exh. P. 170]

17. The Student’s October 27, 2015, IEP was completed subsequent to the aforementioned evaluations and were considered in the formulation of the Student’s IEP. [P. Exh. P. 81]

18. An Arkansas Department of Education complaint pursuant to State Complaint Procedures, Section 12.00 was filed by the Parent on October 8, 2014. P. Exh. P. 119 says that “District staff was not able to provide evidence of or confirm Indirect services, such as consultation or technical assistance, were provided to the teacher(s). The District also could not provide evidence of or confirm that a formal review conference had been held for World History, listed on the Student’s High School Grade Report with a grade F at a progress review period. Further, no Indirect Service progress reports were provided to the Complainant or Investigative Team.”

19. The ADE complaint alleged two distinct violations of the ADE Special Education and Related Services, Procedural Requirements: 1) that the District failed to develop an appropriate Individualized Education Program (IEP) for the Student, including the appropriate

placement for the Student and modifications and supports necessary to enable the Student to make progress in the general curriculum and to be educated with nondisabled children; and 2) that the District failed to implement the Student's IEP, specifically by not providing the modifications and supports provided in the IEP and not following the standards for eligibility and reviewing progress for Indirect Services. [P. Exh. P. 117]

20. The IEP's generally provided for goals and objectives and charts showing a status for goals and objectives showing whether they were Continued, Discontinued, Mastered, or Not Initiated [P. Exh. P. 10, 10A, 12, 12A, 23, 38]

21. The Parent and/or Parent Advocate has participated in several IEP conferences and said IEP's bear her signature. [P. Exh. P. 16, 28, 43] At least one of the IEP conferences was for a facilitated conference, indicating that a facilitator-mediator was present. The May 18, 2015, facilitated IEP has an Agreement to Facilitate, Annual Review documentation, a Memorandum of Understanding along with the IEP.

FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

The first and foremost purpose of the IDEA is "insure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d).

A "free appropriate public education" includes "special education and related services that . . . have been provided at public expense . . . and are provided in conformity with the individualized education program [(“IEP”) of the Student]." 20 U.S.C. Section 1401(9); see, 34 CFR. Section 300.101-300.109. "Special education" means "specifically designed instruction, at

no cost the parents, to meet the unique needs of the child with a disability” 34 CFR 300.39 (a)(1). To provide FAPE, a school formulates an Individual Educational Program (“IEP”) during a meeting between the student’s parents and school officials. See USC Section 1414 (d)(1)(A)-(B). Specially designed instruction means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction— to address the unique needs of the child that result from the child’s disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all the children. See 34 CFR Section 300.39.

Prior to putting a child with a disability on an IEP, the District is required to conduct a comprehensive evaluation to identify all areas of suspected disability. See 20 U.S.C. 1414(a)(1); 20 U.S.C. 1414(b)(2); 34 CFR Section 300.15; ADE Regulation Section 6.00. In addition, the District is required to use a variety of instruments, evaluations and information provided by the parents, assessments and classroom observations, and observations by service providers, to ensure that “the child is assessed in all areas of suspected disability,” and to determine the nature and extent of the special education and related services that the child needs. 20 U.S.C. 1414(b)(2); 34 CFR. Section 300.15.

In this case, the Student was evaluated by Dr. Rebecca West, a psychologist, and Easter Seals, (Lory Greer, Licensed Psychological Examiner), along with an earlier psychological examination. There was not sufficient evidence presented demonstrating that the Student’s previous evaluations were not in compliance with the requirements of the law and regulations. Furthermore, the Parent quoted liberally the examination findings of Dr. West in her Post-Hearing brief.

The Parent here largely asserts that the Student’s evaluations demonstrated the need for

direct special education services to address his deficits in Reading and Written Expression. Subsequent to Dr. West's evaluation on April 30, 2015, the Student's IEP was formulated on May 18, 2015. At this point, the Student's deficits in reading and writing were well known as Dr. West's evaluation was available to the IEP Team. This IEP provided that the Student would use a natural reader, a text-to-voice adaptive technology which allows classroom documents to be read to him over his laptop computer. Also, the Student used Dragon Software, which is a voice-to-text assistive technology. [P. Exh. P. 20] P. Exh. P. 27 stated that the Student would be served through Indirect Services and that his reading disability would be addressed through pre-teaching and pull out services. A prior IEP dated December 11, 2014, contains the same or similar methods for addressing the Student's disability. As stated below, an IEP is appropriate if it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade".

An IEP "means a written statement that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance, . . . a statement of measurable annual goal, including academic and functional goals, . . . a statement of the special education and related services and supplementary aids and services. . . to be provided to the child . . . and a statement of the program modification or supports for the school personnel that will be provided for the child . . ." See 20 USC Section 1414(d)(1)(A)(I). An IEP must be established for a student with a disability at the beginning of the school year and reviewed and revised periodically as needed, "but not less than annually, to determine whether the annual goals for the child are being achieved." See 20 USC Section 1414(d)(4)(A) (I); 34 CFR Section 300.324(b)(1)(I). The school administering the IEP must revise the IEP "as appropriate to address any lack of expected

progress toward the annual goals and in the general education curriculum. . . the results of any reevaluation . . . information about the child provided to, or by, the parents . . .the child's anticipated needs; or other matters.” 20 U.S.C. Section 1414(d)(4)(A)(ii)(I)-(V).

An IEP is appropriate if it is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Bd. Educ. Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 203 (1982). FAPE is satisfied when the state provides “personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction, and that this instruction should be reasonably calculated to enable the child to advance from grade to grade.” *See Rowley*, 458 U.S. at 203. Through the development and implementation of an IEP, a school district fulfills its statutory responsibility of providing a disabled child with a free and appropriate public education. Although the IDEA reflects a structural preference in favor of providing special education in public schools, it recognizes that certain public schools are unable or unwilling to provide appropriate special education services. The IDEA, therefore, provides a remedy of reimbursement to Parents when the public school did not make FAPE available to their child in a timely manner. See 20 USC Section 1415 et seq.

In analyzing whether a child has received educational benefits, courts must ask two questions:

1. Has the District complied with the IDEA procedures; and
2. Is the IEP developed through those procedures reasonably calculated to enable the Student to receive educational benefits. *Rowley*, 458 U.S. at 206-207.

If the answer to both questions is “yes,” the judicial review is concluded. *Supra*. On the other hand, a “no” answer means no FAPE was provided, thus qualifying for appropriate relief, including reimbursement for private expenditures on special education services, if such services

are determined to be necessary because the District's IEP failed to provide a free appropriate public education. School Committee of the *Town of Burlington v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 369 (1985).

The achievement of IEP goals and objectives is one measure of educational benefit. See *Walczak v. Florida Union Free Sch. Dist.*, 27 IDELR 1135 (2d Cir. 1998); *M.B. v. Hamilton Southeastern Schs.*, 58 IDELR 92 (7th Cir. 2011); and *M.N. v. State of Hawaii, Dept. Of Educ.*, 60 IDELR 181 (9th Cir. 2013, unpublished). The key question is whether the student made gains in his areas of need.

In this matter, the evidence indicated that the Student's progress regarding his reading ability remains stagnant. A district's continuation of inadequate services will almost certainly be regarded as a denial of FAPE. See, e.g. *District of Columbia Pub. Schs.*, 49 IDELR 267 (D.D.C. 2008) (noting that a student's present levels of performance remained stagnant for several years); *Unionville-Chadds Ford Sch. Dist.*, 47 IDELR 280 (SEA PA 2007) (finding that a district should have addressed a child's reading deficiencies when it became apparent that the student was not making any progress); and *Department of Educ., State of Hawaii*, 47 IDELR 238 (SEA HI 2007) (criticizing the ED's decision to continue an ineffective reading program despite the student's lack of progress over a three-year period.).

In this case, the Student is advancing from grade to grade and the District maintained through testimony that he was making progress on his goals and objectives. His first semester English teacher testified that he made a 70% in her class and was performing 11th grade work. Other witnesses testified that he was making progress on his goals and objectives as demonstrated by his class work and passing grades. [TR V2, P. 215] However, on three consecutive IEP's, the District reported that the Student's reading level remained at fourth grade

level [P. Exh. P. 2, 19, 34] His IEP's continued to reflect that he was being served through pre-teaching and pull out services [P. Exh. P. 8, 27, 42] even though his reading grade level remained stagnant. His IEP's also indicated that he was using a natural reader and Dragon software, which apparently, has not improved his reading ability. The evidence reflects that the District largely carried forward the services on each preceding IEP without considering whether to change the Student's program. Under these circumstances, the undersigned hearing officer determines that the Student has been denied FAPE.

The Parent asserted that the lack of a highly qualified teacher contributed to the denial of FAPE. However, according to 34 CFR 300.18(f), "notwithstanding any other individual right of action that a parent may maintain under [Part B], nothing in this section or part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular [state or district] employee to be highly qualified." "In its discussion accompanying the publication of the final 2006 IDEA regulations, the ED added that 'if the only reason a parent believes that their child was denied FAPE is that the child did not have a highly qualified teacher, the parent would have no right of action under the Act on that basis.' 71 Fed. Reg. 46.562 (2006). However, although due process or a judicial action are prohibited, the regulations at 34 CFR 300.18(f) specifically permit parents to file a complaint about staff qualifications with the SEA in accordance with SEA complaint procedures set forth at 34 CFR 300.151 through 34 CFR 300.153."

Finally, as referenced in paragraph 21 above, the Parent has not only participated in the IEP process, she has meaningfully participated.

ORDER

1. As the hearing officer finds that the Student was denied FAPE, he orders the following relief.
2. The District is to hold an IEP Meeting to develop a plan to address the Student's deficits. The District is not ordered to perform further evaluations. The District will immediately upon receipt of this order, but no later than September 1, 2016, prepare for and notify the Parent of an IEP conference in which it will be decided as to how the Student's unique needs can be met through the provision of services as deemed appropriate through consultation with experts as determined qualified by the District.

Finality of Order and Right of 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 of 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.

DATED:

August 1, 2016

SIGNATURE:

GARRY J. CORROTHERS,
HEARING OFFICER

